

**BOARD OF AGRICULTURE AND CONSUMER SERVICES**

**Patrick Henry Building  
East Reading Room  
1111 E. Broad Street  
Richmond, Virginia**

**Thursday, December 7, 2023**

**9 A.M.**

1. Call to order
2. Roll call
3. Approval of draft Board meeting minutes from August 4, 2023
4. Board member reports
5. Commissioner's Report to Board – Joseph Guthrie, Commissioner of Agriculture and Consumer Services
6. Budget update – Dewey Jennings, Director, Administration and Finance

**10 A.M. Public Hearing – Proposed Regulations for 2 VAC 5-317 (Regulations for Enforcement of the Noxious Weeds Law) – Larry Nichols, Director, Division of Consumer Protection**

7. Office of Pesticide Services – Case Decision – Thibault Enterprises, LLC (Case # 73148)
8. Notice of Intended Regulatory Action – 2 VAC 5-680 (Regulations Governing Licensing of Pesticide Businesses Operating under Authority of the Virginia Pesticide Control Act) and 2 VAC 5-685 (Regulations Governing Pesticide Applicator Certification under Authority of Virginia Pesticide Control Act) – Liza Fleeson Trossbach, Program Manager, Office of Pesticide Services
9. Proposed Fast-Track Action to Amend 2 VAC 5-585 (Retail Food Establishment Regulations) – Pamela Miles, Program Manager, Office of Dairy and Foods
10. Petition for Rulemaking – Animal Partisan's petition for regulations for the transportation of poultry – Dr.Carolynn Bissett, Program Manager, Office of Veterinary Services
11. Pesticide Control Fund Report to the Board – Liza Fleeson Trossbach, Program Manager, Office of Pesticide Services
12. Regulatory Advisory Panel for 2 VAC 5-675 (Regulations Governing Pesticide Fees Charged By the Department of Agriculture and Consumer Services) Report to Board – Liza Fleeson Trossbach, Program Manager, Office of Pesticide Services
13. New business

14. Future Board meetings
15. Public comment period
16. Adjourn

**DRAFT MINUTES**

Board of Agriculture and Consumer Services  
Virginia Beach City Hall  
Building 1, 2401 Courthouse Dr,  
Virginia Beach, VA

Friday, August 4, 2023

The meeting of the Board of Agriculture and Consumer Services (Board) convened at approximately 9:05 a.m. on Friday, August 4, 2023, at Virginia Beach City Hall. President Horsley called the meeting to order.

**ROLL CALL**

The Board Secretary called the roll:

**PRESENT**

Donald Horsley  
Raymond Keating  
Jacquelin Easter  
Kailee Tkacz Buller  
James S. Huffard, III  
Tyler Wegmeyer  
Richard Sellers  
Neil Houff  
Charles Church  
Dr. Robert Corley  
  
Lonnie Johnson

**CONGRESSIONAL DISTRICT**

2<sup>nd</sup>  
3<sup>rd</sup>  
7<sup>th</sup>  
8<sup>th</sup>  
9<sup>th</sup>  
10<sup>th</sup>  
11<sup>th</sup>  
Pesticides – Commercial Agricultural  
Pesticides – Commercial Structural  
Representing Dr. Makola Abdullah, President,  
Virginia State University  
Representing Dr. Timothy D. Sands, President,  
Virginia Tech

**ABSENT**

Keith Harris 1<sup>st</sup>  
Clifton Slade 4<sup>th</sup>  
Cecil Shell 5<sup>th</sup>  
Margaret Ann Smith 6<sup>th</sup>

**STAFF PRESENT**

Joseph Guthrie, Commissioner, Virginia Department of Agriculture and Consumer Services (VDACS)  
Kevin Schmidt, Secretary, Board of Agriculture and Consumer Services  
Nicolas Robichaud, Policy Assistant, VDACS

**OPENING REMARKS**

Patrick Duhaney, Virginia Beach City Manager, welcomed the Board to Virginia Beach and acknowledged the Board's efforts to support the city's agricultural infrastructure. He acknowledged City Councilman Rocky Holcomb and Delegate Barry Knight. He remarked that Virginia Beach has exceeded its goal, set in the 1980's, of preserving 10,000 acres of agricultural land, with 10,500 acres preserved through the Agricultural Reserve Program. He thanked VDACS and the Board for providing \$2 million over the past 10 years to assist the city in achieving this goal and mentioned that agriculture had a \$200 million impact in the city over the past year. He also thanked VDACS for bringing the Ag Expo back to Virginia Beach.

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Delegate Barry Knight also welcomed the Board to Virginia Beach. As the Chairman of the House Appropriations Committee, he thanked the Board for its work promulgating regulations and commented on the need to look out for contentious regulations, such as the pet shop regulations.

### **APPROVAL OF MINUTES**

Mr. Church moved that the draft minutes of the meeting on May 18, 2023, be approved as distributed. Ms. Easter seconded the motion. The Board voted unanimously to approve the motion.

### **REPORT FROM BOARD MEMBERS**

#### **Jacquelin Easter**

Ms. Easter remarked that her district has recently gotten much needed rain. Ripple effects of the Tyson plant closure continue to be felt, especially by truck drivers. As corn harvest begins, work should increase for those drivers most impacted. She thanked everybody for the research into possible long-term solutions.

#### **Kailee M. Tkacz Buller**

Ms. Buller thanked Mr. Horsley and the city for their hospitality. She reported on Congress leaving for its August recess without funding the government or passing a Farm Bill. Government funding is likely to be the top priority when Congress returns on September 6 given the expiration of the federal budget on September 30. A short-term Farm Bill extension is likely, though no drafts have been issued yet. She commented on the unlikelihood of workforce reform in the short term, despite the efforts of a bipartisan group of legislators, and mentioned that soybean exports to China are high. She called the Board's attention to the U.S. Food and Drug Administration's (FDA) need for increased authority over recalls to promote food safety. She will continue to track several proposed reforms and regulations from FDA.

#### **James S. Huffard, III**

Mr. Huffard thanked Ms. Buller for her extensive work and mentioned the ideal weather in his district this year. He indicated he is expanding his dairy operation to meet the southeast's demand for milk. He reported on his work as a member of the National All-Jersey Board, particularly on the need for immigration and H2A reform to support year-round labor needs. He reported that no significant progress has been made in this regard for several years and that he will continue working with National Milk and the Farm Bureau to advocate for dairy industry reform, especially regarding pricing. Duchess Milk processing has enjoyed a successful year, landing new customers and strengthening relationships with schools.

#### **Tyler Wegmeyer**

Mr. Wegmeyer also thanked Mr. Horsley for his hospitality. He reported a desperate need for rain in his district. Strawberry season was very successful, with the season elongated several weeks and resulting in increased sales. He reported on the success of the Virginia Tourism Corporation's event celebrating the new sub-slogan "Virginia is for Strawberry Lovers" and thanked the Commissioner for his attendance. He referenced a visit to his farm by the Rt Hon Mark Spencer, Minister of State for Food, Farming and Fisheries for the United Kingdom. He said they shared stories about agritourism experiences and trade opportunities and discussed impacts of the UK's exit from the European Union.

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Mr. Wegmeyer reported on the Virginia Christmas Tree Association's meetings to discuss increases in demand. He also stated that several crops in his district do not have the requisite supply to meet increases in demand, providing further economic opportunity for growers.

### **Richard Sellers**

Mr. Sellers thanked Mr. and Mrs. Horsley for their hospitality. His district experienced strong spring rain, with farmers' markets and personal gardens flourishing. Farmers' market exhibitors have increased roughly 40 percent in his area. Temperatures have recently warmed, and rain has remained steady.

### **Dr. Robert Corley**

Dr. Corley remarked that the week's events showcased a different aspect of Virginia Beach and he appreciated the hospitality. Virginia State University (VSU) welcomed back former U.S. Department of Agriculture (USDA) Deputy Secretary and VDACS Commissioner Dr. Jewel Bronaugh, who will be leading the new Center of Transformational Leadership and Community Impact. VSU held a USDA/1890 taskforce meeting to continue discussing partnerships. A USDA strategy meeting in Arlington focused on components of the Farm Bill. He commented on the strength of VSU's relationship with Virginia Tech (VT) and reported on the recent Council for Agricultural Research, Extension, and Teaching meetings in Knoxville, Tennessee, which also focused on the Farm Bill. VSU received a portion of an \$18.1 million NextGen grant from USDA to help create a highly talented and diverse workforce. VSU's Small Farm Outreach Program received an additional \$10 million to support small farmers, with new initiatives focused on urban agriculture programs. This program will kickoff in Atlanta and continue to work in 17 communities nationwide. VSU has worked alongside VT and the Department of Environmental Quality to research the environmental impact of solar rays and solar farming. Dr. Corley concluded by reporting that construction of VSU's new Food Sciences Building is nearly complete.

### **Lonnie Johnson**

Mr. Johnson remarked on the success of both VSU and VT's booths at the Ag Expo. VT recently welcomed Dr. Mary Burrows as the new Director of the Virginia Agricultural Experiment Station and Associate Dean for Research. Former Director Saied Mostaghimi was awarded emeritus status. Dr. Michael Gutter has continued working on engagement missions across the state, with recent visits to Mecklenburg and the Northern Shenandoah Valley. Through a new extension budget process instituted by Dr. Gutter, additional funds were reallocated back into the field and toward agent positions. There are about 12 agent positions currently in the hiring process, with an additional 10 positions to be posted during the fiscal year. VT has had trouble attracting qualified applicants to fill these positions. A new agent onboarding process and training program has been implemented, which he hopes will help VT retain agent positions long term. He concluded by reporting VT will likely complete its updated Civil Rights Review with USDA this month.

### **Charles Church**

Mr. Church reported that the Virginia Pest Management association held its training sessions in June, training over 130 people. There are labor shortages across the pesticide industry, which is especially felt in the summer months. The State Technical Meeting and Training in December will be in Virginia Beach.

### **Neil Houff**

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Mr. Houff expressed his enjoyment of the Ag Expo, noting the soil pit demonstration as particularly interesting. The Ag Retail Group is focused on the Endangered Species Act, as the U.S. Environmental Protection Agency (EPA) has come under increased scrutiny to better enforce the endangered species regulations in place. EPA has released a new strategy, which includes stricter labeling and other requirements that will put more pressure on agricultural retail operations, restricting their ability to operate. These drafts are currently open for public comment. Mr. Houff also mentioned that the Virginia Crop Production Association has set its Crop Summit Meeting for January 16-18 in Midlothian.

### **Raymond Keating**

Mr. Keating remarked on the success of the Ag Expo. He is originally from Minnesota and has worked in grain operations for over 50 years. He is the Head International Merchandiser at the Perdue AgriBusiness Chesapeake Export Facility, the only deepwater export terminal in the U.S. This facility exported 2.6 million tons of grain in 2022. Mr. Keating commented on Virginia's unique position to take advantage of market instability due to the port and the stability and diversity of Virginia agriculture. Mr. Keating also extended an invitation to the Board to come tour Perdue's Chesapeake facility.

### **Donald Horsley**

Mr. Horsley commented on the success of the Ag Expo at Land of Promise Farms as a showcase of the strength of agriculture his district. Some areas have had more rain than others, though the whole area should have a strong crop this year. Mr. Horsley concluded his report by welcoming former Board Members Shelley Butler and Bryan Taliaferro, Jr. and, alongside Commissioner Guthrie, presented them with plaques commemorating their service. Both Mr. Taliaferro and Ms. Barlow expressed their appreciation, with Ms. Barlow stating her commitment to continue advocating for Virginia agriculture, particularly in Suffolk.

### **COMMISSIONER'S REPORT**

Commissioner Guthrie delivered his report to the Board. During the presentation of this report, he briefed the Board on personnel changes, recent events, and other matters relating to VDACS. A copy of the written report on which his presentation was based was included in the Board meeting agenda and materials.

### **NOTICE OF INTENDED REGULATORY ACTION – 2 VAC 5-455 – (REGULATION FOR TRADESPERSONS INSTALLING INVASIVE PLANT SPECIES)**

President Horsley called on David Gianino, VDACS Office of Plant Industry Services Program Manager. Mr. Gianino briefed the Board on the proposed stage for 2 VAC 5-455. Following Mr. Gianino's presentation, Mr. Sellers moved that the Board of Agriculture and Consumer Services authorize staff to take any and all steps necessary to file a notice of intended regulatory action to promulgate 2 VAC 5-455, *Regulations for Tradespersons Installing Invasive Plant Species*, for public comment.

Mr. Huffard seconded the motion. The Board voted unanimously to approve the motion.

### **BUDGET UPDATE**

President Horsley called on Dr. W. Dewey Jennings, VDACS Director of Administrative and Financial Services, to provide a budget update to the Board. Following Dr. Jennings's report, the Board asked several questions, which Dr. Jennings, Commissioner Guthrie, and Deputy Commissioner Charles Green addressed.

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**NEW BUSINESS**

There was no new business brought before the Board.

**FUTURE BOARD MEETINGS**

President Horsley announced that the remaining Board meeting date for 2023 in Richmond will be December 7 at the Patrick Henry Building in the East Reading Room.

President Horsley announced the 2024 meeting dates: March 21, May 23, and December 12, all in Richmond. A summer meeting and tour will be announced at a later date.

**PUBLIC COMMENT PERIOD**

There were no public comments.

**CLOSING REMARKS**

David Trimmer, Director of the City of Virginia Beach Department of Agriculture, delivered closing remarks, thanking the Board for its support in preserving agricultural land in the city. He communicated the success of local farmers' markets in Virginia Beach, especially YNot Wednesday. He also thanked VDACS staff for its work supporting the citizens and government of Virginia Beach. Before closing, he invited the Board to attend Virginia Beach's Agriculture Week in March 2024.

President Horsley extended his gratitude to Mr. Trimmer and the City of Virginia Beach for their hospitality and assistance in hosting the Board.

**ADJOURNMENT**

There being no further business, the Board adjourned at approximately 11:10 P.M.

Respectfully submitted,

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Donald Horsley  
Board President

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Kevin Schmidt  
Board Secretary

COMMISSIONER'S REPORT TO  
BOARD OF AGRICULTURE AND CONSUMER SERVICES  
December 7, 2023

PERSONNEL NEWS

The agency has filled some key vacancies. Ashley Reed is the new Deputy Director of Administrative and Financial Services. Also joining that office is the new facilities director Harry "Sonny" Knighton. The agency is adding a new program in Animal and Food Industry Services, the Office of Hemp Enforcement. Lisa Ramsey has been selected as interim program director.

GOVERNOR'S PRIORITIES

On July 31, Secretary Lohr, Commissioner Guthrie, the Director of Marketing and Development, and staff from the Office of Agriculture and Forestry Development OAFD staff joined Governor Youngkin as a groundbreaking ceremony for the vertical agriculture grow campus that Plenty Unlimited Inc. is building in Chesterfield County. The event was in conjunction with Chesterfield County officials and the Virginia Economic Development Partnership (VEDP) staff. The event celebrated the building of the world's largest controlled environmental agriculture facility. Plenty will be growing indoor strawberries under the Driscoll label and has several retailers lined up for its products. This project investment is estimated to be at \$300M, creating over 300 jobs.

Governor Youngkin met with the VDACS Strategic Management Team on September 7 at the Oliver Hill Building. Staff provided the Governor with an update on agency activities and heard from the Governor about his priorities and received direction from him on achieving them.

The Governor's inaugural Controlled Environment Agriculture (CEA) symposium "The Great Indoors" was held September 25-26 in Loudoun County. The invitation-only event was attended by c-suite executives from around the world representing policy leaders, industry experts, retailers, and capital providers. VDACS staff worked with the Secretary's office to plan the event. It provided an excellent opportunity for staff to meet with CEA companies considering Virginia and to share information on resources, including the Governor's Agriculture and Forestry Industries Development (AFID) program.

The 2023 Virginia Agricultural Trade Conference was November 1 in Richmond. The annual conference was hosted by VDACS, Virginia Farm Bureau Federation (VFBB), The Port of Virginia, and Virginia Tech College of Agricultural and Life Sciences Department of Agricultural and Applied Economics with several industry sponsors. The Deputy Commissioner and Director of Marketing and Development served on the conference planning committee. The event featured presentations on trade and policy priorities perspectives from the National Association of State Departments of Agriculture (NASDA); current risks to U.S. and global agricultural markets; U.S. Department of Agriculture (USDA) trade priorities from the Foreign Agricultural Service; and panel discussions on growing agricultural exports, Trade Opportunities in Africa, and Renewable Fuels. Governor Glenn Youngkin gave the keynote address on the



Governor's trade policies. There were 182 registered attendees for the event.

## AGENCY OPERATIONS

### *Commissioner's Office*

Commissioner Guthrie and Deputy Commissioner Green participated in the Tri-National Accord annual meeting in Saskatoon, Saskatchewan, in August along with leaders from several U.S. state departments of agriculture, provincial ministers of agriculture from Canada, and a small delegation from Mexico. Primary topics of discussion were trade and foreign animal disease.

At the NASDA Annual Meeting in Cheyenne, Wyoming, in September, Commissioner Guthrie was elected to the NASDA Board of Directors as the representative from SASDA, which he is President of for 2023-24. Commissioner Guthrie also serves on the Board of Directors of the NASDA Foundation and is Secretary/Treasurer of the Southern U.S. Trade Association (SUSTA). Deputy Commissioner Green provides additional staff support for all these offices.

Commissioner Guthrie met with the entire Office of Dairy and Foods (ODF) Dairy Services Program team at their annual training meeting in Wytheville in September.

The Commissioner and numerous staff from throughout the agency participated in and provide services to the State Fair of Virginia September 22 – October 1 at the Meadow Event Park.

Commissioner Guthrie toured facilities and met with Commodity Services Peanut Program staff at Birdsong's facility in Franklin and at Wakefield Peanuts buying station in Wakefield in October as peanut harvest was underway.

### *Division of Marketing and Development*

The VDACS Office of International Marketing (OIM) participated at ANUGA, Europe's largest specialty food and beverage show, from October 7 – 11. Companies included Virginia Diner, a Virginia peanut producer, wholesaler, and retailer; Commercial Lynks, an exporter of grains and pulses; and Spark Bites, a vegan and gluten-free probiotic energy snack producer. All three companies reported actual sales or significant strong buying interest from major overseas buyers.

In October, OIM conducted an international in-bound trade mission trade group consisting of spirits, wine, and beer (AlcoBev) buyers from Canada and Mexico. OIM introduced the group of seven buyers to over 60 Virginia alcoholic beverage producing companies. The initial response has been positive, with all seven buyers committing to at least one purchase. All buyers were surveyed before and after the inbound mission, and all buyers responded with a significantly elevated view of Virginia's brand, reputation, and quality of spirits, wine, and craft beer.

OIM, in partnership with USDA Foreign Agriculture Service France and Dubai offices, welcomed three chefs and three social media influencers to experience Virginia's seafood and wine industries. The group visited crab, scallop, and blue catfish operations in Hampton Roads and wine industries in Williamsburg and Charlottesville.

In September, VDACS OIM exhibited at IFMAC, a major wood show in Jakarta, Indonesia. Three Virginia companies exhibited at the show. Current sales from the show exceed \$1.5 million and are expected to exceed \$2.6 million within 12 months.

OAFD staff have been working with VEDP, Virginia Department of Forestry, and the Secretary's office to recruit sawmills into Virginia. VEDP has identified 30 target companies. Recruitment materials were distributed in October. Virginia has approximately 60 sawmills in operation, and each will be contacted to gauge its interest in expansion.

In September, OAFD staff participated in the Agricultural Marketing and Rural Development Officers Conference for Virginia and Maryland hosted by the Cecil County and Harford County Maryland offices of economic development, the Upper Shore Regional Council, and MARBIDCO. The conference is an important learning and networking opportunity for VDACS employees. The group toured several farms and a hydroponic operation. Commissioner Guthrie and Maryland Secretary of Agriculture Atticks attended and presented remarks. The conference gave staff a chance to strengthen relationships across Maryland and Virginia.

OAFD staff participated in two meetings in October regarding the Central Virginia Poultry Group (CVPG), which is considering the formation of a cooperative for producing cage-free table eggs for retail and wholesale markets. CVPG, a local group of approximately 35 poultry growers affected by the closure of the Tyson Glen Allen plant, recognizes the growing market for cage-free table eggs and has recently discussed establishing a production contract with Indiana-based Dutch Country Organics, a producer of family farmed, pasture raised, organic table eggs. CVPG is working with VFBB, the Tobacco Commission, Virginia Farm Service Agency, and Farm Credit to assist farms in evaluation of the conversion of poultry houses, related expenses, financing opportunities, and establishing a poultry cooperative. OAFD presented information on how to apply for an AFID Planning Grant to support these efforts.

In July through October, the Office of Domestic Marketing and Promotions (ODMP) staff participated in several agriculture promotional, marketing, and educational events, including the Virginia Cotton Growers Association Board Meeting, Emporia Peanut Festival, Virginia Christmas Tree Growers Association Annual Meeting, Wytheville/Wythe/Bland Agriculture Task Force, Annual Big Walker Soil and Water Conservation District Annual Meeting in Wytheville, Cotton Board/Cotton Incorporated Annual Meeting, North Carolina State University Fiber Hemp Field Day, Virginia Cooperative Extension's Central Crops Expo, Strawberry Pre-Plant Meeting, The Virginia Cotton Growers Field Day, Virginia State University's Small Farm Outreach Boots2Roots, Virginia Specialty Food Association's Fall Event, Virginia Pumpkin Growers' Association's Annual Field Day, Kentland Farm Field Day, North Carolina State University/Virginia Tech Peanut Variety and Quality Evaluation Field Day, Pittsylvania County Soil and Water District's Ag Day, 25<sup>th</sup> Annual Accomack County Farm Tour at Duncan Farms, Virginia Agribusiness Council's Ag Labor Forum, SBA National Ag Day Virtual Workshop, 2023 Eastern Shore Agricultural Fair, and Legislation to Support Agritourism webinar.

In July and August, ODMP staff, in partnership with Virginia Department of General Services, hosted the OnTheSquare Berry and Peach Recipe Contests. These are annual contests for state employees to submit recipes in multiple categories featuring Virginia grown peaches and berries.

In August, ODMF participated in the Virginia Nursery and Landscape Association's Annual Field Day hosted at the Hahn Gardens at Virginia Tech.

In October, DM staff participated in the Virginia Loves Ag Day at Hokie Village adjacent to Lane Stadium prior to a home football game.

In October, ODMF staff participated in the International Fresh Produce Association's Global Produce and Floral Show in Anaheim, California. Five Virginia Grown companies exhibited in the show that had representatives over 1,100 companies from over 60 countries.

From July through October, ODMF staff continued to work with the Virginia Department of the Aging and Rehabilitative Services and Virginia farmers supporting the 2023 Senior Farmers' Market Nutrition and WIC Nutrition Program.

On September 18, VDACS received an award acceptance letter for \$552,005 from USDA for the 2023 round of Specialty Crop Block Grant Funding that includes seven projects.

VDACS Office of Food Distribution has administered nearly \$1 million of local food purchases as part of the USDA Local Food Purchase Assistance grant. VDACS received \$6.4 million in federal funding and awarded sub grants to seven agencies that have focused their food purchases on socially disadvantaged farmers or vendors. The program runs through July 2025.

VDACS Food Distribution office worked with the Federation of Virginia Food Banks to administer the American Rescue Plan Act Shelf Stable Food Program. The federation has spent \$3.5 million to purchase shelf-stable inventory and purchase low-cost produce, dairy, meat, and other proteins and a variety of shelf stable foods for distribution to underserved communities.

Food Distribution worked with the seven Virginia Food Banks to order \$2.8 million of food from USDA for distribution through the Emergency Food Assistance Program. These foods were part of a bonus offering purchased with funds provided by USDA's Commodity Credit Corporation.

Market News published the *Hay Clearing House* newsletter. With much of the state experiencing dry conditions, the newsletter assists producers who are interested in purchasing hay. The October issue lists 34 sellers of hay and provides prices and information for the Rushville hay auction in the Shenandoah Valley. Information on other sources of hay is also provided. The publication is mailed and emailed to over 1,350 subscribers and is also available online.

Market News provided state-graded feeder cattle data to Virginia Tech at the request of the Virginia-Maryland College of Veterinary Medicine. It included head count by location for all state graded sales in 2022. The data was requested for studying cattle movements and will be used to model population health and the potential movement and interventions for new diseases.

### *Division of Commodity Services*

Since August 5, Division of Commodity Services (DCS) Staff:

- Conducted Terminal Market Inspections on 809,555 and Shipping Point Inspections on 550,400 pounds of fresh fruits and vegetables (exports included Honduras, El Salvador, and Colombia); processed Food Inspections on 807,396 pounds of processed apples and products; and completed 31 USDA COOL reviews and 33 Good Agricultural Practices (GAP) Audits;
- Inspected and certified grain commodities including soybeans, corn, wheat, soybean meal, and soybean hull pellets with a value over \$204 million destined for 19 countries;
- Conducted three grain grading classes with industry participants (Scoular, Virginia Beef). Visited nine grain dealer/handler sites, ensuring compliance with Virginia Grain Laws;
- Provided livestock evaluation services on 61,195 cattle, 941 lambs/goats, 1,250 head of junior market livestock, and graded 50 beef carcasses; provided 90 Market News Reports on 42,311 head of livestock at livestock markets and 969 bales of hay.
- Inspected and certified approximately 81,904,000 pounds of Farmers' Stock peanuts and regrades, approximately 54,777,399 pounds of shelled and in-shell milled peanuts, and 7,252,264 pounds of imported peanuts from Argentina and Paraguay;
- Analyzed approximately 1,591 samples of peanuts for the presence and levels of aflatoxin to determine if the peanuts were safe for human consumption;
- Certified 6,397,214 pounds of various poultry parts for the USDA Feeding Program for School Lunch Products;
- Graded, via contracted full-time grading services, 198,087,252 pounds of chicken and 34,432,864 pounds of turkey for the Virginia poultry and egg industry;
- Provided non-contract fee grading and certification services for 981,510 pounds of poultry based on U.S. Consumer Grades to fulfill necessary specifications and contract requirements for the Virginia poultry and egg industry; and
- Performed three USDA Food Defense Audits.

#### *Division of Consumer Protection (DCP)*

Staff from the Office of Plant Industry Services (OPIS) has continued to survey for the spotted lanternfly in areas outside of the known quarantined areas. OPIS staff has recently confirmed reproducing spotted lanternfly populations in 13 counties and independent cities in addition to the quarantined areas. Staff works to slow the spread of the spotted lanternfly by surveying for populations, performing treatments to reduce populations at sites with a high risk of human-assisted movement, and administering and enforcing the spotted lanternfly quarantine.

In August, OPIS staff attended the Association of American Plant Food Control Officials annual meeting in Baltimore, Maryland, along with over 160 attendees from 29 states, Canada, U.S.

EPA, and industry stakeholders. The meeting's purpose is to promote uniform standards for consumer protection and environmental stewardship and provide a forum for regulatory consensus.

On August 9, Office of Pesticide Services (OPS) and OPIS staff attended a virtual meeting of the NASDA Plant Agriculture and Pesticide Regulation Policy Committee. The Committee heard comments from EPA regarding pesticide regulation and the Endangered Species Act (ESA). The ESA requires federal agencies, in consultation with the U.S. Fish and Wildlife Service or the NOAA Fisheries Service, to ensure that actions they authorize, fund, or carry out are not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of designated critical habitat of such species. This includes pesticide registration decisions. OPS continues to monitor EPA's activities related to endangered species and all pesticide related activities.

On August 24, OPIS staff, along with staff from the USDA Animal and Plant Health Inspection Service (APHIS) Plant Protection and Quarantine (PPQ), met with staff from a Virginia greenhouse to discuss their United States-Canada Greenhouse Grown Certification Program (GCP) application and Pest Management Plan. This is the only greenhouse in Virginia that is working toward this certification.

The application period for the 2024 Beehive Distribution Program was August 28 through September 12. There were 3,943 applications received. VDACS receives a general fund appropriation of \$200,000 for this program, which provides up to three beehive units to selected individuals. OPIS staff randomly selected 380 individuals to receive approximately 970 beehive units. OPIS staff is working with a contractor to begin distributing hive units.

As of November 6, OPIS's contractor had treated approximately 700 imported fire ant mounds in fiscal year (FY) 2024. Treatments are supported through a general fund appropriation for invasive species. Treatments are prioritized to target mounds confirmed outside of the Virginia Imported Fire Ant Quarantine and within the most recently quarantined counties of Charlotte, Dinwiddie, Halifax, Lunenburg, and Sussex. In FY 2023, the contractor treated 2,040 mounds.

VDACS made an award to a contractor who submitted a proposal for the control of the aquatic, invasive plant species known as two-horned trapa (*Trapa bispinosa*). As of November 6, the contractor had performed site visits and assessments on 27 properties. The contractor will reach out to the other 40 property owners over the winter to seek their permission for participation in the program. Treatments by the contractor will begin in 2024.

The trapping season for the Slow the Spread (STS) of the Spongy Moth in Virginia concluded on October 13. OPIS contractors placed and monitored 5,169 traps in the STS action area. On October 26, OPIS staff met with members of the USDA Forest Service (FS) and support staff at Virginia Tech to discuss the 2024 treatment plan for the STS project in Virginia. Approximately 54,974 acres of mating disruption treatments, 3,384 acres of larvicide treatments, and an estimated 5,640 trapping sites throughout the state are proposed for 2024.

OPIS staff have performed surveys for the cotton seed bug (*Oxycarenus hyalinipennis*) across Virginia as a part of a regional survey effort. While the pest is not known to occur outside of

California, the survey will support Virginia's status as cotton seed bug-free, thereby ensuring cotton exports are not impacted. To date, more than 40 surveys have been performed across the state looking at alternate hosts in nurseries as well as 21 commercial cotton fields, which were selected due to their proximity to transportation risks (cotton gins, railroads, trucking distribution centers, etc.). OPIS plans to survey additional nurseries and cotton fields in 2024.

OPS staff participated in the EPA's Bilingual Pesticide Labeling Webinar. Under the Pesticide Registration Improvement Act, the Federal Insecticide Fungicide and Rodenticide Act was amended and now requires Spanish language translation for sections of the end-use pesticide product labels where translation is available in the EPA Spanish Translation Guide. This requirement does not the complete label, only those portions related to human health.

On July 24, OPS staff participated in a Special Purpose Call hosted by the EPA's Office of Chemical Safety and Pollution Prevention (OCSPP). During the national call with pesticide regulatory officials, OCSPP announced an initiative to increase transparency by posting 10 years of pesticide incident data on its website. Previously, EPA generally only provided incident information to the public when responding to requests under FOIA or as an incident summary as part of EPA's pesticide registration review process.

OPS staff participated in the 2023 Pesticide Safety Educators Workshop (PSEW) in Roanoke, August 24-25. The workshop provides recertification course credit for Virginia Cooperative Extension agents. The PSEW also included the presentation of awards as part of VDACS Recognition Awards Program, which recognizes agents for outstanding performance in pesticide safety education, pesticide collection, and pesticide container recycling. Commissioner Guthrie presented the awards at the annual Awards Dinner.

OPS staff attended the 2023 Association of Structural Pest Control Regulatory Officials (ASPCRO) Annual Board of Directors and Conference, August 21-25 in Reno, Nevada. The 130 attendees included state and federal pesticide regulatory officials, pesticide safety education, academia, and the regulated industry. OPS Program Manager Liza Trossbach was inducted into the ASPCRO Hall of Fame for her years of dedicated service to ASPRCO and the structural pesticide regulatory industry.

OPS staff attended the 2023 EPA Region III Inspectors' Workshop in Washington, D.C. As part of the annual workshop, EPA presents awards. This year, Catherine "Kate" Hrezo, Pesticide Investigator (Roanoke territory) was the recipient of the "Outstanding Investigator of the Year" Award. Kate joins a long list of Virginia OPS Investigators who have been so recognized for their outstanding work throughout the years.

OPS concluded the 2023 Pesticide Collection Program in October. Over 47,000 pounds of unwanted and outdated pesticides were collected from seven sites. Virginia's Pesticide Collection Program assists agricultural producers, licensed pesticide dealers, pest control firms, golf courses, and homeowners with the proper disposal of unwanted pesticides. Since its inception in 1997, Virginia's Pesticide Collection Program has collected and destroyed more than 1.8 million pounds of pesticides and is available at no cost to eligible participants.

Staff from the Office of Weights and Measures (OWM) participated in the annual meeting of the National Conference on Weights and Measures (NCWM) held in Norfolk July 30 - August 3. Commissioner Guthrie provided the Opening Remarks to the convention. The meeting provides for member states' weights and measures officials and industry stakeholders to consider and vote on proposed changes to national laws and regulations found in the National Institute of Standards and Technology Handbooks. These handbooks have been adopted by the Code of Virginia for OWM to use as guidance in performing inspection activities. NCWM passed labeling and method of sale requirements for Cannabis and Cannabis-containing products.

#### *Division of Animal and Food Industry Services (AFIS)*

In October, OMPS conducted the final walkthrough at Anderson & Son Meat Processing, LLC, Slaughter and processing facility in Abingdon then sent the recommendation for inspection to USDA Food Safety Inspection Services (FSIS) Raleigh District Office. OMPS has received notification from the Raleigh office that the conditional grant of inspection had been issued. The company is scheduled to begin operating this fall serving local farmers in SW Virginia. The owner plans on providing both custom exempt and inspection options to farmers.

Monogram Foods in Martinsville continues to proceed with the expansion at the facility and expects to increase its production capacity by 80 percent to meet rising demand for ready-to-eat jerky and meat stick snacks. The company expects to add 156 jobs to the 530-employee base, making it the second-largest private employer in Henry County. Once the expansion is completed, an additional inspector position will be needed to support this facility.

OMPS is working with newly interested establishment operators in Halifax who are building a facility to slaughter around 10-15 cattle a week. They plan to provide slaughter and processing for farmers in the South Boston area by late summer to early fall of 2024.

Four Eagle Farm, LLC, located in New Kent, has reached out and has expressed interest in building an inspected facility that will help service New Kent and surrounding counties.

OMPS continues to work with Terra di Siena's second location in Mechanicsville. This second location will be processing Italian-style products for Negroni's once it is operational.

The Office of Dairy and Foods (ODF) Food Safety Program (FSP) conducted over 2,700 inspections July - September of food establishments including food retail stores, manufacturers, and warehouses. FSP investigated 191 consumer complaints and collected 228 food samples. FSP also performed inspections to open 371 new food businesses. Over 590 hours were spent working with vendors to open these firms. FSP has 13,012 firms under inspection. In September, ODF FSP was awarded a 2023-24 contract with the U.S. Food and Drug Administration (FDA) and will receive \$411,478 funding to conduct inspections on FDA's behalf. FSP Specialists will be performing 208 contract inspections at food manufacturers and food warehouses in Virginia. Also, ODF FSP was awarded a Cooperative Agreement with FDA for continued funding of \$231,000 for the next three years for continued maintenance and conformance with the Manufactured Food Regulatory Standards and to maintain the Virginia Food Safety Task Force. In addition, ODF FSP was awarded a Cooperative Agreement with

FDA for continued funding for the next three years for \$225,000 to sustain and maintain the Virginia Rapid Response Team

In June - September, the ODF Dairy Services Program (DSP) conducted 490 inspections of Grade "A" and manufactured-grade dairy farms and 95 cheese and ice cream manufacturing plant inspections. Staff collected 1,466 milk samples and 72 water samples from Virginia dairy farms, collected 867 cheese and frozen dessert samples, and inspected 120 bulk milk haulers and milk transport tankers. Dairy inspectors performed 2,512 physical on-farm visits and extensive phone discussions with producers to review construction of facilities, installation of equipment, and other related items and to offer advice to dairy farmers and manufactured milk processors.

In July and September, the DSP permitted its second and third Amish cheese manufacturing plants, Country Corner Dairy, LLC, in Charlotte County and Peacock Hill Dairy in Richmond County. These plants are not powered by conventional electricity and, instead, utilize hydraulic systems and DC current diesel generators. Additionally, these are two of only three cheese plants utilizing HTST (High-Temperature-Short-Time) continuous flow pasteurization methods within the Commonwealth. HTST processing implements a vast amount of additional public health controls that must be evaluated and tested by the DSP and are not found in conventional cheese manufacturing facilities using traditional vat pasteurization.

The ODF Produce Safety Program (PSP) continues to prioritize three focus areas: regulatory farm inspections, industry education and outreach, and farm inventory development. In July - September, PSP conducted 47 inspections of covered produce farms and made 42 visits to other produce farms to determine coverage under the FDA Produce Safety Rule. There are currently three trained Produce Safety Specialists responsible for oversight of these farms. The PSP has currently identified 212 covered produce farms that require inspection (55 large, 47 small, and 110 very small). In addition, PSP identified another 841 produce farms that grow covered produce but are exempt under one of the numerous exemptions within the FDA Produce Safety Rule. There are currently 1,053 total verified produce farms in the PSP database.

In September, PSP staff attended the national Controlled Environment Agriculture (CEA) Summit East in Danville. This meeting included growers, educators, scientists, extension agents, suppliers, and other industry members that all came together to network with each other and to learn and make advancements in CEA.

VDACS is actively working on launching the Office of Hemp Enforcement. The first objectives are to hire staff, procure necessary equipment, and develop training programs. An interim Program Manager has been appointed to lead these efforts. Staffing is divided into management, compliance, and inspection duties. Several interviews have already been conducted and interviews will continue each week for the remainder of the year. The first new hire started on November 10. It is anticipated that new positions will be filled each week as the agency works through the hiring process. This fiscal year is focused on building the program, and progress should be made during the next biennium towards reducing the backlog of establishments that need to be inspected and brought into compliance with the laws and regulations.

The Office of Veterinary Services (OVS) staff attended the Virginia Poultry Disease Taskforce



Meeting and Highly Pathogenic Avian Influenza (HPAI) After-Action Review in Harrisonburg. There were discussions on lessons from the 2023 Virginia HPAI Outbreak and feedback from the Virginia poultry industry.

During September, OVS staff provided technical assistance at the Virginia State Fair. OVS veterinarians briefly examined all show animals for signs of infectious disease, and staff ensured compliance with all regulatory requirements. OVS staff collected urine samples at the Virginia State Youth Livestock Show for the Grand Champion and Reserve Grand Champion from each livestock species. The samples were submitted to an out-of-state lab to test for illegal substances.

On October 4, OVS Animal Care staff completed the summary of the Animal Control Officer Status Report submission, review, and tracking process. All 140 localities employing animal control officers have submitted the required reports. There were two towns removed from the tracking system, as they no longer employ animal control officers. There were 474 animal control officers employed by Virginia localities during this reporting cycle. There were no instances of noncompliance in report submission or training completion. No civil penalties were issued.

VDACS and James Madison University have worked in conjunction to hold interviews and oversee negotiations for the architecture and engineering firm who will oversee the Laboratory Capital Expansion Project. The selected firm will oversee design and planning of the expansions to occur at Harrisonburg, Warrenton, and Lynchburg.

The Office of Laboratory Services (OLS) Program Manager and staff set up and staffed outreach/event booths at several fairs around the state from July through September. They provided outreach information and materials and spoke with community members, producers, and representatives regarding how the lab can support them.

The Wytheville Lab Staff has been working with a local producer and referring veterinarian on a BVD (bovine viral diarrhea) outbreak in a group of feeder calves. A 500-pound calf was presented for necropsy and diagnosed with respiratory disease and BVD. This was the 10th calf in a group of 70 that had died. The rest of the group of 57 were tested for BVD, and 31 were positive. Those will need to be retested to identify a Persistently Infected animal. This case is extreme, but OLS has been confirming more cases of BVD in recent months.

In August, OLS staff attended the annual Virginia Poultry Health and Management Seminar. During the seminar, the OLS Program Manager and Harrisonburg Lab Director presented an overview presentation titled "Poultry Disease Trends in the Shenandoah Valley," which looked at disease trends for the past year with regards to infections, vaccination titers, and submissions. In August, the OLS Program Manager and the Harrisonburg Microbiologist Supervisor attended the 2023 NAHLN/AAVLD Quality Management System training at the National Veterinary Services Laboratory in Ames, Iowa. This training works to standardize Quality Management throughout NAHLN Laboratories.

In August, the Warrenton Diagnostician and the Harrisonburg Mammalian Diagnostician traveled to California for a specialty racehorse necropsy techniques training through the CL

Davis Foundation. This training will allow VDACS Diagnosticians to comply with newly mandated necropsy requirements for racehorses.

The Harrisonburg Lab Director and Poultry Diagnostician passed her board certification examination and is now a Diplomate of the American College of Poultry Veterinarians. This Diplomate status places her among elite poultry veterinarians with specialized training in poultry management and disease diagnostics.

The new Lynchburg Diagnostician/Laboratory Director began employment in September. He has completed training, and Lynchburg necropsies resumed on November 1. This is a service that was missed by local producers and veterinarians since October 2020.

In September, the Harrisonburg RAHL confirmed a case of Eastern Equine Encephalitis in a Virginia emu. The State Veterinarian, Virginia Department of Health, and Centers for Disease Control and Prevention were informed. Three of the owners' five emus have died, and all other animals and humans on site were unaffected.

OLS and OVS have hosted senior veterinary students for a public practice three-week clerkship. Students participate in necropsy cases and ancillary testing. They also rotate through the various labs (bacteriology, serology, etc.) to better understand testing options and methodology. They also interact with other regulatory VDACS programs such as meat and dairy inspection.

The State Veterinarian and OLS and OVS staff attended two HPAI hotwashes, one with industry and one internal with VDACS and USDA, to review protocols and needed changes for the 2023 HPAI response.

Since the end of September, the VDACS RAHL's have performed 185,647 tests, of which 109,053 were poultry serology; 33,196 were Mammalian Serology; 15,063 were molecular testing; and the remainder were Bacteriology, Dairy Microbiology, Food Safety, Hematology, Parasitology, Pathology, Virology, and Water testing.

**Project 6889**

**Department Of Agriculture And Consumer Services**

**Amend noxious weed list**

Chapter 317

Regulations for Enforcement of the Noxious Weeds Law

**2VAC5-317-20. Tier 1, Tier 2, and Tier 3 noxious weeds.**

A. The following plants are hereby declared Tier 1 noxious weeds:

1. *Salvinia molesta*, Giant salvinia.
2. *Solanum viarum*, Tropical soda apple.
3. *Heracleum mantegazzianum*, Giant hogweed.

B. The following plants are hereby declared Tier 2 noxious weeds:

1. *Imperata cylindrica*, Cogon grass.
2. *Lythrum salicaria*, Purple loosestrife.
3. *Ipomoea aquatica*, Water spinach.
4. *Vitex rotundifolia*, Beach vitex.
5. *Oplismenus hirtellus* spp. *undulatifolius*, Wavyleaf basketgrass.
6. *Corydalis incisa*, Incised fumewort.
7. *Trapa bispinosa*, Two horned trapa.

C. The following plants are hereby declared Tier 3 noxious weeds:

1. *Ailanthus altissima*, Tree of heaven.
2. *Ampelopsis brevipedunculata*, Porcelain berry.
3. *Celastrus orbiculatus*, Oriental bittersweet.
4. *Hydrilla verticillata*, Hydrilla.
5. *Persicaria perfoliata*, Mile-a-minute weed.
6. *Alliaria petiolata*, Garlic mustard.
7. *Dioscorea polystachya*, Chinese yam.
8. *Elaeagnus umbellata*, Autumn olive.
9. *Ficaria verna*, Lesser celandine.
10. *Lespedeza bicolor*, Bicolor lespedeza.
11. *Lonicera maackii*, Amur honeysuckle.
12. *Lonicera japonica*, Japanese honeysuckle.
13. *Phragmites australis*, Common reed.
14. *Pueraria montana*, Kudzu.
15. *Reynoutria japonica*, Japanese knotweed.
16. *Ulmus pumila*, Siberian elm.

**Virginia Department of Agriculture and Consumer Services**  
**Division of Consumer Protection**  
**Office of Pesticide Services [Revised 5/14/15]**

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**Administrative Procedure for Processing Violations for Assessment of  
Civil Penalties and Action on Certificates, Licenses, and Registrations (Eff. August 7, 2012)**

<b>Decision-Maker</b>	<b>Activity</b>
Enforcement or Field Supervisor	<p>Review reports, photographs, laboratory analysis reports, sample results, and other supporting documentation to ensure record of inspection, investigation, monitoring, or observation is complete, clearly written, and the findings are well-documented; contact investigator or inspector if additional information is needed; determine if a <u>possible</u> violation of assigned statutes or regulations occurred.</p> <p>For routine inspections, if no violation was found, close case and update appropriate Enforcement Case Review &amp; Actions database.</p> <p>For a complaint investigation in which no violation was found, close case and update appropriate Enforcement Case Review &amp; Actions database. Forward to Compliance Manager.</p> <p>If possible violation occurred, update appropriate Enforcement Case Review &amp; Actions database and forward record to Compliance Manager.</p>

Decision-Maker	Activity
Compliance Manager	<p>Review record received from the Enforcement Supervisor to ensure it contains proper documentation to substantiate possible violation(s); contact the Enforcement Supervisor, or, if the Enforcement Supervisor is not available, the investigator or inspector if additional information is needed.</p> <p>If conditions do not warrant compliance action, close case and update appropriate Enforcement Case Review &amp; Actions database.</p> <p>For a complaint investigation in which no violation was found, send results of investigation to complainant.</p> <p>If conditions substantiate a possible violation(s), issue a Notice of Alleged Violation notifying the respondent of the conditions found and providing the opportunity to show good faith efforts to remedy the situation and/or request an informal fact-finding or a formal hearing on the allegations levied by the Department within 15 calendar days of receipt of the Notice of Alleged Violation.</p> <p>Upon receipt of a request for an informal fact-finding, Compliance Manager will schedule the informal fact-finding.</p> <p>Upon receipt of a request for a formal hearing, Compliance Manager will notify Program Manager.</p> <p>Upon receipt of any duly provided Good Faith Opportunity Form and completion of any properly requested informal fact-finding conference or formal hearing, or in the absence thereof within 15 days of receipt of the Notice of Alleged Violation:</p> <p style="padding-left: 40px;">If conditions found show a violation:</p> <p style="padding-left: 80px;">If violative conditions do not warrant a civil penalty, send a Letter of Caution to respondent. If case resulted from complaint investigation, send results of investigation to complainant. Update appropriate Enforcement Case Review &amp; Actions database.</p> <p style="padding-left: 80px;">If violative conditions warrant a civil penalty, issue a Notice of Violation calculating the amount of penalty in accordance with civil penalty decision matrix. If case resulted from complaint investigation, send results of investigation to complainant.</p> <p style="padding-left: 40px;">If conditions found do not show a violation:</p> <p style="padding-left: 80px;">For routine inspections, if no violation is found, close case and update appropriate Enforcement Case Review &amp; Actions database.</p> <p style="padding-left: 80px;">For a complaint investigation in which no violation was found, close case and update appropriate Enforcement Case Review &amp; Actions database. Send results of the investigation to the complainant.</p>

Decision-Maker	Activity
Compliance Manager (cont'd)	<p><b>If Civil Penalty is \$2,500 or less</b>, mail Notice of Violation and civil penalty assessment to respondent along with payment statement and notification that the civil penalty can be appealed in a fact-finding conference authorized by § 2.2-4019 of the Code of Virginia (the Code); inform respondent that request for an informal fact-finding conference must be made in writing to the Program Manager within 15 calendar days of receipt of Notice of Violation; update appropriate Enforcement Case Review &amp; Actions database.</p> <p><b>If Civil Penalty is greater than \$2,500</b>, forward to Program Manager for review and approval.</p> <p><b>If denial, suspension, revocation, or modification of a license, certificate, or registration is involved</b> alone or in conjunction with a civil penalty, forward to Program Manager for review and approval.</p> <p>At the discretion of the Compliance Manager, the civil penalty assessment may be prepared in the form of a Consent Agreement.</p>
Program Manager	<p><b>If Civil Penalty greater than \$2,500 is approved</b>, return to Compliance Manager for mailing to respondent.</p> <p><b>If Civil Penalty greater than \$2,500 is NOT approved</b>, return to Compliance Manager for reassessment of penalty.</p> <p>If denial, suspension, revocation, or modification of a license, certificate, or registration is involved alone or in conjunction with a civil penalty and is approved, return to Compliance Manager for mailing to respondent.</p> <p>If denial, suspension, revocation, or modification of a license, certificate, or registration is involved alone or in conjunction with a civil penalty and is NOT approved, return to Compliance Manager for reassessment.</p>
Compliance Manager	<p>Mail Notice of Violation and civil penalty assessment with payment statement to respondent; include notification that the civil penalty can be appealed in an informal fact-finding conference authorized by § 2.2-4019 of the Code; inform respondent that request for fact-finding conference must be made in writing to the Program Manager within 15 calendar days of receipt of Notice of Violation; update appropriate Enforcement Case Review &amp; Actions database.</p> <p>If action is <b>NOT approved</b>, reassess and resubmit action for approval or close case; update appropriate Enforcement Case Review &amp; Actions database.</p>
Program Manager	<p>Upon receipt of properly filed written request for <b>an informal fact-finding conference</b>, appoint a Conference Officer; instruct Compliance Manager to schedule the Fact-Finding Conference.</p>

Decision-Maker	Activity
Compliance Manager	Upon instruction from Program Manager, schedule an informal fact-finding conference with Conference Officer appointed by Program Manager; notify respondent and investigator or inspector of the location, date, and time of informal fact-finding conference; update appropriate Enforcement Case Review & Actions database.
Conference Officer	<p>Hold informal fact-finding conference to consider all relevant information on case; Conference Officer may affirm, raise, lower, or abate a penalty, or may negotiate a settlement based on new information; notify the respondent of decision in writing.</p> <p>Notify respondent of right to appeal the decision of informal fact-finding conference in a <b>formal hearing</b> authorized by §2.2-4020 of the Code; notify respondent that request for a formal hearing must be made in writing to the Program Manager within 15 calendar days after receipt of Conference Officer decision.</p>
Program Manager	Upon receipt of properly filed written request for a <b>formal hearing</b> , arrange for a Court-appointed attorney to act as Hearing Officer; arrange location of <b>formal hearing</b> ; arrange for a Court Reporter; notify investigator or inspector; update of the appropriate Enforcement Case Review & Actions database.
Hearing Officer	Hold <b>formal hearing</b> to hear relevant information about case; consider the facts of all violations identified in the case; evaluate the civil penalty and/or the denial, suspension, revocation, or modification of a license, certificate, or registration; Hearing Officer may recommend affirming, raising, lowering, or abating a penalty, or may recommend another outcome; transmit findings and recommendations to the Board and the respondent within 30 days of the <b>formal hearing</b> ; inform respondent of their right under § 2.2-4021(A) to address the Board.
Program Manager	Notify respondent in writing of the date and time of the meeting during which the Board will consider the recommendations of the Hearing Officer; notify respondent of their right under § 2.2-4021(A) to address the Board.
Board	Consider recommendations from <b>formal hearing</b> ; provide opportunity for final arguments from VDACS and respondent; render decision; inform respondent that decision can be appealed to Circuit Court for judicial review; instruct VDACS staff to notify respondent in writing of the Board's decision within 30 days of such decision, including notification of right to appeal to Circuit Court; instruct VDACS staff to send transcripts and all case materials to appropriate program for filing.
Compliance Manager	Update appropriate Enforcement Case Review & Actions database.



# COMMONWEALTH of VIRGINIA

*Joseph W. Guthrie*  
Commissioner

Department of Agriculture and Consumer Services  
Division of Consumer Protection  
*Office of Pesticide Services*

PO Box 1163, Richmond, Virginia 23218  
Phone: 804/786-3798 • Fax: 804/786-9149 • Hearing Impaired: 800/828-1120  
[www.vdacs.virginia.gov](http://www.vdacs.virginia.gov)

March 22, 2023  
CERTIFIED MAIL

Thibault Enterprises, LLC  
4108 Leonards Lane  
Sutherland, VA 23885

**NOTICE OF VIOLATION**

Case Number: 73148

Dear Thibault Enterprises, LLC:

This letter serves as a Notice of Violation pursuant to the Virginia Pesticide Control Act. Actions taken herein have been delegated by the Board of Agriculture and Consumer Services to the Office of Pesticide Services and are in accordance with the Virginia Pesticide Control Act and other laws, regulations and guidelines. A copy of these laws, regulations and guidelines are available at <http://www.vdacs.virginia.gov/pesticides.shtml>. Hard copies are available upon request.

**A. Factual Basis of Action**

On May 17, 2022, Pesticide Investigator Vincent Abston initiated an investigation in response to a complaint. Specifically, the complainant alleged that pesticide drifted onto their property from a pesticide application made by your vineyard. Our Office subsequently received two additional complaints alleging pesticide drift from applications made by your vineyard for a total of three applications made on May 16, 2022, June 21, 2022, and June 26, 2022.

On May 20, 2022, Investigator Abston interviewed Alan Thibault via telephone regarding the initial pesticide application of May 16, 2022. Mr. Thibault stated that he was not a certified pesticide applicator, only made applications to his own property, and that he does not apply Restricted Use Pesticides. He further stated that he was only applying fungicides at that point in the season.



On June 3, 2022, Investigator Abston interviewed Alan Thibault and Kirk Thibault in person. It was at this interview that Investigator Abston was informed that the fungicides used in the applications were *Microthiol Disperss* (EPA Reg. no. 7506-187) and *Mancozeb Flowable with Zinc Concentrate* (EPA Reg. no. 62719-396-4), and that Surround Kaolin Clay was used in the mix along with Widespread Max as a surfactant, and Compadre as a drift control agent.

Investigator Abston visited the complainant's property on May 17, 2022, May 18, 2022, June 22, 2022, and on July 1, 2022. He observed conditions, took site photographs, and collected residue samples. The samples were sent to the Division of Consolidated Laboratory Services (DCLS) to be analyzed for the presence of pesticides. The DCLS report indicated the following results:

Sample #: 247500822 – 05/18/2022 Swab of lamp post at beginning of complainant's property.  
Results: sulfur qualitatively detected.

Sample #: 247500922 – 05/18/2022 Swab of plastic container in grass in yard along complainant's driveway.  
Results: sulfur qualitatively detected.

Sample #: 247501022 – 05/18/2022 Swab of satellite dish in complainant's front yard.  
Results: no pesticide detected.

Sample #: 247501122 – 05/18/2022 Vegetation sample in complainant's front yard.  
Results: no pesticide detected.

Sample #: 247501922 – 06/22/2022 Swab of automobile in complainant's front yard.  
Results: no pesticide detected.

Sample #: 247502022 – 06/22/2022 Vegetation sample in complainant's front yard.  
Results: no pesticide detected.

Sample #: 247502122 – 7/01/2022 Swab of automobile in front yard.  
Results: no pesticide detected.

Sample #: 247502222 – 7/01/2022 Swab of plastic container in front yard.  
Results: sulfur qualitatively detected.

On February 6, 2023, this office sent you a letter notifying you of the potential violation and providing you with an opportunity to document your good faith efforts to correct the adverse condition. On February 20, 2023, we received your completed Good Faith Effort Reporting Form.

## **B. Virginia Pesticide Control Act Sections Violated**

Virginia Code § 3.2-3939(B) (1950) which prohibits “any person to use or cause to be used any pesticide in a manner inconsistent with its labeling...”

The “Directions For Use” section of the label for Microthiol Disperss (EPA Reg. no. 7506-187), states, “Do not apply this product in a way that will contact workers or other persons, either directly or through drift.” Additional language under the “Application Instructions” states, “Do not apply when wind speed favors drift beyond the target area intended for treatment.”

Your vineyard acknowledged the use of *Mancozeb Flowable with Zinc Concentrate* (EPA Reg. no. 62719-396-4) and *Microthiol Disperss* (EPA Reg. no. 7506-187), which contains the active ingredient sulfur. Sulfur was detected in sample numbers 247500822, 247500922 and 247502222. According to Weather Underground, recorded wind speeds from North Dinwiddie station on May 16, 2022, varied from 0 mph to 16 mph, with prevailing winds from the South and Southwest. Recorded wind speeds varied from 0 mph to 7 mph on June 26, 2022, with prevailing winds from the South and Southwest.

This Office appreciates the measures your vineyard utilizes to avoid drift as indicated in your good faith response. Provided the weather data indicating the wind direction towards the collected sample locations, and the samples with the closest proximity to the vineyard (the lamp post and plastic container) testing positive for sulfur, it is likely that drift occurred from the pesticide applications made by your vineyard. When we consider the half-life for Mancozeb being a reportedly one to seven days, it is not unlikely to have undetectable levels of residue given the time lapse from application, sample collection, and the need for DCLS to develop a method for testing. The complainant’s property and the lamp post, regardless of ownership, were all non-target areas.

## **C. Conclusion of Law**

Based on the evidence, OPS concludes Thibault Enterprises, LLC violated § 3.2-3939(B) of the Virginia Code.

## **D. Penalty Assessment**

Virginia Code § 3.2-3943(A) provides for the assessment of monetary civil penalties when violations of the Act and regulations occur.

For using a pesticide in a manner inconsistent with its labeling, Thibault Enterprises, LLC is assessed a penalty of \$120.00.

Enclosed is an itemized explanation of each penalty assessment along with a payment statement for the total amount assessed of \$120.00. **This penalty reflects good faith credit and a 20% reduction for no prior violation.**

## **E. Appeal Procedure**

You have the right to appeal this case decision by requesting a Fact-Finding Conference or requesting to waive the Fact-Finding Conference and proceed directly to a formal hearing under Virginia Code § 2.2-4019. This will allow you to present additional information or arguments challenging the violation or the civil penalty. Either request must be submitted on the enclosed form to the Program Manager, Office of Pesticide Services, Virginia Department of Agriculture and Consumer Services. If you request a Fact-Finding Conference, a Conference Officer will be assigned to your case, and, if the civil penalty is upheld, you will have a further opportunity for appeal to a formal hearing.

Pursuant to Virginia Code §3.2-3943(D) of the Virginia Pesticide Control Act, “[t]he person to whom a civil penalty is issued shall have 15 days to request an informal fact-finding conference ...to challenge the fact or amount of the civil penalty.” Thus, the request for or waiver of a Fact-Finding Conference must be postmarked within 15 calendar days from receipt of this case decision.

## **F. Payment of Civil Penalty**

If you do not request a fact-finding conference or a formal hearing within 15 calendar days following receipt of this notice, the civil penalty becomes final, due and payable within 15 calendar days from receipt of this notice. Payment of the penalty may be made by either check (certified or cashier's) or money order made payable to the Treasurer of Virginia. Please print the invoice number on the check or money order.

The Virginia Department of Agriculture and Consumer Services also offers the option of “**Online Bill Pay**”. To use the Online Bill Pay option, please visit <https://portal.vdacs.virginia.gov>.

- View all outstanding invoices on your account
- Securely pay in full invoices less than 60 days past due
- Pay by credit card (VISA, MC Discovery) – an additional \$3.00 convenience fee per bill will be added to check out.
- Pay by e-Check / ACH (no additional fees)
- Obtain online confirmation and receive email receipt.

For questions or assistance with the Online Payment Portal, contact VDACS by email at: [VDACSPaymentPortal@vdacs.virginia.gov](mailto:VDACSPaymentPortal@vdacs.virginia.gov).

If you have any questions concerning this violation, the appeal procedure, or payment of the civil penalty, you may reach me by email ([Nicole.Wilkins@vdacs.virginia.gov](mailto:Nicole.Wilkins@vdacs.virginia.gov)) or by phone (804-371-8485)

Thibault Enterprises, LLC  
March 22, 2023  
Page 5 of 5

Sincerely,



Nicole L. Wilkins  
Senior Compliance Officer

Enclosures

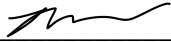
cc: Larry M. Nichols, Division Director  
Liza Fleeson Trossbach, Program Manager  
Robert D. Christian, Acting Supervisor, Enforcement & Field Operations  
Davis Wilcox, Compliance Officer  
Vincent Abston, Pesticide Investigator  
Allison Jewell, Finance Office

COMMONWEALTH OF VIRGINIA  
DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES  
Office of Pesticide Services  
P. O. Box 1163, Richmond, Virginia 23218

PENALTY ASSESSMENT EXPLANATION

PERSON/FIRM NAME: Thibault Enterprises, LLC  
APPLICATOR CERTIFICATION NUMBER: N/A  
PESTICIDE BUSINESS LICENSE NUMBER: N/A  
CASE NUMBER: 73148

<u>VIOLATION 1 OF 1</u>	<u>POINTS ASSESSED</u>
<b>A. Type of Violation</b> RANGE 1 → 10 PTS Using any pesticide inconsistent with label directions.	3
<b>B. Damage Caused by Violation</b> RANGE 0 → 10 PTS Slight actual or potential damage to property or the environment, or threat to human health and safety.	1
<b>C. Culpability</b> RANGE 0 → 6 PTS Negligence.	1
<b>D. History of Previous Violations</b> 1 PT / PREVIOUS VIOLATION	
<b>E. Good Faith Credit for Prompt Compliance</b> RANGE 0 → 4 PTS Monitoring and other methods to avoid drift.	<u>-2</u>
<b>TOTAL POINTS:</b>	<b>3</b>
<b>BASE PENALTY AMOUNT:</b>	<b>\$150.00</b>
<b>F. Reduction of base penalty by 20%, if no previous violation</b>	-30.00
<b>G. Additional Penalty for Serious Damage/Injury/Death</b> No additional penalty.	<u>+0.00</u>
<b>TOTAL PENALTY AMOUNT:</b>	<b>\$120.00</b>

Compliance Manager:  Date: 3 / 22 / 2023



**Pay Online at:**  
<https://portal.vdacs.virginia.gov>

**Invoice #: 360820**

**Total Amount Due:** \$120.00

Invoice Date: Mar 22, 2023

Due Date: Apr 21, 2023

Amount Remitted: \$ \_\_\_\_\_

Make Check Payable to:  
**TREASURER OF VIRGINIA**

Mail Payment to: VDACS  
 PO Box 430  
 Richmond VA 23218-0430

THIBAUT ENTERPRISES, LLC  
 4108 LEONARDS LANE  
 SUTHERLAND VA 23885-

*Payment is due 30 days after billing date, unless a contract or the Code of Virginia requires different payment terms. The Code of Virginia authorizes the Department of Agriculture and Consumer Services to charge interest, late fees, collection costs and/or administrative costs and to deny services on past due accounts. A fee of \$50.00 will be assessed on each returned check.*

Customer #46014195 RETURN THIS PORTION WITH PAYMENT FOR PROPER CREDIT  
 VDACS, PO BOX 430, RICHMOND VA 23218-0430, (804) 371-6560 Customer #46014195

Page 1 of 1 **Invoice #: 360820**

Date of Service	Description of Service	Unit Price	Qty	Line Total
Mar 22, 2023	PESTICIDE CIVIL PENALTY ASSESSMENT FAILURE TO COMPLY WITH LABEL 770-08319-CP-PSTENF	\$120.00	1	\$120.00

**Total Amount Due:** \$120.00

**VIRGINIA:**

**VIRGINIA DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES  
OFFICE OF PESTICIDE SERVICES**

**In the matter of  
THIBAUT ENTERPRISES, LLC,**

**Petitioner**

**v.**

**VIRGINIA DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES,  
OFFICE OF PESTICIDE SERVICES,**

**Respondent**

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*September 5, 2023  
Virtual Hearing*

**Hearing Officer: Rhonda J. S. Mitchell**

**Representatives:**

**Nathaniel Scaggs, Counsel for Thibault Enterprises, LLC  
Justin Bell, Counsel for the Virginia Department of Agriculture and Consumer Services**

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***Hearing Officer's Recommended Findings of Fact and Conclusions of Law***

**Introduction and Procedural Summary**

A request for formal hearing (complaint) was filed on or about May 4, 2023 by Thibault Enterprises, LLC (petitioner) in appeal of a civil penalty assessed by the Virginia Department of Agriculture and Consumer Services (VDACS), Office of Pesticide Services, (agency or respondent). The complaint was filed pursuant to §2.2-4020 and §2.2-4021, Code of Virginia (1950), as amended. The hearing officer was formally notified of her appointment on May 5, 2023 by the Office of the Executive Secretary, Virginia Supreme Court, and by electronic message from the agency dated May 8, 2023.

Two prehearing telephone conference calls were convened on May 15 and June 6, 2023. The formal hearing was initially scheduled for June 14, 2023. On joint motion of the parties and in anticipation of settlement, the hearing officer granted a hearing delay until July 5, 2023 and again to August 24, 2023. On or about August 18, 2023, the parties jointly moved for yet another delay. The hearing officer granted the delay but set the hearing date for September 5, 2023 with the caveat that no further delays would be granted. The virtual hearing was conducted on September 5, 2023.

VDACS is requesting that the hearing officer recommend to the Board of Agriculture and Consumer Services that Thibault be ordered to pay a \$120.00 civil penalty (fine) it imposed for a pesticide violation. Thibault has appealed the violation and the \$120.00 fine.

The purpose of this formal administrative hearing process is for the hearing officer to review evidence and render recommended findings of fact and conclusions of law to the Board of

Agriculture and Consumer Services (Board). This formal proceeding is a culmination of unsuccessful discussions between the parties, investigations by VDACS, and a notice of violation dated March 22, 2023 sent to Thibault by VDACS. As a result of the violation set forth in the notice of violation, VDACS imposed a \$120.00 fine against Thibault. Thibault appealed.

At close of the hearing, counsel for the VDACS moved that the hearing officer delay issuing her recommend findings of fact and conclusions of law until November 7, 2023, or alternatively, to delay the effective date until November 7, 2023 to align with the next scheduled meeting of the Board of Agriculture and Consumer Services. Hearing no objection from Thibault, the hearing officer granted the motion, opting to delay issuance of her recommended findings of fact and conclusions of law until November 7, 2023.

### **Factual Synopsis**

The VDACS, Office of Pesticide Services, is the Virginia state agency responsible for investigating pesticide complaints. Thibault Enterprises is a Virginia Limited Liability Company owned and operated by William Thibault. Thibault operates a winery called Riverside Vines located at 3415 Leonards Lane, Sutherland, Virginia where it grows grapes. The winery is approximately 170 acres.

On May 17, 2022, Vincent Abston, a pesticide investigator with the Office of Pesticide Services, VDACS, initiated an investigation of Riverside Vines (winery or vineyard). The investigation was prompted by a complaint made against Thibault Enterprises, LLC by David and Caryn Yost (complainants) who own land adjacent to Riverside Vines. The complaint specifically alleged that pesticide had drifted onto the complainant's property from pesticide applications conducted by Thibault on May 16, 2022, June 21, 2022 and June 26, 2022.

The investigator visited the complainant's property on May 17, 2022, May 18, 2022, June 22, 2022 and July 1, 2022. During the course of his investigation, Mr. Abston spoke with the complainants, David and Caryn Yost, Mr. Thibault, and his son, Kirk Thibault. The complainants are neighbors to the winery. They reside on approximately one acre located at 3601 Leonards Lane, Sutherland, Virginia.

When conducting his investigation, Mr. Abston observed conditions and took photographs. He also collected eight residue samples. The samples were dated as follows: four samples on May 17<sup>th</sup>; two samples on June 22<sup>nd</sup>; and two samples on July 1<sup>st</sup>. The samples were sent to the Division of Consolidated Laboratory Services (DCLS) to be analyzed for the presence of pesticides. DCLS determined that three of the samples, one from a lamp post, one from a plastic bin, and one from a plastic container (later determined to be trash), tested positive for sulfur. The remaining samples detected no pesticides.

During an interview with Mr. Thibault and his son, Kirk Thibault, conducted on June 3, 2022, Mr. Abston learned that the fungicides applied at the winery were Microthiol Disperss and Mancozeb Flowable with Zinc Concentrate. Surround Kaolin Clay was also used, along with Widespread Max as a surfactant, and Compadre as a drift control agent.



On February 6, 2023, VDACS notified Mr. Thibault of a potential Virginia Pesticide Control Act violation. On February 20, 2023, Mr. Thibault responded via a good faith effort reporting form. On March 22, 2023, VDACS fined Thibault Enterprises with a \$120.00 civil penalty, providing a penalty assessment explanation and bill for failure to comply with a pesticide label.

### **The Hearing**

The virtual due process hearing was conducted on September 5, 2023. VDACS was responsible for operation and support of the virtual hearing. On motion of counsel for VDACS, exhibit books for both parties were submitted and admitted to the record at start of the hearing. Counsel for Thibault raised no objection. Previously submitted stipulations were also admitted to the record. An opening statement was given by counsel for VDACS followed by an opening statement from counsel for Thibault. At close of the hearing, the parties opted not to submit closing briefs. Four credible witnesses testified.

#### **The following witnesses were sworn and called by the respondent, VDACS:**

Vincent Abston, Pesticide Investigator, VDACS, Transcript pages (Tr. pgs.) 17 - 67

Nicole Wilkins, Senior Compliance Officer, VDACS, Tr. pgs. 68 – 83

#### **The following witnesses were sworn and called by the petitioner, Thibault Enterprises, LLC:**

Alan Thibault, Managing Member, Thibault Enterprises, LLC, Tr. pgs. 85 – 108

William Thibault, Owner and Operator, Thibault Enterprises, LLC, Tr. Pgs. 109 - 136

### **Witness Summaries**

#### ***VDACS Witnesses:***

***Vincent Abston*** (Tr. pgs. 17 - 67): On direct examination, Mr. Abston testified that he currently serves as a pesticide investigator for VDACS. He officially identified this matter as case number 73148.

Mr. Abston reviewed and explained the narrative he wrote regarding the case. (VDACS Exhibit C) The case was a Richmond investigation referral based on several complaints made by the complainants. (VDACS Exhibits E and F) He testified as to the nature of the complaints, explaining that the complainants, Mr. and Mrs. Yost, were concerned that pesticide treatments from the vineyard had drifted onto their property. They were concerned about possible well water contamination thru runoff, and about the odor.

After explaining the investigative process to the complainants, Mr. Abston collected samples from the site and took photographs of where the samples were collected (VDACS Exhibit I). Mr.

Abston explained that he took four samples on May 17<sup>th</sup>; two samples on June 22<sup>nd</sup>, and two samples on July 1<sup>st</sup>. He explained how the samples were documented. (VDACS Exhibit K)

Upon speaking to the petitioners on May 20<sup>th</sup> and June 3<sup>rd</sup>, Mr. Abston testified that he was made aware that the vineyard was only using fungicides at the time of the complaints. The active ingredients in the fungicide were sulfur and Mancozeb. At that point he asked the lab to test for sulfur. Mr. Abston testified that he was later provided copies of the pesticide labels used at the vineyard by the petitioner. The labels showed that Mancozeb and Microthiol Disperss had been used, both of which contain sulfur. (VDACS Exs. P and Q) Mr. Abston then explained the process for sending the samples to the lab, thereby establishing a chain of custody.

Mr. Abston testified that three of the samples showed traces of sulfur: the first from a lamppost at the beginning of the complainants' yard; the second from a plastic containing (determined to be trash) laying in the grass along the complainants' driveway; and a third larger plastic containing laying in the front yard. (VDACS Ex. M)

Once the investigation was completed, Mr. Abston testified that his information details and a for-cause investigation report was sent to enforcement for review. (VDACS Ex. S) The report was then sent to compliance.

Mr. Abston testified that he had been an investigator with VDACS for three years. He further testified that he had not met either of the parties prior to this case.

On cross-examination, Mr. Abston testified that he estimated visiting the property 10 or 11 times between 2022 and 2023 in response to complaints from the Yosts. When questioned about an odor or irritation from the pesticide application, Mr. Abston testified that he did not smell an odor or become irritated during any of his visits, nor did he have to wear a mask or goggles. Mr. Abston testified that sulfur was a fairly common active ingredient in fungicides. He acknowledged that fungicides containing sulfur could be purchased at local hardware stores by the average consumer.

When questioned about chain of custody, Mr. Abston acknowledged that since the positive samples were found on the complainants' property, the property owners actually had initial control of the sampled items. When questioned about the positive sample on the plastic trash, Mr. Abston testified that he did not notice other trash on either of the parties' properties. He further testified that although the lamppost tested positive, it was really not on the complainants' property but on the property of another neighbor who had not filed a complaint. The third positive test was on a moveable plastic bin that was laying upside-down in the complainants' yard.

When asked about communications with the complainants, Mr. Abston testified that the Yosts' often communicated with him directly via email or his work cell phone. Mr. Abston acknowledged that he had not personally witnessed any of the pesticide sprays but relied on what he was told by the complainants. When asked whether it was possible that either the Yosts or other neighbor (Linda Barker) could have used fungicides on their property, Mr. Abston affirmed the possibility.

Upon questioning by the hearing officer, Mr. Abston explained that he was not sure whose property the lamppost was on, i.e. the Barker or Thibault property, but he was initially told by Mrs. Yost that the lamppost was on the Yost property. Mr. Abston explained that although the pesticide used with the sulfur could be used, it could not be used if there was a possibility of drift.

**Nicole Wilkins** (Tr. Pgs 68 – 83): Ms. Wilkins is a senior compliance officer with VDACS. She reviewed this case to determine a violation. She prepared the notice of violation that was sent to Thibault. (VDACS Ex. A)

On direct examination, Ms. Wilkins testified that she based her decision to violate on the following: information she received from the field; lab results from the samples; and weather reports provided by Mr. Abston (VDACS Ex. W) that showed wind towards the complainants' property.

She testified that the wind ranged from 0 to 16 miles per hour during sprays. She stated that Thibault violated 3.2-3939(B) by using a pesticide in a manner inconsistent with its label. She testified that the Microthiol Dispers label states "not to allow the product to come into contact with workers or other persons, either directly or through drift." It also states "Do not apply when wind speeds favor drift beyond the intended target area." She concluded that since three of the samples detected sulfur, that there was a drift from the application.

Ms. Wilkins then explained that once she made her decision, she sent a notice of alleged violation to Thibault, therein providing them with an opportunity to respond. (VDACS Exs. U and V) When Thibault provided its good faith response, she testified that she considered all the methods they outlined to prevent drift. Nonetheless, she issued a notice of violation. Ms. Wilkins then explained how the civil penalty of \$120.00 was calculated. (VDACS Ex. A)

On cross-examination, Ms. Wilkins was asked about any communications she may have had with the parties. Ms. Wilkins testified that she had not had any direct communications with the parties.

***Thibault Witnesses:***

**Alan Thibault** (Tr. pgs. 85 - 108): Mr. Thibault is vineyard manager at Riverside Vines. As such, he oversees upkeep of the grapevines, including administering pesticides. He is the son of William Thibault, the managing member of Thibault Enterprises, LLC.

On direct examination, Mr. Thibault testified that they spray the vineyard with the fungicide Mancozeb to control mildew. (VDACS Ex. P) He also testified that they spray Microthiol Dispers which contains sulfur. (VDACS Ex. Q) He discussed other treatments used at the vineyard used to curb sunburn of the grapes and to deter harmful insects.

Mr. Thibault stated that he knew his neighbors, both the complainants (Yosts) and Linda Barker. He claimed that his interactions with the Yosts were not good and that they nitpicked various things about the vineyard. Mr. Thibault described where the vines are located on the vineyard through use of a Google Earth photo of the vineyard (Pet. Ex. A) He testified that the

days between spraying the vineyard depended on the weather. He stated that spraying generally starts at 6:00 AM and ends around 10:30 or 11:00 AM.

Mr. Thibault explained that he has been spraying the current combination of pesticides for between 10 and 12 years at both Riverside Vines and at the petitioner's second vineyard located at Ashton Creek in Chester, Virginia. He uses this combination because it is effective on mildew and is relatively harmless. He stated that he never experienced a smell or irritant from the sprays. He stated that he did not notice any drift or wind blowing towards the Yosts' property when he was spraying. If he had seen them outside he would have stopped spraying until another time. He would have also stopped if he had noticed wind causing drift at any time during the spray.

Mr. Thibault testified that he has a degree from Virginia Tech in viticulture and attends viticulture training twice a year. He stated that he has knowledge about the proper use and application of fungicides.

On cross-examination, Mr. Thibault testified that he was not a registered pesticide applicator but that he had taken about two courses per year for 10 years. He further testified that he did not wear protective eyewear during the sprays as the pesticide instructions dictate because he is in a cabbed tractor. When asked, he stated that he never intended to spray the plastic container, trash container or lamppost that tested positive for sulfur.

On redirect examination, Mr. Thibault explained that he did not wear protective eyewear during the sprays because the tractor is driving the sprayer. He explained that as a precaution during sprays, he intentionally does not spray near the Yosts side of the property until he is at least four rows in.

**William Thibault** (Tr. pgs. 109 - 136): On direct examination, Mr. Thibault stated that he is the owner of Thibault Enterprises, LLC. He purchased the Riverside Vines property approximately three years ago but rented it for two years prior to purchase. He stated that the property is on the edge of Lake Chesdin. He testified that the previous owners at some point made money on a campground there, but that it had primarily been farmed for the last 100 years.

Mr. Thibault explained how the spraying process works. He stated that he and his son, Alan Thibault, split the duty of spraying. He testified that the machine has anti-drift nozzles to keep drift to a minimum. He explained that they do not spray the leaves until they are dripping or soaking wet because that is a waste of the pesticide, which is quite expensive.

He testified that the lamppost that tested positive for sulfur was on the property in his neighbor, Linda Barker. Mr. Thibault stated that the Yosts questioned the operation from the beginning but their relationship was decent. That changed when he realized that the complainants had been fighting them behind their backs and trying to shut them down. He found out that the Yosts had been sending adverse emails to the county and the Virginia Department of Transportation about the Riverside Vineyard. (Pet. Exs. D, G, H, I, J, K, L)

Mr. Thibault testified that as a result of complaints made by the Yosts, he has had to deal with the following agencies: Department of Environmental Quality; Appomattox Water Authority;

County Board of Zoning; and the Department of Health. The Yosts have filed numerous lawsuits against the county and the vineyard for an alleged easement violation. The Yosts also sued one of the vineyard subcontractors for hate crimes which was summarily dismissed. It was proven that the vineyard is grandfathered as an agricultural operation. None of the other agency complaints were determined to be founded.

Mr. Thibault mentioned that he and his son do not need to be licensed by VDACS as a pesticide applicator because what they use on the vineyard is non-regulated nor are they commercial applicators. He claimed that the dogs and sheep on the property have had no adverse affects from the pesticides they use. He testified that as a general rule, there is no trash around his property since they are more than a mile from the road. He also testified that the Yosts' property is very well manicured and has no trash.

In regard to the trash that tested positive for sulfur, he testified that if drift were the cause, the van that was near the trash should have also tested positive but it did not. He mentioned that they use Surround, which acts as a tracer, so if the pesticide had gone on the trash that was close to the van, white specks would have shown on the van and on the trash. He stated that the van next to the trash had been sitting in the same spot for a long time so it should have been there during the spraying.

He stated that when spraying the vineyard, they insure that they spray away from the Yosts' property. He testified that the spray has an anti-drift ingredient and no smell. Within ½ an hour the leaves are dry. He testified that he is an old man who can get out of the cab every 20-30 minutes and is not bothered by the spray.

Mr. Thibault testified that he has a great relationship with his other neighbor, Linda Barker. He claimed that both neighbors, Ms. Barker and the Yosts, often walk through the vineyard and that the Yosts are not complaining then – only when they are trying to shut down the vineyard.

He stated that an inspector came out with two police officers and he showed them how the sprayer worked. He insisted that they only spray early in the mornings when the wind is calm, including the sprays in May, June and July, 2022 that are the dates cited for this case.

On cross-examination, Mr. Thibault testified that he did not intend to spray the Yosts' property nor any of the items that tested positive for sulfur. Following prompting by counsel for VDACS, Mr. Thibault read the following pesticide direction: "It is a violation of federal law to use this product in a manner inconsistent with its labeling. Do not apply this product in a way that it will contact workers or other persons, either directly or through drift."

### Issues

The issues in this case are as follows:

*Did Thibault Enterprises, LLC violate Code of Virginia § 3.2-3939(B) by using a pesticide in a manner inconsistent with its label?*

*Did Thibault Enterprises, LLC apply pesticides in a manner to allow the product to come into contact with workers or other persons, either directly or through drift?*

*Did Thibault Enterprises, LLC apply pesticides when wind speeds favored drift beyond the intended target areas?*

### **Argument Summaries**

VDACS argues that the notice of violation should be upheld. They argue that although the violation does not rise to a level of negligence, the evidence shows that three samples taken by the investigator tested positive for sulfur as a result of drift from spraying by the petitioners. These three samples were found on property other than the vineyard.

VDACS further argues that the sulfur found on the three samples are a regulated substance and that when spraying, the Thibaults' failed to follow the instructions on the label. This is a violation of § 3.2-3939(B).

Thibault argues that the notice of violation should be overturned. They claim that this is yet another of a long string of complaints made by the Yosts against the vineyard to several agencies. They argue that the Thibaults are not required to be certified pesticide applicators because they are not commercial applicators. They spray only on the property they own.

Thibault further argues that the sulfur found on the samples could be purchased through products sold at a local hardware store. They question the chain of custody since the Yosts controlled the tested trash and plastic container on which the sulfur was found prior to the investigator's arrival. They point out that the lamppost was on the edge of the Barker property -- not the Yosts. They question why the moveable plastic tub laying beside a vehicle tested positive but the vehicle, which has a larger surface, did not test positive. Thibault summarily argues that there is no proof that the three positive sample results came from anything they did wrong. They argue that there was no wind causing drift during the sprays and that they take extra precautions to avoid drift.

### **Burden of Proof**

The burden of proof rests with the Department of Agriculture and Consumer Services (VDACS). VDACS bears the burden of proving its case by a preponderance of the evidence.

### **Legal Analysis**

***Did Thibault Enterprises, LLC violate Code of Virginia § 3.2-3939(B) by using a pesticide in a manner inconsistent with its label?***

Code of Virginia § 3.2-3939(B) states: It is unlawful for any person to use or cause to be used any pesticide in a manner inconsistent with its labeling or regulations of the Board, provided that

such deviation may include provisions set forth in Section 2 (ee) of the Federal Insecticide, Fungicide and Rodenticide Act (7 U.S.C. § 136 et seq.). VDACS has cited and fined Thibault \$120.00 for violating § 3.2-3939(B) alleging that they sprayed pesticides in wind conditions resulting in drift. Three of eight samples tested positive for sulfur.

The label in question states that it is a violation of federal law to use the product in a manner inconsistent with its labeling. The label also reads not to apply the product in a way that it will contact workers or other persons, either directly or through drift. (VDACS Ex. Q)

In this case, the petitioners own a vineyard. The evidence establishes that the petitioners frequently spray pesticides on their grapes to protect them from disease and insects. The evidence establishes that the neighbors (Yosts) have filed numerous complaints about the vineyard with various state agencies, including VDACS. Until now, the complaints have been determined unfounded.

Two of the three samples that tested positive for sulfur could have easily been sprayed independently and placed where they were found in light of the fact that products containing sulfur are easy to purchase. Although possible, it is suspicious that no trace of sulfur was located on the van that was sitting close to one of the plastic containers. The pictures show that the vehicle is clearly larger than the plastic container.

Both of the Thibaults, father and son, explained that they use a sprayer. They sit in a cabbed vehicle to which the sprayer is attached. They control the amount of spray and direction of spray from the cabbed vehicle. They testified that they are extremely cautious, especially when it comes to spraying near the Yosts' property due to on-going conflicts with the Yosts. The Thibaults testified that they do not overspray the pesticide because it is too expensive to waste. The decision to cite the vineyard was based on three samples that tested positive for sulfur. The investigator testified that products with sulfur can be purchased from any local hardware store.

I FIND that VDACS has failed to establish exactly how the Thibaults used the pesticide in a manner inconsistent with its label. The investigator was not present during any of the sprays. During his many visits to the vineyard after sprays, the investigator testified that he did not detect an odor nor any irritations in the air.

***Did Thibault Enterprises, LLC apply pesticides in a manner to allow the product to come into contact with workers or other persons, either directly or through drift?***

The label reads not to apply the product in a way that it will contact workers or other persons, either directly or through drift. The evidence is clear that the Thibaults did not intend to directly spray any properties other than their own. Nor did they intend for pesticides to drift onto any other properties. The Thibaults testified that they made a point of spraying in the mornings when the winds were low to intentionally avoid drift. They sprayed away from the Yosts property so no drift would get onto their land. They sprayed four rows in to avoid contact with the Yosts property despite the fact that some of the grapes might not be sprayed thereby causing them to be damaged. As an added precaution, they used an anti-drift agent when spraying.

The wind report cited by VDACS confirms that winds were low – between 0 and 16 miles per hour. (VDACS Ex. W) Although the Thibaults did not wear protective eye gear when spraying, they testified that they never encountered irritation from the spray. They controlled the direction and volume of the spray from a cabbed vehicle. Also, to avoid any confrontation with the Yosts, they would not spray if they saw the Yosts in their yard.

I FIND that the Thibaults acted reasonably when spraying. VDACS has failed to show that Thibault applied pesticides in a manner that allowed the product to come into contact with workers or other persons, either directly or through drift.

***Did Thibault Enterprises, LLC apply pesticides when wind speeds favored drift beyond the intended target areas?***

Ms. Wilkins testified that she partially based her decision to fine the vineyard on weather reports provided by the investigation. (VDACS Ex. W) The reports showed winds between 0 and 16 miles per hour. These are low winds that should not have caused a substantial drift while spraying. VDACS has failed to meet its burden.

The Thibaults testified that they use an anti-drift agent called Compadre during sprays. They intentionally spray early in the morning when winds are lowest. The sprayer has an anti-drift nozzle to minimize drift.

I FIND that VDACS has failed to meet its burden of proof. I FIND that Thibault Enterprises, LLC did not apply pesticides when wind speeds favored drift beyond the intended target areas.

#### **Recommended Findings of Fact**

Considering, and incorporating by reference, the content of this document, witness testimony, exhibits, other relevant documents, and counsel arguments, the hearing officer recommends the following findings of fact to the VDACS Board of Agriculture and Consumer Services:

- Thibault Enterprises, LLC acted reasonably when spraying pesticides.
- Thibault Enterprises, LLC did not violate Code of Virginia § 3.2-3939(B).
- Thibault Enterprises, LLC did not apply pesticides in a manner that allowed the product to come into contact with workers or other persons, either directly or through drift.
- Thibault Enterprises, LLC followed the labeling directions on the pesticide(s).
- Products containing sulfur can be purchased by anyone at a local hardware store and therefore, could have been sprayed on the three positive items independent of Thibault Enterprises, LLC.
- Thibault Enterprises, LLC did not apply pesticides when wind speeds favored drift beyond the intended target areas.

#### **Recommended Conclusions of Law**



After a thorough review of the evidence presented and a comprehensive application of applicable laws, regulations and compliance requirements, the hearing officer recommends the following conclusions of law to the VDACS Board of Agriculture and Consumer Services:

- That the \$120.00 civil penalty or fine assessed by VDACS against Thibault Enterprises, LLC be lifted or overturned.
- That VDACS failed to meet its burden of proof in this case.
- That Thibault Enterprises, LLC did not violate Code of Virginia § 3.2-3939(B) nor any labeling directions while applying pesticides or fungicides to its vineyard.

The hearing officer recommends that the VDACS Board of Agriculture and Consumer Services adopt the recommended findings of fact and conclusions of law set forth herein.

DATED: November 7, 2023

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RHONDA J. S. MITCHELL  
Hearing Officer

*Certificate of Service*

I, Rhonda J. S. Mitchell, hearing officer, do hereby certify that a true copy of the above was emailed to Justin Bell, counsel for the Department of Agriculture and Consumer Services, Liza Fleeson Trossbach, project manager for VDACS, and to Nathaniel Scaggs, counsel for Thibault Enterprises, LLC, on the 7<sup>th</sup> day of November, 2023. This document is to be forwarded to the VDACS Board of Agriculture and Consumer Services.

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Rhonda J. S. Mitchell  
Hearing Officer

VIRGINIA DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES

OFFICE OF PESTICIDE SERVICES

**GUIDELINES FOR ENFORCEMENT OF THE VIRGINIA PESTICIDE CONTROL ACT:  
CIVIL PENALTY ASSESSMENT DECISION MATRIX**

Statutory Authority: § 3.2-3943 of the Code of Virginia (1950), as amended.

**§ 1.1 Definitions**

The following words and terms, when used in these guidelines, shall have the following meanings, unless the context clearly indicates otherwise:

**“Act”** means the Virginia Pesticide Control Act, Chapter 39 of Title 3.2 (§§ 3.2-3900 through 3.2-3947) of the Code of Virginia (1950), as amended.

**“Board”** means the Board of Agriculture and Consumer Services

**“Pesticide Business”** means any person engaged in the business of: distributing, applying, or recommending the use of a product; or storing, selling, or offering for sale pesticides directly to the user. The term “pesticide business” does NOT include (i) wood treaters not for hire; (ii) seed treaters not for hire; (iii) operations that produce agricultural products unless the owners or operators of such operations described in clauses (i), (ii), and (iii) are engaged in the business of selling or offering for sale pesticides, or distributing pesticides to persons outside of that agricultural producing operation in connection with commercial transactions; or (iv) businesses exempted by regulations adopted by the Board.

**“Previous Violation”** means any violation of the Virginia Pesticide Control Act, or regulations adopted pursuant thereto, that resulted in a Notice of Warning or civil penalty cited within the three-year period preceding the current violation.

**“Reportable pesticide spill, accident, or incident”** means any release of a pesticide into the environment in any manner not in accordance with instructions for use or disposal provided on the product label.

**§ 1.2 Provision for Civil Penalties Generally**

- A. The Board may assess a penalty of not more than \$1,000 for a violation that is less than serious, not more than \$5,000 for a serious violation, and not more than \$20,000 for a repeat or knowing violation.\*
- B. The Board may assess an additional penalty of up to \$100,000 for any violation that causes serious damage to the environment, causes serious injury to property; serious injury to, or death of, any person.\*
- C. Civil penalties may be imposed against a pesticide business or its employees for acts determined to be violations of the Pesticide Control Act or regulations of the Board. Each physical business location shall be treated as a separate entity.
- D. Civil penalties may be imposed against any person for acts determined to be violations of the Pesticide Control Act or regulations of the Board.

\*Language taken from the Code of Virginia, § 3.2-3943, Part B

### § 1.3 Assessment of separate violations

- A. Each violation of the Act, or regulations adopted pursuant thereto, shall be assessed separately for the purpose of determining the total civil penalty assessment.
- B. In cases of continued violation, a civil penalty may be assessed separately for each day of the violation beginning with the date of notification of the violation and ending with the date of abatement.

### § 1.4 Penalty Point System

The point system described in this section shall be used to determine the amount of the civil penalty.

- A. Type of violation

A natural person or pesticide business in violation of the Act, or regulations adopted pursuant thereto, shall be assigned up to 10 points for the type of violation described in one of the following categories:

<b>Points</b>	<b>Violation Category</b>
1-2	Failing to comply with the regulations for certification or licensing, or the conditions of a certificate or license.
1-2	Failing to meet all requirements regarding labeling, registration, color, composition, and container for a pesticide or device.
1-2	Making any statement, declaration or representation through any medium implying that any natural person certified or registered under the provisions of Article 3 of the Act is recommended or endorsed by any agency of the Commonwealth.
2-3	Applying any pesticide in a negligent manner.
2-3	Failing to maintain proper records or permit access to records as required.
2-3	Failing to notify Department of a reportable pesticide spill, accident, or incident.
2-3	Dispensing, applying or using any pesticide through any equipment not in sound mechanical condition, or not properly equipped with effective cut-off valves, leak-proof pesticide tanks and distribution systems, or not equipped to dispense a pesticide at the proper rate.
2-4	Handling, transporting, storing, displaying, or distributing pesticides in a manner that may endanger humans, and the environment, or which may contaminate food, feed, or other products transported, displayed, stored, or distributed with pesticides.
2-4	Making pesticide recommendations, or causing a natural person to use any pesticide, in a manner inconsistent with label directions or in violation of the Act, or regulations promulgated pursuant thereto.

- 2-4 Making false or fraudulent records, invoices or reports.
- 3-6 Using any pesticide, or storing or disposing of any pesticide or container inconsistent with label directions or in violation of the Act, or regulations promulgated pursuant thereto.
- 3 Providing one's certification or registration to be used by another natural person.
- 4 Using to fill pesticide handling, storage, or application equipment, any hose, pump, or other equipment that has not been fitted with an effective device to prevent back flow or back siphon.
- 4 Providing or making available any restricted use pesticide to any natural person not certified to use such a pesticide.
- 7-8 Aiding, abetting or conspiring with any natural person to violate the provisions of Article 3 of the Act, or regulations adopted pursuant thereto.
- 8 Using fraud, or false claims involving pesticide sale or use, or involving licensing, certification, or registration requirements of the Act, or regulations adopted pursuant thereto.
- 8 Making false or fraudulent claims misrepresenting the effect of materials or methods to be utilized or sold or the effects of a pesticide application on the environment or on human health and safety.
- 10 Violating a stop sale, use, or removal order.
- 10 Failure to comply with any lawful order of the Commissioner or the Board.
- 10 Neglecting, or after notice, refusing to comply with the provisions of Article 5 of the Act, or regulations promulgated pursuant thereto.
- 10 Interfering with the Commissioner or his duly authorized agents in the performance of duties.
- 10 Impersonating any federal, state, county or city inspector or official.

**B. Damage Caused or Potential for Causing Damage**

A natural person or pesticide business in violation of the Act, or regulations adopted pursuant thereto, shall be assigned up to 10 points for the real or potential damage associated with the violation, taking into consideration any harm to the environment and any hazard to public health and safety, as described in one of the following categories:

<b>Points</b>	<b>Damage Category</b>
0	No actual or potential damage to the environment or threat to human health and safety.
1-2	Slight actual or potential damage to property or the environment, or such threat to human health and safety.
3-4	Moderate, but significant, actual damage to property or the environment; also, moderate, but significant, potential damage to property or the environment, or such threat to human health and safety.
5-6	Serious actual damage to property or the environment; also, serious potential damage to property or the environment, or such threat to human health and safety.
7-8	Very serious actual damage to property or the environment; also, very serious potential damage to property, the environment, or such threat to human health and safety.
9-10	Extremely serious actual damage to property or the environment that may be irreparable, or which can be corrected only after a considerable effort or period of time; also, extremely serious potential damage to property or the environment, or such threat to human health and safety.

C. Culpability

A natural person or pesticide business in violation of the Act, or regulations adopted pursuant thereto, shall be assigned up to six points, from one of the following categories, based on the degree of fault of the natural person to whom the violation was attributed:

<b>Points</b>	<b>Culpability Category</b>
0	No fault attributed; an inadvertent violation that was unavoidable by the exercise of reasonable care.
1-2	Negligent.
3-6	Knowing, aware of actions.

D. History of Previous Violations

In determining the amount of a civil penalty, the history of previous violations of the pesticide business or natural person shall be considered.

For current violations resulting from actions of a pesticide business, one point shall be assigned for each previous violation found that resulted from the actions of the pesticide business. Each physical business location shall be treated as a separate entity.

For current violations resulting from the actions of a natural person, one point shall be assigned for each previous violation found that is attributable to the same natural person cited in the current violation.

Previous violations overturned through the appeal process shall not be counted.

In instances where both the pesticide business and a natural person have been cited in the current case, and both have previous violations, points may be assigned for both.

E. Credit for good faith in attempting to achieve compliance.

The demonstrated good faith of the natural person or pesticide business in attempting to achieve rapid compliance after notification of the violation shall be taken into consideration in determining penalty points. No more than four points may be deducted from the total points assigned under Subsections A, B, C, and D, based on the following categories:

<b>Points</b>	<b>Good Faith Credit Category</b>
3-4	Immediate action taken to abate the violation, and correct any conditions resulting from the violation, in the shortest possible amount of time.
1-2	Prompt and diligent efforts made to abate the violation, and correct any conditions resulting from the violation, within a reasonable period of time.
0	No points deducted.

F. Determination of base civil penalty

The total penalty point amount shall be determined by adding the points assigned under Subsections A, B, C, and D, and subtracting from that subtotal the points assigned under Subsection E of this Section. The resulting total penalty point amount is converted to a dollar amount, according to Table A.

G. Reduction of Penalty

In the case of a less than serious violation where no previous violation exists, the base civil penalty may be reduced by 20 percent. In the case of a serious violation or a previous violation, the base civil penalty shall not be reduced.

H. Additional penalty for causing serious damage, illness, or death

An additional penalty of up to \$100,000 may be assessed for any violation that causes serious damage to the environment, serious injury to property, or serious injury to or death of any person. Each serious incident shall be examined on a case-by-case basis, taking into consideration the severity of the damage or injury, the potential long-term effects, and any economic loss involved. The basis for an additional assessment shall be fully explained and documented in the records of the case.

**§ 1.5 Waiver of Use of Formula to Determine Civil Penalty**

- A. The Board may waive the use of the formula contained in Section 1.4 to set the civil penalty, if the Board determines that, taking into account exceptional factors present in the particular case, the penalty is demonstrably unjust. The basis for every waiver shall be fully explained and documented in the records of the case.
  
- B. If the Board waives the use of the formula, it shall give a full written explanation of the basis for any penalty assessment to the natural person or pesticide business found in violation.

Virginia Department of Agriculture and Consumer Services  
Office of Pesticide Services  
September 1995 (published revision)  
December 2003 (reformatted)  
February 2009 (code citations updated)  
July 2012 (reference to Board of Agriculture & Consumer Services updated)

**TABLE A**  
**For converting total penalty points into base civil penalty**

<b>Points</b>	<b>Dollars</b>	<b>Points</b>	<b>Dollars</b>
<b>1</b>	<b>\$ 50</b>	<b>21</b>	<b>\$ 7000</b>
<b>2</b>	<b>100</b>	<b>22</b>	<b>7500</b>
<b>3</b>	<b>150</b>	<b>23</b>	<b>8000</b>
<b>4</b>	<b>200</b>	<b>24</b>	<b>8500</b>
<b>5</b>	<b>350</b>	<b>25</b>	<b>9000</b>
<b>6</b>	<b>500</b>	<b>26</b>	<b>9500</b>
<b>7</b>	<b>650</b>	<b>27</b>	<b>10000</b>
<b>8</b>	<b>800</b>	<b>28</b>	<b>10500</b>
<b>9</b>	<b>1000</b>	<b>29</b>	<b>11000</b>
<b>10</b>	<b>1500</b>	<b>30</b>	<b>11500</b>
<b>11</b>	<b>2000</b>	<b>31</b>	<b>12000</b>
<b>12</b>	<b>2500</b>	<b>32</b>	<b>12500</b>
<b>13</b>	<b>3000</b>	<b>33</b>	<b>13000</b>
<b>14</b>	<b>3500</b>	<b>34</b>	<b>14000</b>
<b>15</b>	<b>4000</b>	<b>35</b>	<b>15000</b>
<b>16</b>	<b>4500</b>	<b>36</b>	<b>16000</b>
<b>17</b>	<b>5000</b>	<b>37</b>	<b>17000</b>
<b>18</b>	<b>5500</b>	<b>38</b>	<b>18000</b>
<b>19</b>	<b>6000</b>	<b>39</b>	<b>19000</b>
<b>20</b>	<b>6500</b>	<b>40</b>	<b>20000</b>



## Project 7696 - Fast-Track

## Department of Agriculture And Consumer Services

## Action to Amend 2 VAC 5-585 Retail Food Establishment Regulations

**2VAC5-585-40. Definitions.**

The following words and terms when used in this chapter shall have the following meanings unless the context clearly indicates otherwise:

"Accredited program" means a food protection manager certification program that has been evaluated and listed by an accrediting agency as conforming to national standards for organizations that certify individuals. "Accredited program" refers to the certification process and is a designation based upon an independent evaluation of factors such as the sponsor's mission; organizational structure; staff resources; revenue sources; policies; public information regarding program scope, eligibility requirements, recertification, discipline, and grievance procedures; and test development and administration. "Accredited program" does not refer to training functions or educational programs.

"Additive" means either a (i) "food additive" having the meaning stated in the Federal Food, Drug, and Cosmetic Act, 21 USC § 321(s) and 21 CFR 170.3(e)(1) or (ii) "color additive" having the meaning stated in the Federal Food, Drug, and Cosmetic Act, 21 USC § 321(t) and 21 CFR 70.3(f).

"Adulterated" has the meaning stated in the Federal Food, Drug, and Cosmetic Act, 21 USC § 342.

"Approved" means acceptable to the department based on a determination of conformity with principles, practices, and generally recognized standards that protect public health.

"Approved water system" means a permitted waterworks constructed, maintained, and operated pursuant to 12VAC5-590 or a private well constructed, maintained, and operated pursuant to 12VAC5-630.

"Asymptomatic" means without obvious symptoms; not showing or producing indications of a disease or other medical condition, such as an individual infected with a pathogen but not exhibiting or producing any signs or symptoms of vomiting, diarrhea, or jaundice. "Asymptomatic" includes not showing symptoms because symptoms have resolved or subsided, or because symptoms never manifested.

" $A_w$ " means water activity that is a measure of the free moisture in a food, is the quotient of the water vapor pressure of the substance divided by the vapor pressure of pure water at the same temperature, and is indicated by the symbol  $A_w$ .

"Balut" means an embryo inside a fertile egg that has been incubated for a period sufficient for the embryo to reach a specific stage of development after which it is removed from incubation before hatching.

"Beverage" means a liquid for drinking, including water.

"Bottled drinking water" means water that is sealed in bottles, packages, or other containers and offered for sale for human consumption, including bottled mineral water.

"Casing" means a tubular container for sausage products made of either natural or artificial (synthetic) material.

"Certification number" means a the unique combination of letters and numbers assigned identification number issued by a shellfish control authority to a molluscan shellfish dealer according to the provisions of the National Shellfish Sanitation Program each dealer for each location. Each certification number shall consist of a one-digit to five-digit Arabic numeral preceded by the two-letter state abbreviation and followed by a two-letter abbreviation for each type of activity the dealer is qualified to perform in accordance with the provisions of the National Shellfish Program using the terms in the following tables:

Table A. Certifications

<u>ACRONYM</u>	<u>TERM</u>
<u>SP</u>	<u>Shucker Packer</u>
<u>RP</u>	<u>Repacker</u>
<u>SS</u>	<u>SHELLSTOCK Shipper</u>
<u>RS</u>	<u>Reshipper</u>
<u>DP</u>	<u>Depuration</u>

Table B. Permits

ACRONYM	TERM
PHP	Post-Harvesting Processing
AQ	Aquaculture
WS	Wet Storage

"CFR" means Code of Federal Regulations. Citations in this chapter to the CFR refer sequentially to the title, part, and section numbers. For example, 40 CFR 180.194 refers to Title 40, Part 180, Section 194.

"CIP" means cleaned in place by the circulation or flowing by mechanical means through a piping system of a detergent solution, water rinse, and sanitizing solution onto or over equipment surfaces that require cleaning, such as the method used, in part, to clean and sanitize a frozen dessert machine. "CIP" does not include the cleaning of equipment such as band saws, slicers, or mixers that are subjected to in-place manual cleaning without the use of a CIP system.

"Commingle" means:

1. ~~To combine shellstock harvested on different days or from different growing areas as identified on the tag or label; or~~
2. ~~To combine shucked shellfish from containers with different container codes or different shucking dates~~ the act of combining different lots of shellfish.

"Comminuted" means reduced in size by methods including chopping, flaking, grinding, or mincing. "Comminuted" includes (i) fish or meat products that are reduced in size and restructured or reformulated such as gefilte fish, gyros, ground beef, and sausage and (ii) a mixture of two or more types of meat that have been reduced in size and combined, such as sausages made from two or more meats.

"Commissioner" means the Commissioner of Agriculture and Consumer Services, his duly designated officer, or his agent.

"Conditional employee" means a potential food employee to whom a job offer is made, conditional on responses to subsequent medical questions or examinations designed to identify potential food employees who may be suffering from a disease that can be transmitted through food and done in compliance with Title 1 of the Americans with Disabilities Act of 1990.

"Confirmed disease outbreak" means a foodborne disease outbreak in which laboratory analysis of appropriate specimens identifies a causative agent and epidemiological analysis implicates the food as the source of the illness.

"Consumer" means a person who is a member of the public, takes possession of food, is not functioning in the capacity of an operator of a food establishment or food processing plant, and does not offer the food for resale.

"Core item" means a provision in this chapter that is not designated as a priority item or a priority foundation item. "Core item" includes an item that usually relates to general sanitation, operational controls, sanitation standard operating procedures (SSOPs), facilities or structures, equipment design, or general maintenance.

"Corrosion-resistant materials" means a material that maintains acceptable surface cleanability characteristics under prolonged influence of the food to be contacted, the normal use of cleaning compounds and sanitizing solutions, and other conditions of the use environment.

"Counter-mounted equipment" means equipment that is not portable and is designed to be mounted off the floor on a table, counter, or shelf.

"Critical control point" means a point or procedure in a specific food system where loss of control may result in an unacceptable health risk.

"Critical limit" means the maximum or minimum value to which a physical, biological, or chemical parameter must be controlled at a critical control point to minimize the risk that the identified food safety hazard may occur.

"Cut leafy greens" means fresh leafy greens whose leaves have been cut, shredded, sliced, chopped, or torn. The term "leafy greens" includes iceberg lettuce, romaine lettuce, leaf lettuce, butter lettuce, baby leaf lettuce (i.e., immature lettuce or leafy greens), escarole, endive, spring mix, spinach, cabbage, kale, arugula, and chard. The term "leafy greens" does not include herbs such as cilantro or parsley.

"Dealer" means a person who is authorized by a shellfish control authority for the activities of a shellstock shipper, shucker-packer, repacker, reshipper, or depuration processor of molluscan shellfish according to the provisions of the National Shellfish Sanitation Program.

"Department" means the Virginia Department of Agriculture and Consumer Services.

"Disclosure" means a written statement that clearly identifies the animal-derived foods that are, or can be ordered, raw, undercooked, or without otherwise being processed to eliminate pathogens, or items that

contain an ingredient that is raw, undercooked, or without otherwise being processed to eliminate pathogens.

"Dry storage area" means a room or area designated for the storage of packaged or containerized bulk food that is not time/temperature control for safety food and dry goods such as single-service items.

"Easily cleanable" means a characteristic of a surface that:

1. Allows effective removal of soil by normal cleaning methods;
2. Is dependent on the material, design, construction, and installation of the surface; and
3. Varies with the likelihood of the surface's role in introducing pathogenic or toxigenic agents or other contaminants into food based on the surface's approved placement, purpose, and use.

"Easily cleanable" includes a tiered application of the criteria that qualify the surface as easily cleanable as specified above in this definition to different situations in which varying degrees of cleanability are required such as:

1. The appropriateness of stainless steel for a food preparation surface as opposed to the lack of need for stainless steel to be used for floors or for tables used for consumer dining; or
2. The need for a different degree of cleanability for a utilitarian attachment or accessory in the kitchen as opposed to a decorative attachment or accessory in the consumer dining area.

"Easily movable" means:

1. Portable; mounted on casters, gliders, or rollers; or provided with a mechanical means to safely tilt a unit of equipment for cleaning; and
2. Having no utility connection, a utility connection that disconnects quickly, or a flexible utility connection line of sufficient length to allow the equipment to be moved for cleaning of the equipment and adjacent area.

"Egg" means the shell egg of avian species such as chicken, duck, goose, guinea, quail, ratites, or turkey. "Egg" does not include a balut, egg of the reptile species such as alligator, or an egg product.

"Egg product" means all, or a portion of, the contents found inside eggs separated from the shell and pasteurized in a food processing plant, with or without added ingredients, intended for human consumption, such as dried, frozen, or liquid eggs. "Egg product" does not include food that contains eggs only in a relatively small proportion such as cake mixes.

"Employee" means the ~~operator~~ permit holder, person in charge, food employee, person having supervisory or management duties, person on the payroll, family member, volunteer, person performing work under contractual agreement, or other person working in a food establishment.

"EPA" means the U.S. Environmental Protection Agency.

"Equipment" means an article that is used in the operation of a food establishment, such as a freezer, grinder, hood, ice maker, meat block, mixer, oven, reach-in refrigerator, scale, sink, slicer, stove, table, temperature measuring device for ambient air, vending machine, or warewashing machine. "Equipment" does not include apparatuses used for handling or storing large quantities of packaged foods that are received from a supplier in a cased or overwrapped lot, such as hand trucks, forklifts, dollies, pallets, racks, and skids.

"Exclude" means to prevent a person from working as an employee in a food establishment or entering a food establishment as an employee.

"FDA" means the U.S. Food and Drug Administration.

"Fish" means fresh or saltwater finfish, crustaceans, other forms of aquatic life (including alligator, frog, aquatic turtle, jellyfish, sea cucumber, and sea urchin and the roe of such animals) other than birds or mammals, and all mollusks, if such animal life is intended for human consumption; and includes an edible human food product derived in whole or in part from fish, including fish that has been processed in any manner.

"Food" means (i) a raw, cooked, or processed edible substance, ice, beverage, or ingredient used or intended for use or for sale in whole or in part for human consumption or (ii) chewing gum.

"Foodborne disease outbreak" means the occurrence of two or more cases of a similar illness resulting from the ingestion of a common food.

"Food-contact surface" means a surface of equipment or a utensil with which food normally comes into contact, or a surface of equipment or a utensil from which food may drain, drip, or splash into a food, or onto a surface normally in contact with food.

"Food employee" means an individual working with unpackaged food, food equipment or utensils, or food-contact surfaces.

"Food establishment" means an operation that (i) stores, prepares, packages, serves, vends food directly to the consumer, or otherwise provides food for human consumption such as a market, restaurant,

satellite or catered feeding location, catering operation if the operation provides food directly to a consumer or to a conveyance used to transport people, vending location, conveyance used to transport people, institution, or food bank and (ii) relinquishes possession of a food to a consumer directly, or indirectly through a delivery service such as home delivery of grocery orders or restaurant takeout orders, or delivery service that is provided by common carriers.

"Food establishment" includes (i) an element of the operation such as a transportation vehicle or a central preparation facility that supplies a vending location or satellite feeding location unless the vending or satellite feeding location is inspected by the regulatory authority and (ii) an operation that is conducted in a mobile, stationary, temporary, or permanent facility or location where consumption is on or off the premises.

"Food establishment" does not include:

1. An establishment that offers only prepackaged foods that are not time/temperature control for safety foods;
2. A produce stand that only offers whole, uncut fresh fruits and vegetables;
3. A food processing plant, including those that are located on the premises of a food establishment;
4. A food warehouse;
5. A kitchen in a private home; or
6. A private home that receives catered or home delivered food.

"Food processing plant" means a commercial operation that manufactures, packages, labels, or stores food for human consumption and provides food for sale or distribution to other business entities such as food processing plants or food establishments. "Food processing plant" does not include a "food establishment."

"Game animal" means an animal, the products of which are food, that is not classified as (i) livestock, sheep, swine, goat, horse, mule, or other equine in 9 CFR 301.2; (ii) poultry; or (iii) fish. "Game animal" includes mammals such as reindeer, elk, deer, antelope, water buffalo, bison, rabbit, squirrel, opossum, raccoon, nutria, or muskrat, and nonaquatic reptiles such as land snakes. "Game animal" does not include ratites.

"General use pesticide" means a pesticide that is not classified by EPA for restricted use as specified in 40 CFR 152.175.

"Grade A standards" means the requirements of the Grade "A" Pasteurized Milk Ordinance, 2017 Revision, (U.S. Food and Drug Administration) with which certain fluid and dry milk and milk products comply.

"HACCP plan" means a written document that delineates the formal procedures for following the Hazard Analysis and Critical Control Point principles developed by the National Advisory Committee on Microbiological Criteria for Foods.

"Handwashing sink" means a lavatory, a basin or vessel for washing, a wash basin, or a plumbing fixture especially placed for use in personal hygiene and designed for the washing of hands. "Handwashing sink" includes an automatic handwashing facility.

"Hazard" means a biological, chemical, or physical property that may cause an unacceptable consumer health risk.

"Health practitioner" means a physician licensed to practice medicine, or if allowed by law, a nurse practitioner, physician assistant, or similar medical professional.

"Hermetically sealed container" means a container that is designed and intended to be secure against the entry of microorganisms and, in the case of low acid canned foods, to maintain the commercial sterility of its contents after processing.

"Highly susceptible population" means persons who are more likely than other people in the general population to experience foodborne disease because they are (i) immunocompromised; preschool age children, or older adults; and (ii) obtaining food at a facility that provides services such as custodial care, health care, or assisted living, such as a child or adult day care center, kidney dialysis center, hospital or nursing home, or nutritional or socialization services such as a senior center.

"Imminent health hazard" means a significant threat or danger to health that is considered to exist when there is evidence sufficient to show that a product, practice, circumstance, or event creates a situation that requires immediate correction or cessation of operation to prevent injury based on the number of potential injuries, and the nature, severity, and duration of the anticipated injury.

"Injected" means manipulating meat to which a solution has been introduced into its interior by processes that are referred to as "injecting," "pump marinating," or "stitch pumping."

"In-shell product" means non-living, processed shellfish with one or both shells present.

"Intact meat" means a cut of whole muscle meat that has not undergone comminution, mechanical tenderization, vacuum tumbling with solutions, mechanical tenderization, or reconstruction, cubing, or

pounding.

"Juice" means the aqueous liquid expressed or extracted from one or more fruits or vegetables, purées of the edible portions of one or more fruits or vegetables, or any concentrate of such liquid or purée. "Juice" does not include, for purposes of HACCP, liquids, purées, or concentrates that are not used as beverages or ingredients of beverages.

"Kitchenware" means food preparation and storage utensils.

"Law" means applicable local, state, and federal statutes, regulations, and ordinances.

"Linens" means fabric items such as cloth hampers, cloth napkins, table cloths, wiping cloths, and work garments, including cloth gloves.

"Major food allergen" means milk, egg, fish (such as bass, flounder, cod, and including crustacean shellfish such as crab, lobster, or shrimp), tree nuts (such as almonds, pecans, or walnuts), wheat, peanuts, ~~and soybeans, and sesame;~~ or a food ingredient that contains protein derived from one of these foods. "Major food allergen" does not include (i) any highly refined oil derived from a major food allergen in this definition and any ingredient derived from such highly refined oil or (ii) any ingredient that is exempt under the petition or notification process specified in the Food Allergen Labeling and Consumer Protection Act of 2004 (P.L. 108-282).

"Meat" means the flesh of animals used as food including the dressed flesh of cattle, swine, sheep, or goats and other edible animals, except fish, poultry, and wild game animals as specified under 2VAC5-585-330 A 2 and 3.

"Mechanically tenderized" means manipulating meat by piercing with a set of needles, pins, blades, or any mechanical device that breaks up muscle fiber and tough connective tissue to increase tenderness. This includes injection, scoring, and processes that may be referred to as "blade tenderizing," "jaccarding," "pinning," or "needling."

"mg/L" means milligrams per liter, which is the metric equivalent of parts per million (ppm).

"Mobile food establishment" means a food establishment mounted on wheels, excluding boats in the water, that is readily movable from place to place at all times during operation and shall include pushcarts, trailers, trucks, or vans. The unit, all operations, and all equipment must be integral to and be within or attached to the unit.

"Molluscan shellfish" means any edible species of fresh or frozen oysters, clams, mussels, and scallops or edible portions thereof, except when the scallop product consists only of the shucked adductor muscle. Molluscan shellfish includes shellstock, shucked shellfish, and in-shell products.

"Noncontinuous cooking" means the cooking of food in a food establishment using a process in which the initial heating of the food is intentionally halted so that it may be cooled and held for complete cooking at a later time prior to sale or service. "Noncontinuous cooking" does not include cooking procedures that only involve temporarily interrupting or slowing an otherwise continuous cooking process.

~~"Operator" means the entity that is legally responsible for the operation of the food establishment such as the owner, the owner's agent, or other person.~~

"Packaged" means bottled, canned, cartoned, bagged, or wrapped, whether packaged in a food establishment or a food processing plant. "Packaged" does not include wrapped or placed in a carry-out container to protect the food during service or delivery to the consumer, by a food employee, upon consumer request.

"Permit" means the document issued by the department that authorizes a person to operate a food establishment.

"Permit holder" means the entity that:

1. Is legally responsible for the operation of the food establishment, such as the owner, the owner's agent, or other person; and
2. Possesses a valid permit to operate a food establishment.

"Person" means an association, a corporation, individual, partnership, other legal entity, government, or governmental subdivision or agency.

"Person in charge" means the individual present at a food establishment who is responsible for the operation at the time of inspection.

"Personal care items" means items or substances that may be poisonous, toxic, or a source of contamination and are used to maintain or enhance a person's health, hygiene, or appearance. "Personal care items" include items such as medicines, first aid supplies, and other items such as cosmetics and toiletries such as toothpaste and mouthwash.

"pH" means the symbol for the negative logarithm of the hydrogen ion concentration, which is a measure of the degree of acidity or alkalinity of a solution. Values between 0 and 7.0 indicate acidity and values between 7.0 and 14 indicate alkalinity. The value for pure distilled water is 7.0, which is considered

neutral.

"Physical facilities" means the structure and interior surfaces of a food establishment including accessories such as soap and towel dispensers and attachments such as light fixtures and heating or air conditioning system vents.

"Plumbing fixture" means a receptacle or device that is permanently or temporarily connected to the water distribution system of the premises and demands a supply of water from the system or discharges used water, waste materials, or sewage directly or indirectly to the drainage system of the premises.

"Plumbing system" means the water supply and distribution pipes; plumbing fixtures and traps; soil, waste, and vent pipes; sanitary and storm sewers and building drains, including their respective connections, devices, and appurtenances within the premises; and water-treating equipment.

"Poisonous or toxic materials" means substances that are not intended for ingestion and are included in ~~four~~ five categories:

1. Cleaners and sanitizers, which include cleaning and sanitizing agents and agents such as caustics, acids, drying agents, polishes, and other chemicals;
2. Pesticides, except sanitizers, which include substances such as insecticides and rodenticides;
3. Substances necessary for the operation and maintenance of the establishment such as nonfood grade lubricants and personal care items that may be deleterious to health; ~~and~~
4. Substances that are not necessary for the operation and maintenance of the establishment and are on the premises for retail sale, such as petroleum products and paints; and
5. Restricted use pesticides.

"Potable water" means water fit for human consumption that is obtained from an approved water supply and that is (i) sanitary and normally free of minerals, organic substances, and toxic agents in excess of reasonable amounts and (ii) adequate in quantity and quality for the minimum health requirements of the person served. Potable water is traditionally known as drinking water and excludes such nonpotable forms as boiler water, mop water, rainwater, wastewater, and nondrinking water.

"Poultry" means any domesticated bird (chickens, turkeys, ducks, geese, guineas, ratites, or squabs), whether live or dead, as defined in 9 CFR 381.1 and any migratory waterfowl, game bird, pheasant, partridge, quail, grouse, or pigeon, whether live or dead, as defined in 9 CFR 362.1.

"Premises" means the physical facility, its contents, and the contiguous land or property under the control of the ~~operator~~ permit holder or the physical facility, its contents, and the land or property not described above if its facilities and contents are under the control of the ~~operator~~ permit holder and may impact food establishment personnel, facilities, or operations, and a food establishment is only one component of a larger operation.

"Primal cut" means a basic major cut into which carcasses and sides of meat are separated, such as a beef round, pork loin, lamb flank, or veal breast.

"Priority foundation item" means a provision in this chapter whose application supports, facilitates, or enables one or more priority items. "Priority foundation item" includes an item that requires the purposeful incorporation of specific actions, equipment, or procedures by industry management to attain control of risk factors that contribute to foodborne illness or injury such as personnel training, infrastructure or necessary equipment, HACCP plans, documentation or recordkeeping, and labeling and is denoted in this chapter with a superscript "Pf," which looks like this: <sup>Pf</sup>.

"Priority item" means a provision in this chapter whose application contributes directly to the elimination, prevention, or reduction to an acceptable level of hazards associated with foodborne illness or injury and there is no other provision that more directly controls the hazard. "Priority item" includes items with a quantifiable measure to show control of hazards such as cooking, reheating, cooling, and handwashing and is denoted in this chapter with a superscript "P," which looks like this: <sup>P</sup>.

"Private well" means any water well constructed for a person on land that is owned or leased by that person and is usually intended for household, groundwater source heat pump, agricultural use, industrial use, or other nonpublic water well.

"Pure water" means potable water fit for human consumption that is (i) sanitary and normally free of minerals, organic substances, and toxic agents in excess of reasonable amounts and (ii) adequate in quantity and quality for the minimum health requirements of the persons served.

"Ratite" means a flightless bird such as an emu, ostrich, or rhea.

"Ready-to-eat food" means food that:

1. (i) Is in a form that is edible without additional preparation to achieve food safety, as specified under 2VAC5-585-700 A, B, and C; 2VAC5-585-710; or 2VAC5-585-730; (ii) is a raw or partially cooked animal food and the consumer is advised as specified under 2VAC5-585-700 D 1 and D 3; or (iii) is prepared in accordance with a variance that is granted as specified under 2VAC5-585-700

D 4; and

2. May receive additional preparation for palatability or aesthetic, epicurean, gastronomic, or culinary purposes.

"Ready-to-eat food" includes:

1. Raw animal food that is cooked as specified under 2VAC5-585-700 or 2VAC5-585-710, or frozen as specified under 2VAC5-585-730;
2. Raw fruits and vegetables that are washed as specified under 2VAC5-585-510;
3. Plant food that is cooked for hot holding as specified under 2VAC5-585-720;
4. All time/temperature control for safety food that is cooked to the temperature and time required for the specific food under Article 4 (2VAC5-585-700 et seq.) of Part III of this chapter and cooled as specified in 2VAC5-585-800;
5. Plant food for which further washing, cooking, or other processing is not required for food safety, and from which rinds, peels, husks, or shells, if naturally present, are removed;
6. Substances derived from plants such as spices, seasonings, and sugar;
7. A bakery item such as bread, cakes, pies, fillings, or icing for which further cooking is not required for food safety;
8. The following products that are produced in accordance with USDA guidelines and that have received a lethality treatment for pathogens: dry, fermented sausages, such as dry salami or pepperoni; salt-cured meat and poultry products, such as prosciutto ham, country cured ham, and Parma ham; and dried meat and poultry products, such as jerky or beef sticks; and
9. Food manufactured as specified in 21 CFR Part 113.

"Ready-to-eat food" does not include:

1. Commercially packaged food that bears a manufacturer's cooking instructions; and
2. Food for which the manufacturer has provided information that it has not been processed to control for pathogens.

"Reduced oxygen packaging" means (i) the reduction of the amount of oxygen in a package by removing oxygen; displacing oxygen and replacing it with another gas or combination of gases; or otherwise controlling the oxygen content to a level below that normally found in the atmosphere (approximately 21% at sea level); and (ii) a process as specified in clause (i) of this definition that involves a food for which the hazards *Clostridium botulinum* or *Listeria monocytogenes* require control in the final packaged form.

"Reduced oxygen packaging" includes:

1. Vacuum packaging, in which air is removed from a package of food and the package is hermetically sealed so that a vacuum remains inside the package;
2. Modified atmosphere packaging, in which the atmosphere of a package of food is modified so that its composition is different from air, but the atmosphere may change over time due to the permeability of the packaging material or the respiration of the food. Modified atmosphere packaging includes reduction in the proportion of oxygen, total replacement of oxygen, or an increase in the proportion of other gases such as carbon dioxide or nitrogen;
3. Controlled atmosphere packaging, in which the atmosphere of a package of food is modified so that until the package is opened, its composition is different from air, and continuous control of that atmosphere is maintained, such as by using oxygen scavengers or a combination of total replacement of oxygen, nonrespiring food, and impermeable packaging material;
4. Cook chill packaging, in which cooked food is hot filled into impermeable bags that ~~have the air expelled and~~ are then sealed or crimped closed. The bagged food is rapidly chilled and refrigerated at temperatures that inhibit the growth of ~~psychotrophic~~ psychrotrophic pathogens; or
5. Sous vide packaging, in which raw or partially cooked food is vacuum packaged in an impermeable bag, cooked in the bag, rapidly chilled, and refrigerated at temperatures that inhibit the growth of ~~psychotrophic~~ psychrotrophic pathogens.

"Refuse" means solid waste not carried by water through the sewage system.

"Regulatory authority" means local, state, or federal enforcement body or their authorized representative having jurisdiction over the food establishment.

"Reminder" means a written statement concerning the health risk of consuming animal foods raw, undercooked, or without otherwise being processed to eliminate pathogens.

"Reservice" means the transfer of food that is unused and returned by a consumer after being served or sold and in the possession of the consumer, to another person.

"Restrict" means to limit the activities of a food employee so that there is no risk of transmitting a

disease that is transmissible through food and the food employee does not work with exposed food, clean equipment, utensils, linens, or unwrapped single-service or single-use articles.

"Restricted egg" means any check, dirty egg, incubator reject, inedible, leaker, or loss as defined in 9 CFR Part 590.

"Restricted use pesticide" means a pesticide product that contains the active ingredients specified in 40 CFR 152.175 and that is limited to use by or under the direct supervision of a certified applicator.

"Risk" means the likelihood that an adverse health effect will occur within a population as a result of a hazard in a food.

"Safe material" means an article manufactured from or composed of materials that may not reasonably be expected to result, directly or indirectly, in their becoming a component or otherwise affecting the characteristics of any food; an additive that is used as specified in § 409 of the Federal Food, Drug, and Cosmetic Act (21 USC § 348); or other materials that are not additives and that are used in conformity with applicable regulations of the Food and Drug Administration.

"Sanitization" means the application of cumulative heat or chemicals on cleaned food-contact surfaces that, when evaluated for efficacy, is sufficient to yield a 5-log reduction, which is equal to a 99.999% reduction, of representative disease microorganisms of public health importance.

"Sealed" means free of cracks or other openings that allow the entry or passage of moisture.

"Service animal" means an animal such as a guide dog, signal dog, or other animal individually trained to provide assistance to an individual with a disability.

"Servicing area" means an operating base location to which a mobile food establishment or transportation vehicle returns regularly for such things as vehicle and equipment cleaning, discharging liquid or solid wastes, refilling water tanks and ice bins, and boarding food.

"Sewage" means liquid waste containing animal or vegetable matter in suspension or solution and may include liquids containing chemicals in solution. "Sewage" includes water-carried and non-water-carried human excrement or kitchen, laundry, shower, bath, or lavatory waste separately or together with such underground surface, storm, or other water and liquid industrial wastes as may be present from residences, buildings, vehicles, industrial establishments, or other places.

"Shellfish control authority" means a state, federal, foreign, tribal, or other government entity legally responsible for administering a program that includes certification of molluscan shellfish harvesters and dealers for interstate commerce.

"Shellstock" means ~~raw, in-shell~~ live molluscan shellfish in the shell.

"Shiga toxin-producing Escherichia coli" or "STEC" means any E. coli capable of producing Shiga toxins (also called verocytotoxins). STEC infections can be asymptomatic or may result in a spectrum of illness ranging from mild nonbloody diarrhea to hemorrhagic colitis (i.e., bloody diarrhea) to hemolytic uremic syndrome (HUS), which is a type of kidney failure. Examples of serotypes of STEC include: E. coli O157:H7, E. coli O157:NM, E. coli O26:H11, E. coli O145:NM, E. coli O103:H2, and E. coli O111:NM. STEC are sometimes referred to as VTEC (verocytotoxigenic E. coli) or as EHEC (enterohemorrhagic E. coli). EHEC are a subset of STEC that can cause hemorrhagic colitis or HUS.

"Shucked shellfish" means molluscan shellfish that have ~~one or~~ both shells removed.

"Single-service articles" means tableware, carry-out utensils, and other items such as bags, containers, placemats, stirrers, straws, toothpicks, and wrappers that are designed and constructed for one time, one person use after which they are intended for discard.

"Single-use articles" means utensils and bulk food containers designed and constructed to be used once and discarded. "Single-use articles" includes items such as wax paper, butcher paper, plastic wrap, formed aluminum food containers, jars, plastic tubs or buckets, bread wrappers, pickle barrels, ketchup bottles, and number 10 cans that do not meet the materials, durability, strength, and cleanability specifications under 2VAC5-585-960, 2VAC5-585-1080, and 2VAC5-585-1100 for multiuse utensils.

"Slacking" means the process of moderating the temperature of a food such as allowing a food to gradually increase from a temperature of -10°F (-23°C) to 25°F (-4°C) in preparation for deep-fat frying or to facilitate even heat penetration during the cooking of previously block-frozen food such as shrimp.

"Smooth" means a food-contact surface having a surface free of pits and inclusions with a cleanability equal to or exceeding that of (100 grit) number three stainless steel; a nonfood-contact surface of equipment having a surface equal to that of commercial grade hot-rolled steel free of visible scale; and a floor, wall, or ceiling having an even or level surface with no roughness or projections that render it difficult to clean.

"Tableware" means eating, drinking, and serving utensils for table use such as flatware including forks, knives, and spoons; hollowware including bowls, cups, serving dishes, and tumblers; and plates.

"Temperature measuring device" means a thermometer, thermocouple, thermistor, or other device that



indicates the temperature of food, air, or water.

"Temporary food establishment" means a food establishment that operates for a period of no more than 14 consecutive days in conjunction with a single event or celebration.

"Time/temperature control for safety food" or "TCS" (formerly "potentially hazardous food") means a food that requires time/temperature control for safety to limit pathogenic microorganism growth or toxin formation:

1. "Time/temperature control for safety food" includes an animal food that is raw or heat treated; a plant food that is heat treated or consists of raw seed sprouts, cut melons, cut leafy greens, cut tomatoes or mixtures of cut tomatoes that are not modified in a way so that they are unable to support pathogenic microorganism growth or toxin formation, or garlic-in-oil mixtures that are not modified in a way so that they are unable to support pathogenic microorganism growth or toxin formation; and except as specified in subdivision 2 d of this definition, a food that because of the interaction of its  $A_w$  and pH values is designated as product assessment required (PA) in Table A or B of this definition:

Table A. Interaction of pH and  $A_w$  for control of spores in food heat treated to destroy vegetative cells and subsequently packaged.

$A_w$ values	pH values		
	4.6 or less	>4.6 - 5.6	>5.6
$\leq 0.92$	non-TCS food*	non-TCS food	non-TCS food
>0.92 - 0.95	non-TCS food	non-TCS food	PA**
>0.95	non-TCS food	PA	PA

\*TCS means time/temperature control for safety food  
\*\*PA means product assessment required

Table B. Interaction of pH and  $A_w$  for control of vegetative cells and spores in food not heat treated or heat treated but not packaged.

$A_w$ values	pH values			
	< 4.2	4.2 - 4.6	> 4.6 - 5.0	> 5.0
<0.88	non-TCS food*	non-TCS food	non-TCS food	non-TCS food
0.88 - 0.90	non-TCS food	non-TCS food	non-TCS food	PA**
>0.90 - 0.92	non-TCS food	non-TCS food	PA	PA
>0.92	non-TCS food	PA	PA	PA

\*TCS means time/temperature control for safety food  
\*\*PA means product assessment required

2. "Time/temperature control for safety food" does not include:

- a. An air-cooled hard-boiled egg with shell intact, or an egg with shell intact that is not hard boiled, but has been pasteurized to destroy all viable salmonellae;
- b. A food in an unopened hermetically sealed container that is commercially processed to achieve and maintain commercial sterility under conditions of nonrefrigerated storage and distribution;
- c. A food that because of its pH or  $A_w$  value, or interaction of  $A_w$  and pH values, is designated as a non-TCS food in Table A or B of this definition;

d. A food that is designated as PA in Table A or B of this definition and has undergone a product assessment showing that the growth or toxin formation of pathogenic microorganisms that are reasonably likely to occur in that food is precluded due to:

- (1) Intrinsic factors including added or natural characteristics of the food such as preservatives, antimicrobials, humectants, acidulants, or nutrients;
- (2) Extrinsic factors including environmental or operational factors that affect the food such as packaging, modified atmosphere such as reduced oxygen packaging, shelf-life and use, or temperature range of storage and use; or
- (3) A combination of intrinsic and extrinsic factors; or

e. A food that does not support the growth or toxin formation of pathogenic microorganisms in accordance with one of the subdivisions 2 a through 2 d of this definition even though the food may contain a pathogenic microorganism or chemical or physical contaminant at a level sufficient to cause illness or injury.

"Tobacco product" has the meaning stated in § 201(rr) of the Federal Food, Drug, and Cosmetic Act (21 USC § 321(rr)).

"USDA" means the U.S. Department of Agriculture.

"Utensil" means a food-contact implement or container used in the storage, preparation, transportation, dispensing, sale, or service of food, such as kitchenware or tableware that is multiuse, single service, or single use; gloves used in contact with food; temperature sensing probes of food temperature measuring devices; and probe-type price or identification tags used in contact with food.

"Variance" means a written document issued by the department that authorizes a modification or waiver of one or more requirements of this chapter if, in the opinion of the department, a health hazard or nuisance will not result from the modification or waiver.

"Vending machine" means a self-service device that, upon insertion of a coin, paper currency, token, card, key, or by electronic transaction or optional manual operation, dispenses unit servings of food in bulk or in packages without the necessity of replenishing the device between each vending operation.

"Vending machine location" means the room, enclosure, space, or area where one or more vending machines are installed and operated and includes the storage areas and areas on the premises that are used to service and maintain the vending machines.

"Warewashing" means the cleaning and sanitizing of utensils and food-contact surfaces of equipment.

"Waterworks" means a system that serves piped water for human consumption to at least 15 service connections or 25 or more individuals for at least 60 days out of the year. "Waterworks" includes all structures, equipment, and appurtenances used in the storage, collection, purification, treatment, and distribution of pure water except the piping and fixtures inside the building where such water is delivered.

"Whole-muscle, intact beef" means whole muscle beef that is not injected, mechanically tenderized, reconstructed, or scored and marinated, from which beef steaks may be cut.

#### **2VAC5-585-50. Assignment.**

A. Except as specified in subsection B or C of this section, the ~~operator~~ permit holder shall be the person in charge or shall designate a person in charge and shall ensure that a person in charge is present at the food establishment during all hours of operation.<sup>Pf</sup>

B. In a food establishment with two or more separately ~~inspected~~ permitted departments that are the legal responsibility of the same ~~operator~~ permit holder and that are located on the same premises, the ~~operator~~ permit holder may, during specific time periods when food is not being prepared, packaged, or served, designate a single person in charge who is present on the premises during all hours of operation, and who is responsible for each separately ~~inspected~~ permitted food establishment on the premises.<sup>Pf</sup>

C. This section does not apply to certain types of food establishments deemed by the department to pose minimal risk of causing, or contributing to, foodborne illness based on the nature of the operation and the extent of the food preparation.<sup>Pf</sup>

#### **2VAC5-585-65. Certified food protection manager.**

A. At least one employee who has supervisory and management responsibility and the authority to direct and control food preparation and service shall be a certified food protection manager who has shown proficiency of required information through passing a test that is part of an accredited program.

B. The person in charge shall be a certified food protection manager who has shown proficiency of required information through passing a test that is part of an accredited program. ~~For purposes of enforcing this subsection, this requirement will take effect on June 24, 2023.~~

C. This section does not apply to certain types of food establishments deemed by the department to pose minimal risk of causing, or contributing to, foodborne illness based on the nature of the operation and extent of food preparation.

**2VAC5-585-67. Food protection manager certification.**

A. A person in charge who demonstrates knowledge by being a food protection manager who is certified by a food protection manager certification program that is evaluated and listed by a Conference for Food Protection-recognized accrediting agency as conforming to the Conference for Food Protection Standards for Accreditation of Food Protection Manager Certification Programs, April 2018~~2023~~, (Conference for Food Protection) is deemed to comply with subdivision 2 of 2VAC5-585-60.

B. A food establishment that has a person in charge who is certified by a food protection manager certification program that is evaluated and listed by a Conference for Food Protection-recognized accrediting agency as conforming to the Conference for Food Protection Standards for Accreditation of Food Protection Manager Certification Programs, April 2018~~2023~~, (Conference for Food Protection) is deemed to comply with 2VAC5-585-65.

**2VAC5-585-70. Duties of person in charge.**

The person in charge shall ensure that:

1. Food establishment operations are not conducted in a private home or in a room used as living or sleeping quarters as specified under 2VAC5-585-2990;<sup>Pf</sup>
2. Persons unnecessary to the food establishment operation are not allowed in the food preparation, food storage, or warewashing areas, except that brief visits and tours may be authorized by the person in charge if steps are taken to ensure that exposed food; clean equipment, utensils, and linens; and unwrapped single-service and single-use articles are protected from contamination;<sup>Pf</sup>
3. Employees and other persons such as delivery and maintenance persons and pesticide applicators entering the food preparation, food storage, and warewashing areas comply with this chapter;<sup>Pf</sup>
4. Employees are effectively cleaning their hands, by routinely monitoring the employees' handwashing;<sup>Pf</sup>
5. Employees are visibly observing foods as they are received to determine that they are from approved sources, delivered at the required temperatures, protected from contamination, unadulterated, and accurately presented, by routinely monitoring the employees' observations and periodically evaluating foods upon their receipt;<sup>Pf</sup>
6. Employees are verifying that foods delivered to the food establishment during nonoperating hours are from approved sources and are placed into appropriate storage locations such that they are maintained at the required temperatures, protected from contamination, unadulterated, and accurately presented;<sup>Pf</sup>
7. Employees are properly cooking time/temperature control for safety food, being particularly careful in cooking those foods known to cause severe foodborne illness and death, such as eggs and comminuted meats, through daily oversight of the employees' routine monitoring of the cooking temperatures using appropriate temperature measuring devices properly scaled and calibrated as specified under 2VAC5-585-1180 and 2VAC5-585-1730 B;<sup>Pf</sup>
8. Employees are using proper methods to rapidly cool time/temperature control for safety foods that are not held hot or are not for consumption within four hours, through daily oversight of the employees' routine monitoring of food temperatures during cooling;<sup>Pf</sup>
9. Employees are properly maintaining the temperatures of time/temperature control for safety food during hot and cold holding through daily oversight of the employees' routine monitoring of food temperatures;<sup>Pf</sup>
10. Food employees are properly maintaining the temperature of time/temperature control for safety foods during thawing through daily oversight of the food employee's routine monitoring of food temperatures;<sup>Pf</sup>
- ~~10.~~ 11. Consumers who order raw or partially cooked ready-to-eat foods of animal origin are informed as specified under 2VAC5-585-930 that the food is not cooked sufficiently to ensure its safety;<sup>Pf</sup>
- ~~11.~~ 12. Employees are properly sanitizing cleaned multiuse equipment and utensils before they are reused, through routine monitoring of solution temperature and exposure time for hot water sanitizing, and chemical concentration, pH, temperature, and exposure time for chemical sanitizing;<sup>Pf</sup>
- ~~12.~~ 13. Consumers are notified that clean tableware is to be used when they return to self-service areas such as salad bars and buffets as specified under 2VAC5-585-590;<sup>Pf</sup>
- ~~13.~~ 14. Except when approval is obtained from the department as specified in 2VAC5-585-450 E, employees are preventing cross-contamination of ready-to-eat food with bare hands by properly using suitable utensils such as deli tissue, spatulas, tongs, single-use gloves, or dispensing

equipment;<sup>Pf</sup>

44. 15. Employees are properly trained in food safety, including food allergy awareness, as it relates to their assigned duties. Food allergy awareness includes describing foods identified as major food allergens and the symptoms that a major food allergen could cause in a sensitive individual who has an allergic reaction;<sup>Pf</sup>

45. 16. Food employees and conditional employees are informed in a verifiable manner of their responsibility to report in accordance with law, to the person in charge, information about their health and activities as they relate to diseases that are transmissible through food, as specified under 2VAC5-585-80 A;<sup>Pf</sup> and

46. 17. Written procedures and plans where specified by this chapter and as developed by the food establishment are maintained and implemented as required.<sup>Pf</sup>

**2VAC5-585-80. Responsibility of ~~operator~~ permit holder, person in charge, and conditional employees.**

A. The ~~operator~~ permit holder shall require food employees and conditional employees to report to the person in charge information about their health and activities as they relate to diseases that are transmissible through food. A food employee or conditional employee shall report the information in a manner that allows the person in charge to reduce the risk of foodborne disease transmission, including providing necessary additional information, such as the date of onset of symptoms and an illness, or of a diagnosis without symptoms, if the food employee or conditional employee:

1. Has any of the following symptoms:

- a. Vomiting;<sup>P</sup>
- b. Diarrhea;<sup>P</sup>
- c. Jaundice;<sup>P</sup>
- d. Sore throat with fever;<sup>P</sup> or
- e. A lesion containing pus such as a boil or infected wound that is open or draining and is:
  - (1) On the hands or wrists, unless an impermeable cover such as a finger cot or stall protects the lesion and a single-use glove is worn over the impermeable cover;<sup>P</sup>
  - (2) On exposed portions of the arms, unless the lesion is protected by an impermeable cover;<sup>P</sup> or
  - (3) On other parts of the body, unless the lesion is covered by a dry, durable, tight-fitting bandage;<sup>P</sup>

2. Has an illness diagnosed by a health practitioner due to:

- a. Norovirus;<sup>P</sup>
- b. Hepatitis A virus;<sup>P</sup>
- c. Shigella spp.;<sup>P</sup>
- d. Shiga toxin-producing Escherichia coli;<sup>P</sup>
- e. Typhoid fever (caused by Salmonella typhi);<sup>P</sup> or
- f. Salmonella (nontyphoidal);<sup>P</sup>

3. Had typhoid fever, diagnosed by a health practitioner, within the past three months, without having received antibiotic therapy, as determined by a health practitioner;<sup>P</sup>

4. Has been exposed to, or is the suspected source of, a confirmed disease outbreak, because the food employee or conditional employee consumed or prepared food implicated in the outbreak, or consumed food at an event prepared by a person who is infected or ill with:

- a. Norovirus within the past 48 hours of the last exposure;<sup>P</sup>
- b. Shiga toxin-producing Escherichia coli, or Shigella spp. within the past three days of the last exposure;<sup>P</sup>
- c. Typhoid fever within the past 14 days of the last exposure;<sup>P</sup> or
- d. Hepatitis A virus within the past 30 days of the last exposure;<sup>P</sup> or

5. Has been exposed by attending or working in a setting where there is a confirmed disease outbreak, or living in the same household as, and has knowledge about an individual who works or attends a setting where there is a confirmed disease outbreak, or living in the same household as, and has knowledge about, an individual diagnosed with an illness caused by:

- a. Norovirus within the past 48 hours of the last exposure;<sup>P</sup>
- b. Shiga toxin-producing Escherichia coli or Shigella spp. within the past three days of the last exposure;<sup>P</sup>

- c. Typhoid fever (caused by *Salmonella typhi*) within the past 14 days of the last exposure;<sup>P</sup> or
- d. Hepatitis A virus within the past 30 days of the last exposure.<sup>P</sup>

B. The person in charge shall notify the department when a food employee is:

- 1. Jaundiced;<sup>Pf</sup> or
- 2. Diagnosed with an illness due to a pathogen as specified under subdivisions A 2 a through f of this section.<sup>Pf</sup>

C. The person in charge shall ensure that a conditional employee:

- 1. Who exhibits or reports a symptom, or who reports a diagnosed illness as specified under subdivisions A 1 through 3 of this section, is prohibited from becoming a food employee until the conditional employee meets the criteria for the specific symptoms or diagnosed illness as specified under 2VAC5-585-100;<sup>P</sup> and
- 2. Who will work as a food employee in a food establishment that serves a highly susceptible population and reports a history of exposure as specified under subdivisions A 4 and 5 of this section, is prohibited from becoming a food employee until the conditional employee meets the criteria specified under subdivision 10 of 2VAC5-585-100.<sup>P</sup>

D. The person in charge shall ensure that a food employee who exhibits or reports a symptom, or who reports a diagnosed illness or a history of exposure as specified under subsection A of this section is:

- 1. Excluded as specified under subdivisions 1 through 3 and 4 a, 5 a, 6 a, 7, or 8 a of 2VAC5-585-90 and in compliance with the provisions specified under subdivisions 1 through 8 of 2VAC5-585-100;<sup>P</sup> or
- 2. Restricted as specified under subdivision 4 b, 5 b, 6 b, 7, 8 b, 9, or 10 of 2VAC5-585-90 and in compliance with the provisions specified under subdivisions 4 through 10 of 2VAC5-585-100.<sup>P</sup>

E. A food employee or conditional employee shall report to the person in charge the information as specified under subsection A of this section.<sup>Pf</sup>

F. A food employee shall:

- 1. Comply with an exclusion as specified under subdivisions 1 through 3 and 4 a, 5 a, 6 a, 7, or 8 a of 2VAC5-585-90, and with the provisions specified under subdivisions 1 through 8 of 2VAC5-585-100;<sup>P</sup> or
- 2. Comply with a restriction specified under subdivision 4 b, 5 b, 6 b, 7, or 8 b of 2VAC5-585-90 or under subdivision 8, 9, or 10 of 2VAC5-585-90 and comply with the provisions specified under subdivisions 4 through 10 of 2VAC5-585-100.<sup>P</sup>

#### **2VAC5-585-160. When to wash.**

Food employees shall clean their hands and exposed portions of their arms as specified under 2VAC5-585-140 immediately before engaging in food preparation including working with exposed food, clean equipment and utensils, and unwrapped single-service and single-use articles<sup>P</sup> and:

- 1. After touching bare human body parts other than clean hands and clean, exposed portions of arms;<sup>P</sup>
- 2. After using the toilet room;<sup>P</sup>
- 3. After caring for or handling service animals or aquatic animals as allowed under 2VAC5-585-250 B;<sup>P</sup>
- 4. Except as specified in 2VAC5-585-220 B, after coughing, sneezing, using a handkerchief or disposable tissue, using a tobacco product, eating, or drinking;<sup>P</sup>
- 5. After handling soiled equipment or utensils;<sup>P</sup>
- 6. During food preparation, as often as necessary to remove soil and contamination and to prevent cross contamination when changing tasks;<sup>P</sup>
- 7. When switching between working with raw food and working with ready-to-eat food;<sup>P</sup>
- 8. Before donning gloves to initiate a task that involves working with food;<sup>P</sup> and
- 9. After engaging in other activities that contaminate the hands.<sup>P</sup>

#### **2VAC5-585-220. Eating, drinking, or using tobacco products.**

A. Except as specified in subsection B of this section, an employee shall eat, drink, or use any form of tobacco product only in designated areas where the contamination of exposed food; clean equipment, utensils, and linens; unwrapped single-service and single-use articles; or other items needing protection cannot result.

B. A food employee may drink from a closed beverage container if the container is handled to prevent contamination of:

- 1. The employee's hands;

2. The container; and
3. Exposed food; clean equipment, utensils, and linens; and unwrapped single-service and single-use articles.

#### **2VAC5-585-270. Compliance with food law.**

- A. Food shall be obtained from sources that comply with law.<sup>P</sup>
- B. Food prepared in a private home may not be used or offered for human consumption in a food establishment unless the home kitchen is inspected and regulated by the food regulatory authority that has jurisdiction over the private home.<sup>P</sup>
- C. Packaged food shall be labeled as specified in law, including 21 CFR Part 101; 9 CFR Part 317; and 9 CFR Part 381, Subpart N; and as specified under ~~2VAC5-585-400~~ and 2VAC5-585-410.<sup>Pf</sup>
- D. Fish, other than those specified in 2VAC5-585-730 B, that are intended for consumption in raw or undercooked form and allowed as specified in 2VAC5-585-700 D, may be offered for sale or service if they are obtained from a supplier that freezes fish as specified under 2VAC5-585-730 A, or if they are frozen on the premises as specified under 2VAC5-585-730 A and records are retained as specified under 2VAC5-585-740.
- E. Whole-muscle, intact beef steaks that are intended for consumption in an undercooked form without a consumer advisory as specified in 2VAC5-585-700 C shall be:
  1. Obtained from a food processing plant that, ~~upon request by the purchaser, packages the steaks and labels them to indicate that the steaks meet the definition of does not mechanically tenderize, vacuum tumble with solutions, reconstruct, cube, or pound those whole-muscle, intact beef steaks;~~ <sup>Pf</sup> or
  2. Deemed acceptable by the department based on other evidence, such as written buyer specifications or invoices, that indicates that the steaks meet the definition of whole-muscle, intact beef;<sup>Pf</sup> and
  3. If individually cut in a food establishment:
    - a. Cut from whole-muscle, intact beef that is ~~labeled by received from~~ a food processing plant as specified in subdivision 1 of this subsection or identified as specified in subdivision 2 of this subsection;<sup>Pf</sup> and
    - b. Prepared so they remain intact;<sup>Pf</sup> and
    - c. ~~If packaged for undercooking in a food establishment, labeled as specified in subdivision 1 of this subsection or identified as specified in subdivision 2 of this subsection.~~<sup>Pf</sup>
- F. Meat and poultry that are not ready-to-eat foods and are in a packaged form when offered for sale or otherwise offered for consumption shall be labeled to include safe handling instructions as specified in law, including 9 CFR 317.2(l) and 9 CFR 381.125(b).
- G. Eggs that have not been specifically treated to destroy all viable Salmonellae shall be labeled to include safe handling instructions as specified in law, including 21 CFR 101.17(h).

#### **2VAC5-585-400. Shucked Molluscan shellfish, packaging and identification.**

- A. ~~Raw shucked Molluscan shellfish shall be obtained in nonreturnable packages or containers that bear a legible tag or label that identifies the:~~<sup>Pf</sup>
  1. ~~Name, address, and certification number of the shucker/packer or repacker of the molluscan shellfish Source and is affixed by a dealer that deperates, packs, ships, or reships the molluscan shellfish, as specified in the National Shellfish Sanitation Program Guide for Control of Molluscan Shellfish.~~<sup>Pf</sup> and
  2. The "sell by" or "best if used by" date for shucked shellfish packages with a capacity of less than 64 fluid ounces (1.89 L) or the date shucked for packages with a capacity of 64 fluid ounces (1.89 L) or more.<sup>Pf</sup>
- B. A ~~package container~~ of raw shucked molluscan shellfish that does not bear a tag or label or that bears a tag or label that does not contain all the information as specified under subsection A of this section shall be subject to a hold order, as allowed by law, or seizure and destruction in accordance with 21 CFR 1240.60(d).

#### **2VAC5-585-420. Shellstock; condition.**

When received by a food establishment, shellstock shall be reasonably free of mud, dead ~~shellfish~~ shellstock, and ~~shellfish~~ shellstock with broken shells. Dead ~~shellfish or shellstock and~~ shellstock with badly broken shells shall be discarded.

#### **2VAC5-585-430. Molluscan shellfish; original container.**

- A. Except as specified in subsections ~~B through D~~ C through E of this section, molluscan shellfish may

not be removed from the container in which they are received other than immediately before sale or preparation for service.

B. Molluscan shellfish from one tagged or labeled container shall not be commingled with molluscan shellfish from another container with different certification numbers, different harvest dates, or different growing areas identified on the tag or label before being ordered by the consumer.<sup>Pf</sup>

C. For display purposes, shellstock or in-shell product may be removed from the container in which they are received, displayed on drained ice, or held in a display container, and a quantity specified by a consumer may be removed from the display or display container and provided to the consumer if:

1. The source of the shellstock or in-shell product on display is identified as specified under ~~2VAC5-585-410~~ 2VAC5-585-400 and recorded as specified under 2VAC5-585-440; and
2. The shellstock or in-shell product are protected from contamination.

~~C.~~ D. Shucked shellfish may be removed from the container in which they were received and held in a display container from which individual servings are dispensed upon a consumer's request if:

1. The labeling information for the shellfish on display as specified under 2VAC5-585-400 is retained and correlated to the date when, or dates during which, the shellfish are sold or served; and
2. The shellfish are protected from contamination.

~~D.~~ E. Shucked shellfish may be removed from the container in which they were received and repacked in consumer self-service containers where allowed by law if:

1. The labeling information for the shellfish is on each consumer self-service container as specified under 2VAC5-585-400 and 2VAC5-585-900 A and B 1 through 5;
2. The labeling information as specified under 2VAC5-585-400 is retained and correlated with the date when, or dates during which, the shellfish are sold or served;
3. The labeling information and dates specified under subdivision 2 of this subsection are maintained for 90 days; and
4. The shellfish are protected from contamination.

#### **2VAC5-585-440. Shellstock; Molluscan shellfish, maintaining identification.**

A. Except as specified under subdivision C 2 of this section, ~~shellstock~~ molluscan shellfish tags or labels shall remain attached to the container in which the shellstock are received until the container is empty.<sup>Pf</sup>

B. The date when the last ~~shellstock~~ molluscan shellfish from the container is sold or served shall be recorded on the tag ~~or~~, label, or invoice.<sup>Pf</sup>

C. The identity of the source of ~~shellstock~~ molluscan shellfish that are sold or served shall be maintained by retaining ~~shellstock~~ product tags ~~or~~, labels, or invoice for 90 calendar days from the date that is recorded on the tag ~~or~~, label, or invoice as specified in subsection B of this section by:<sup>Pf</sup>

1. Using an approved recordkeeping system that keeps the tags ~~or~~, labels, or invoices in chronological order correlated to the date that is recorded on the tag ~~or~~, label, or invoice as specified under subsection B of this section;<sup>Pf</sup> and
2. If shellstock, shucked shellfish, or in-shell product are removed from its tagged or labeled container:
  - a. Preserving source identification by using a recordkeeping system as specified under subdivision 1 of this subsection;<sup>Pf</sup> and
  - b. Ensuring that shellstock ~~or~~, shucked shellfish, or in-shell product from one tagged or labeled container are not commingled with shellstock ~~or~~, shucked shellfish, or in-shell product from another container with different certification numbers; different harvest dates; or different growing areas as identified on the tag or label before being ordered by the consumer.<sup>Pf</sup>

#### **2VAC5-585-445. Food donation.**

Food stored, prepared, packaged, displayed, and labeled in accordance with the law and this chapter may be offered for donation.

#### **2VAC5-585-450. Preventing contamination from hands.**

A. Food employees shall wash their hands as specified under 2VAC5-585-140.

B. Except when washing fruits and vegetables as specified under 2VAC5-585-510 or as specified in subsections D and E of this section, food employees may not contact exposed, ready-to-eat food with their bare hands and shall use suitable utensils such as deli tissue, spatulas, tongs, single-use gloves, or dispensing equipment.<sup>P</sup>

C. Food employees shall minimize bare hand and arm contact with exposed food that is not in a ready-

to-eat form. Pf

D. Subsection B of this section does not apply to a food employee who contacts exposed, ready-to-eat food with bare hands at the time the ready-to-eat food is being added as an ingredient to food that:

1. Contains a raw animal food and is to be cooked in the food establishment to heat all parts of the food to the minimum temperatures specified in 2VAC5-585-700 A and B or 2VAC5-585-710; or
2. Does not contain a raw animal food but is to be cooked in the food establishment to heat all parts of the food to a temperature of at least 145°F (63°C).

E. Food employees not serving a highly susceptible population may contact exposed, ready-to-eat food with their bare hands if:

1. The ~~operator~~ permit holder obtains prior approval from the department;
2. Written procedures are maintained in the food establishment and made available to the department upon request that include:
  - a. For each bare hand contact procedure, a listing of the specific ready-to-eat foods that are touched by bare hands; and
  - b. Diagrams and other information showing that handwashing facilities, installed, located, equipped, and maintained as specified under 2VAC5-585-2230, 2VAC5-585-2280, 2VAC5-585-2310, 2VAC5-585-3020, 2VAC5-585-3030, and 2VAC5-585-3045, are in an easily accessible location and in close proximity to the work station where the bare hand contact procedure is conducted;
3. A written employee health policy that details how the food establishment complies with 2VAC5-585-80, 2VAC5-585-90, and 2VAC5-585-100 including:
  - a. Documentation that the food employees and conditional employees acknowledge that they are informed to report information about their health and activities as they relate to gastrointestinal symptoms and diseases that are transmittable through food as specified under 2VAC5-585-80 A;
  - b. Documentation that food employees and conditional employees acknowledge their responsibilities as specified under 2VAC5-585-80 E and F; and
  - c. Documentation that the person in charge acknowledges the responsibilities as specified under 2VAC5-585-80 B, C, and D, 2VAC5-585-90, and 2VAC5-585-100;
4. Documentation that the food employees acknowledge that they have received training in:
  - a. The risks of contacting the specific ready-to-eat foods with their bare hands,
  - b. Proper handwashing as specified under 2VAC5-585-140,
  - c. When to wash their hands as specified under 2VAC5-585-160,
  - d. Where to wash their hands as specified under 2VAC5-585-170,
  - e. Proper fingernail maintenance as specified under 2VAC5-585-190,
  - f. Prohibition of jewelry as specified under 2VAC5-585-200, and
  - g. Good hygienic practices as specified under 2VAC5-585-220 and 2VAC5-585-230;
5. Documentation that hands are washed before food preparation and as necessary to prevent cross-contamination by food employees as specified under 2VAC5-585-130, 2VAC5-585-140, 2VAC5-585-160, and 2VAC5-585-170 during all hours of operation when the specific ready-to-eat foods are prepared;
6. Documentation that food employees contacting ready-to-eat food with bare hands use two or more of the following control measures to provide additional safeguards to hazards associated with bare hand contact:
  - a. Double handwashing,
  - b. Nail brushes,
  - c. A hand antiseptic after handwashing as specified under 2VAC5-585-180,
  - d. Incentive programs such as paid sick leave that assist or encourage food employees not to work when they are ill, or
  - e. Other control measures approved by the department; and
7. Documentation that corrective action is taken when subdivisions 1 through 6 of this subsection are not followed.

**2VAC5-585-510. Washing fruits and vegetables.**

A. Except as specified in subsection B of this section and except for whole, raw fruits and vegetables that are intended for washing by the consumer before consumption, raw fruits and vegetables shall be



thoroughly washed in water to remove soil and other contaminants before being cut, combined with other ingredients, cooked, served, or offered for human consumption in ready-to-eat form.

B. Fruits and vegetables may be washed by using chemicals as specified under 2VAC5-585-3390, and a test kit or other device that accurately measures the active ingredient concentration of the fruit and vegetable wash solution may be provided by the manufacturer of the wash solution.

C. Devices used for onsite generation of chemicals meeting the requirements specified in 21 CFR 173.315 for the washing of raw, whole fruits and vegetables shall be used in accordance with the manufacturer's instructions.<sup>Pf</sup>

#### **2VAC5-585-620. Food storage; prohibited areas.**

Food may not be stored:

1. In locker rooms;
2. In toilet rooms;<sup>Pf</sup>
3. In dressing rooms;
4. In garbage rooms;
5. In mechanical rooms;
6. Under sewer lines that are not shielded to intercept potential drips;
7. Under leaking water lines, including leaking automatic fire sprinkler heads, or under lines on which water has condensed;
8. Under open stairwells; or
9. Under other sources of contamination.

#### **2VAC5-585-700. Raw animal foods.**

A. Except as specified in subsections B, C, and D of this section, raw animal foods such as eggs, fish, meat, poultry, and foods containing these raw animal foods shall be cooked to heat all parts of the food to a temperature and for a time that complies with one of the following methods based on the food that is being cooked:

1. 145°F (63°C) or above for 15 seconds for:<sup>P</sup>
  - a. Raw eggs that are broken and prepared in response to a consumer's order and for immediate service;<sup>P</sup> and
  - b. Except as specified under subdivisions A 2 and 3 and subsections B and C of this section, fish and intact meat, including game animals commercially raised for food and under a voluntary inspection program as specified under 2VAC5-585-330 A 1;<sup>P</sup>
2. 155°F (68°C) for 17 seconds or the temperature specified in the following chart that corresponds to the holding time for ratites, ~~mechanically tenderized, and injected meats~~ and nonintact meats; the following if they are comminuted: fish, ~~meat,~~ and game animals commercially raised for food and under a voluntary inspection program as specified under 2VAC5-585-330 A 1; and raw eggs that are not prepared as specified under subdivision A 1 a of this section:<sup>P</sup>

Minimum	
Temperature °F (°C)	Time
145 (63)	3 minutes
150 (66)	1 minute
158 (70)	<1 second (instantaneous)

3. 165°F (74°C) or above for less than one second (instantaneous) for poultry, baluts, wild game animals as specified under 2VAC5-585-330 A 2 and 3, commercially raised rabbits as specified under 2VAC5-585-330 C, stuffed fish, stuffed meat, stuffed pasta, stuffed poultry, stuffed ratites, or stuffing containing fish, meat, poultry, or ratites.<sup>P</sup>

B. Whole meat roasts including beef, corned beef, lamb, pork, and cured pork roasts such as ham shall be cooked:

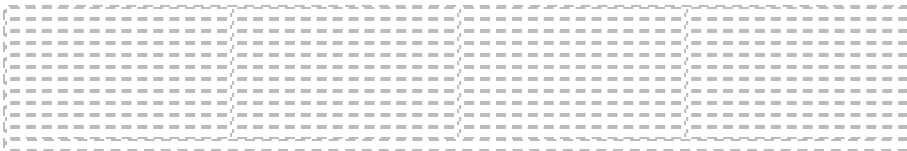
1. As specified in the following chart, to heat all parts of the food to a temperature and for the holding time that corresponds to that temperature;<sup>P</sup> and

--	--

Temperature °F (°C)	Time <sup>1</sup> in Minutes	Temperature °F (°C)	Time <sup>1</sup> in Seconds
130 (54.4)	112	147 (63.9)	134
131 (55.0)	89	149 (65.0)	85
133 (56.1)	56	151 (66.1)	54
135 (57.2)	36	153 (67.2)	34
136 (57.8)	28	155 (68.3)	22
138 (58.9)	18	157 (69.4)	14
140 (60.0)	12	158 (70.0)	0
142 (61.1)	8		
144 (62.2)	5		
145 (62.8)	4		

<sup>1</sup>Holding time may include postoven heat rise.

2.



If cooked in an oven, use an oven that is preheated to the temperature specified for the roast's weight in the following chart and that is held at that temperature.<sup>Pf</sup>

Oven Type	Oven Temperature Based on Roast Weight	
	Less than 10 lbs (4.5 kg)	10 lbs (4.5 kg) or more
Still Dry	350°F (177°C) or more	250°F (121°C) or more
Convection	325°F (163°C) or more	250°F (121°C) or more
High Humidity <sup>1</sup>	250°F (121°C) or less	250°F (121°C) or less

<sup>1</sup>Relative humidity greater than 90% for at least one hour as measured in the cooking chamber or exit of the oven; or in a moisture-impermeable bag that provides 100% humidity

C. A raw or undercooked whole-muscle, intact beef steak may be served or offered for sale in a ready-to-eat form if:

1. The food establishment serves a population that is not a highly susceptible population;
2. The steak is ~~labeled, as specified under 2VAC5-585-270 E, to indicate that it meets the definition of whole muscle, intact beef prepared so that it remains intact;~~ and
3. The steak is cooked on both the top and bottom to a surface temperature of 145°F (63°C) or above and a cooked color change is achieved on all external surfaces.

D. A raw animal food such as raw egg, raw fish, raw-marinated fish, raw molluscan shellfish, or steak tartare or a partially cooked food such as lightly cooked fish, soft cooked eggs, or rare meat other than whole-muscle, intact beef steaks as specified in subsection C of this section may be served or offered for sale upon consumer request or selection in a ready-to-eat form if:

1. As specified under subdivisions 3 a and 3 b of 2VAC5-585-950, the food establishment serves a population that is not a highly susceptible population;
2. The food, if served or offered for service by consumer selection from a children's menu, does not contain comminuted meat;<sup>Pf</sup> and

3. The consumer is informed as specified under 2VAC5-585-930 that to ensure its safety, the food should be cooked as specified under subsection A or B of this section; or
4. The department grants a variance from subsection A or B of this section as specified in 2VAC5-585-3540 based on a HACCP plan that:
  - a. Is submitted by the ~~operator~~ permit holder and approved as specified under 2VAC5-585-3541;
  - b. Documents scientific data or other information showing that a lesser time and temperature regimen results in a safe food; and
  - c. Verifies that equipment and procedures for food preparation and training of food employees at the food establishment meet the conditions of the variance.

#### **2VAC5-585-725. Noncontinuous cooking of raw animal foods.**

Raw animal foods that are cooked using a noncontinuous cooking process shall be:

1. Subject to an initial heating process that is no longer than 60 minutes in duration;<sup>P</sup>
2. Immediately after initial heating, cooled according to the time and temperature parameters specified for cooked time/temperature control for safety food under 2VAC5-585-800 A;<sup>P</sup>
3. After cooling, held frozen or cold as specified for time/temperature control for safety food under 2VAC5-585-820 A 2;<sup>P</sup>
4. Prior to sale or service, cooked using a process that heats all parts of the food to a temperature and for a time as designated in 2VAC5-585-700 A through C;<sup>P</sup>
5. Cooled according to the time and temperature parameters specified for cooked time/temperature control for safety food under 2VAC5-585-800 A if not either hot held as specified under 2VAC5-585-820 A 1, served immediately, or held using time as a public health control as specified under 2VAC5-585-850 after complete cooking;<sup>P</sup> and
6. Prepared and stored according to written procedures that:
  - a. Have obtained prior approval from the department;<sup>Pf</sup>
  - b. Are maintained in the food establishment and are available to the department upon request;<sup>Pf</sup>
  - c. Describe how the requirements specified under subdivisions 1 through 5 of this section are to be monitored and documented by the ~~operator~~ permit holder and the corrective actions to be taken if the requirements are not met;<sup>Pf</sup>
  - d. Describe how the foods, after initial heating but prior to complete cooking, are to be marked or otherwise identified as foods that must be cooked as specified under subdivision 4 of this section prior to being offered for sale or service;<sup>Pf</sup> and
  - e. Describe how the foods, after initial heating but prior to cooking as specified in subdivision 4 of this section, are to be separated from ready-to-eat foods as specified under 2VAC5-585-470 A.<sup>Pf</sup>

#### **2VAC5-585-726. Manufacturer cooking instructions.**

A. Commercially packaged food that bears a manufacturer's cooking instructions shall be cooked according to those instructions before it is used in ready-to-eat foods or offered in unpackaged form for human consumption, unless the manufacturer's instructions specify that the food may be consumed without cooking.<sup>P</sup>

B. Food for which the manufacturer has provided information that the food has not been processed to control pathogens, when used in ready-to-eat foods or offered for human consumption, shall be cooked according to a time and temperature appropriate for the food.<sup>P</sup>

#### **2VAC5-585-790. Thawing.**

A. Except as specified in subdivision 4 of this subsection, time/temperature control for safety food shall be thawed:

1. Under refrigeration that maintains the food temperature at 41°F (5°C) or less;<sup>Pf</sup>
2. Completely submerged under running water:
  - a. At a water temperature of 70°F (21°C) or below;<sup>Pf</sup>
  - b. With sufficient water velocity to agitate and float off loose particles in an overflow;<sup>Pf</sup> and
  - c. For a period of time that does not allow thawed portions of ready-to-eat food to rise above 41°F (5°C);<sup>Pf</sup> or
  - d. For a period of time that does not allow thawed portions of a raw animal food requiring cooking as specified under 2VAC5-585-700 A or B to be above 41°F (5°C) for more than four hours including:

(1) The time the food is exposed to the running water and the time needed for preparation for cooking;<sup>Pf</sup> or

(2) The time it takes under refrigeration to lower the food temperature to 41°F (5°C);<sup>Pf</sup>

3. As part of a cooking process if the food that is frozen is:

a. Cooked as specified under 2VAC5-585-700 A or B or, 2VAC5-585-710, or 2VAC5-585-726;<sup>Pf</sup> or

b. Thawed in a microwave oven and immediately transferred to conventional cooking equipment, with no interruption in the process;<sup>Pf</sup> or

4. Using any procedure if a portion of frozen ready-to-eat food is thawed and prepared for immediate service in response to an individual consumer's order.

B. Reduced oxygen packaged fish that bears a label indicating that it is to be kept frozen until time of use shall be removed from the reduced oxygen environment:

1. Prior to its thawing under refrigeration as specified in subdivision A 1 of this section; or

2. Prior to, or immediately upon completion of, its thawing using procedures specified in subdivision A 2 of this section.

### **2VAC5-585-830. Ready-to-eat, time/temperature control for safety food; date marking.**

A. Except when packaging food using a reduced oxygen packaging method as specified under 2VAC5-585-870 and except as specified in subsections E and F of this section, refrigerated, ready-to-eat, time/temperature control for safety food prepared and held in a food establishment for more than 24 hours shall be clearly marked to indicate the date or day by which the food shall be consumed on the premises, sold, or discarded when held at a temperature of 41°F (5°C) or less for a maximum of seven days. The day of preparation shall be counted as day one.<sup>Pf</sup>

B. Except as specified in subsections E, F, and G of this section, refrigerated, ready-to-eat, time/temperature control for safety food prepared and packaged by a food processing plant shall be clearly marked, at the time the original container is opened in a food establishment and if the food is held for more than 24 hours, to indicate the date or day by which the food shall be consumed on the premises, sold, or discarded, based on the temperature and time combinations specified in subsection A of this section and:<sup>Pf</sup>

1. The day the original container is opened in the food establishment shall be counted as day one;<sup>Pf</sup> and

2. The day or date marked by the food establishment may not exceed a manufacturer's use-by date if the manufacturer determined the use-by date based on food safety.<sup>Pf</sup>

C. A refrigerated, ready-to-eat, time/temperature control for safety food ingredient or a portion of a refrigerated, ready-to-eat, time/temperature control for safety food that is subsequently combined with additional ingredients or portions of food shall retain the date marking of the earliest-prepared or first-prepared ingredient.<sup>Pf</sup>

D. A date marking system that meets the criteria stated in subsections A and B of this section may include:

1. Using a method approved by the department for refrigerated, ready-to-eat, time/temperature control for safety food that is frequently rewrapped, such as lunchmeat or a roast, or for which date marking is impractical, such as soft-serve mix or milk in a dispensing machine;

2. Marking the date or day of preparation, with a procedure to discard the food on or before the last date or day by which the food must be consumed on the premises, sold, or discarded as specified in subsection A of this section;

3. Marking the date or day the original container is opened in a food establishment, with a procedure to discard the food on or before the last date or day by which the food must be consumed on the premises, sold, or discarded as specified under subsection B of this section; or

4. Using calendar dates, days of the week, color-coded marks, or other effective marking methods, provided that the marking system is disclosed to the department upon request.

E. Subsections A and B of this section do not apply to individual meal portions served or repackaged for sale from a bulk container upon a consumer's request.

F. Subsections A and B of this section do not apply to shellstock.

G. Subsection B of this section does not apply to the following foods prepared and packaged by a food processing plant inspected by a regulatory authority:

1. Deli salads, such as ham salad, seafood salad, chicken salad, egg salad, pasta salad, potato salad, and macaroni salad, manufactured in accordance with 21 CFR Part 440 117;

2. Hard cheeses containing not more than 39% moisture as defined in 21 CFR Part 133, such as cheddar, gruyere, parmesan and reggiano, and romano;

3. Semi-soft cheese containing more than 39% moisture, but not more than 50% moisture, as defined in 21 CFR Part 133, such as blue, edam, gorgonzola, gouda, and Monterey Jack;
4. Cultured dairy products as defined in 21 CFR Part 131, such as yogurt, sour cream, and buttermilk;
5. Preserved fish products, such as pickled herring and dried or salted cod, and other acidified fish products as defined in 21 CFR Part 114;
6. Shelf stable, dry fermented sausages, such as pepperoni and Genoa; and
7. Shelf stable salt-cured products such as prosciutto and Parma (ham).

**2VAC5-585-850. Time as a public health control.**

A. Except as specified under subsection D of this section, if time without temperature control is used as the public health control for a working supply of time/temperature control for safety food before cooking, or for ready-to-eat, time/temperature control for safety food that is displayed or held for sale or service, written procedures shall be prepared in advance, maintained in the food establishment, and made available to the department upon request that specify:<sup>Pf</sup>

1. Methods of compliance with subsection B or C of this section;<sup>Pf</sup> and
2. Methods of compliance with 2VAC5-585-800 for food that is prepared, cooked, and refrigerated before time is used as a public health control.<sup>Pf</sup>

B. If time without temperature control is used as the public health control up to a maximum of four hours:

1. Except as specified in subdivision B 2 of this section, the food shall have an initial temperature of 41°F (5°C) or less when removed from cold holding temperature control, 135°F (57°C) or greater when removed from hot-holding temperature control;<sup>P</sup>
2. The food may have an initial temperature of 70°F (21°C) or less if:
  - a. It is a ready-to-eat (i) fruit or vegetable that, upon cutting, is rendered a time/temperature control for safety food or (ii) hermetically sealed food that, upon opening, is rendered a time/temperature control for safety food;
  - b. The food temperature does not exceed 70°F (21°C) within a maximum time period of four hours from the time it was rendered a time/temperature control for safety food; and
  - c. The food is marked or otherwise identified to indicate the time that is four hours past the point in time when the food is rendered a time/temperature control for safety food as specified in subdivision B 2 a of this section.
3. The food shall be marked or otherwise identified to indicate the time that is four hours past (i) the point in time when the food is removed from temperature control or ~~(ii) the time that the food becomes a time/temperature control for safety food;~~<sup>Pf</sup>
4. The food shall be cooked and served; served at any temperature, if ready-to-eat; or discarded within four hours from the point in time when the food is removed from temperature control;<sup>P</sup> and
5. The food in unmarked containers or packages or marked to exceed a four-hour limit shall be discarded.<sup>P</sup>

C. If time without temperature control is used as the public health control up to a maximum of six hours:

1. The food shall have an initial temperature of 41°F (5°C) or less when removed from temperature control and the food temperature may not exceed 70°F (21°C) within a maximum time period of six hours;<sup>P</sup>
2. The food shall be monitored to ensure the warmest portion of the food does not exceed 70°F (21°C) during the six-hour period, unless an ambient air temperature is maintained that ensures the food does not exceed 70°F (21°C) during the six-hour holding period;<sup>Pf</sup>
3. The food shall be marked or otherwise identified to indicate:<sup>Pf</sup>
  - a. The time when the food is removed from 41°F (5°C) or less cold holding temperature control;<sup>Pf</sup> and
  - b. The time that is six hours past the point in time when the food is removed from 41°F (5°C) or less cold holding temperature control;<sup>Pf</sup>
4. The food shall be:
  - a. Discarded if the temperature of the foods exceeds 70°F (21°C);<sup>P</sup> or
  - b. Cooked and served, served at any temperature if ready-to-eat, or discarded within a maximum of six hours from the point in time when the food is removed from 41°F (5°C) or less cold holding temperature control;<sup>P</sup> and
5. The food in unmarked containers or packages, or marked with a time that exceeds the six-hour

limit shall be discarded.<sup>P</sup>

D. A food establishment that serves a highly susceptible population may not use time as specified under subsection A, B, or C of this section as the public health control for raw eggs.

**2VAC5-585-870. Reduced oxygen packaging without a variance; criteria.**

A. Except for a food establishment that obtains a variance as specified under 2VAC5-585-860, a food establishment that packages time/temperature control for safety food using a reduced oxygen packaging method shall control the growth and toxin formation of *Clostridium botulinum* and the growth of *Listeria monocytogenes*.<sup>P</sup>

B. Except as specified in subsection E of this section, a food establishment that packages time/temperature control for safety food using a reduced oxygen packaging method shall implement a HACCP plan that contains the information specified under 2VAC5-585-3630 and that:<sup>Pf</sup>

1. Identifies the food to be packaged;<sup>Pf</sup>

2. Except as specified in subsections C and D of this section, requires that the packaged food shall be maintained at 41°F (5°C) or less and meet at least one of the following criteria:<sup>Pf</sup>

a. Has an  $A_w$  of 0.91 or less,<sup>Pf</sup>

b. Has a pH of 4.6 or less,<sup>Pf</sup>

c. Is a meat or poultry product cured at a food processing plant regulated by the USDA using substances specified in 9 CFR 424.21 and is received in an intact package,<sup>Pf</sup>

d. Is a food with a high level of competing organisms such as raw meat, raw poultry, or raw vegetables;<sup>Pf</sup> or

e. Is a cheese that is commercially manufactured in a food processing plant with no ingredients added in the food establishment and that meets the Standards of Identity as specified in 21 CFR 133.150, 21 CFR 133.169, or 21 CFR 133.187;<sup>P</sup>

3. Describes how the package shall be prominently and conspicuously labeled on the principal display panel in bold type on a contrasting background, with instruction to:<sup>Pf</sup>

a. Maintain the food at 41°F (5°C) or below;<sup>Pf</sup> and

b. Discard the food within 30 calendar days of its packaging if it is not served for on-premises consumption, or consumed if served or sold for off-premises consumption;<sup>Pf</sup>

2. 4. Limits the refrigerated shelf life to no more than 30 calendar days from packaging to consumption, except the time the product is maintained frozen, or the original manufacturer's "sell by" or "use by" date, whichever occurs first;<sup>P</sup>

3. 5. Includes operational procedures that:

a. Prohibit contacting ready-to-eat food with bare hands as specified under 2VAC5-585-450 B;<sup>Pf</sup>

b. Identify a designated work area and the method by which:<sup>Pf</sup>

(1) Physical barriers or methods of separation of raw foods and ready-to-eat foods minimize cross contamination,<sup>Pf</sup> and

(2) Access to the processing equipment is limited to responsible trained personnel familiar with the potential hazards of the operation;<sup>Pf</sup> and

c. Delineate cleaning and sanitization procedures for food-contact surfaces;<sup>Pf</sup> and

d. ~~Describe how the package shall be prominently and conspicuously labeled on the principal display panel in bold type on a contrasting background, with instructions to:~~<sup>Pf</sup>

~~(1) Maintain the food at 41°F (5°C) or below;~~<sup>Pf</sup> and

~~(2) Discard the food if, within 30 calendar days of its packaging, it is not served for on-premises consumption or consumed, if served or sold for off-premises consumption;~~<sup>Pf</sup>

4. 6. Describes the training program that ensures that the individual responsible for the reduced oxygen packaging operation understands the:<sup>Pf</sup>

a. Concepts required for safe operation;<sup>Pf</sup>

b. Equipment and facilities;<sup>Pf</sup> and

c. Procedures specified under subdivision 3 of this subsection and 2VAC5-585-3630;<sup>Pf</sup> and

5. 7. Is provided to the department prior to implementation as specified under subsection B of 2VAC5-585-3620.

C. Except for fish that is frozen before, during, and after packaging and that bears a label indicating that it is to be kept frozen until time of use, a food establishment may not package fish using a reduced oxygen packaging method.<sup>P</sup>

D. Except as specified in subsections C and ~~E~~ E of this section, a food establishment that packages

time/temperature control for safety food using a cook-chill or sous vide process shall:

1. Provide to the department prior to implementation, a HACCP plan that contains the information as specified under 2VAC5-585-3630;<sup>Pf</sup>
2. Ensure the food is:
  - a. Prepared and consumed on the premises, or prepared and consumed off the premises but within the same business entity with no distribution or sale of the packaged product to another business entity or the consumer;<sup>Pf</sup>
  - b. Cooked to heat all parts of the food to a temperature and for a time as specified under 2VAC5-585-700 A, B, and C;<sup>P</sup>
  - c. Protected from contamination before and after cooking as specified in 2VAC5-585-450 through 2VAC5-585-765;<sup>P</sup>
  - d. Placed in a package with an oxygen barrier and sealed before cooking, or placed in a package and sealed immediately after cooking, and before reaching a temperature below 135°F (57°C);<sup>P</sup>
  - e. Cooled to 41°F (5°C) in the sealed package or bag as specified under 2VAC5-585-800 and <sup>P</sup>
    - (1) Cooled to 34°F (1°C) within 48 hours of reaching 41°F (5°C) and held at that temperature until consumed or discarded within 30 calendar days after the date of packaging;<sup>P</sup>
    - (2) Held at 41°F (5°C) or less for no more than seven calendar days, at which time the food must be consumed or discarded;<sup>P</sup>
    - (3) Cooled to 34°F (1°C) within 48 hours of reaching 41°F (5°C), removed from refrigeration equipment that maintains a 34°F (1°C) food temperature, and then held at 41°F (5°C) or less for no more than seven calendar days, not to exceed 30 calendar days from its date of packaging, at which time the food must be consumed or discarded;<sup>P</sup> or
    - (4) Held frozen with no shelf-life restriction while frozen until consumed or used;<sup>P</sup>
  - f. Held in a refrigeration unit that is equipped with an electronic system that continuously monitors time and temperature and is visually examined for proper operation twice daily;<sup>Pf</sup>
  - g. If transported off-site to a satellite location of the same business entity, equipped with verifiable electronic monitoring devices to ensure that times and temperatures are monitored during transportation;<sup>Pf</sup> and
  - h. Labeled with the product name and the date packaged;<sup>Pf</sup> and
3. Maintain the records required to confirm that cooling and cold holding refrigeration time/temperature parameters are required as part of the HACCP plan and:
  - a. Make such records available to the department upon request;<sup>Pf</sup> and
  - b. Hold such records for at least six months;<sup>Pf</sup> and
4. Implement written operational procedures as specified under subdivision B 3 of this section and a training program as specified under subdivision B 4 of this section.<sup>Pf</sup>

E. Except as specified in subsection F of this section, a food establishment that packages cheese using a reduced oxygen packaging method shall:

1. Limit the cheeses packaged to those that (i) are commercially manufactured in a food processing plant, (ii) contain no ingredients added in the food establishment, and (iii) meet the Standards of Identity as specified in 21 CFR 133.150, 21 CFR 133.169, or 21 CFR 133.187;<sup>P</sup>
2. Have a HACCP plan that contains the information specified in subdivisions 3 and 4 of 2VAC5-585-3630 and as specified in subdivisions B 1, B 3 a, B 5, and B 6 of this section;<sup>Pf</sup>
3. Label the package on the principal display panel with a "use by" date that does not exceed (i) 30 days from its packaging or (ii) the original manufacturer's "sell by" or "use by" date, whichever occurs first;<sup>Pf</sup> and
4. Discard the reduced oxygen packaged cheese if it is not sold for off-premises consumption or consumed within 30 calendar days of its packaging.<sup>Pf</sup>

E. A HACCP plan is not required when a food establishment uses a reduced oxygen packaging method to package time/temperature control for safety food that is always:

1. Labeled with the production time and date;
2. Held at 41°F (5°C) or less during refrigerated storage; and
3. Removed from its packaging in the food establishment within 48 hours after packaging.

## **2VAC5-585-900. Food labels.**

A. Food packaged in a food establishment shall be labeled as specified in law, including 21 CFR Part 101 and 9 CFR Part 317.

B. Label information shall include:

1. The common name of the food, or absent a common name, an adequately descriptive identity statement;
2. If made from two or more ingredients, a list of ingredients and subingredients in descending order of predominance by weight, including a declaration of artificial colors, artificial flavors, and chemical preservatives, if contained in the food;
3. An accurate declaration of the net quantity of contents;
4. The name and place of business of the manufacturer, packer, or distributor;
5. The name of the food source for each major food allergen contained in the food unless the food source is already part of the common or usual name of the respective ingredient;<sup>Pf</sup>
6. Except as exempted in the Federal Food, Drug, and Cosmetic Act 21 USC § 403(g)(3) through (5), nutrition labeling as specified in 21 CFR Part 101 and 9 CFR Part 317, Subpart B; and
7. For any salmonid fish containing canthaxanthin or astaxanthin as a color additive, the labeling of the bulk fish container, including a list of ingredients, displayed on the retail container or by other written means, such as a counter card, that discloses the use of canthaxanthin or astaxanthin.

C. Bulk food that is available for consumer self-dispensing shall be prominently labeled with the following information in plain view of the consumer:

1. The manufacturer's or processor's label that was provided with the food; or
2. A card, sign, or other method of notification that includes the information specified under subdivisions B 1, 2, 5, and 6 of this section.

D. Bulk, unpackaged foods such as bakery products and unpackaged foods that are portioned to consumer specification need not be labeled if:

1. A health, nutrient content, or other claim is not made;
2. There are no state or local laws requiring labeling; and
3. The food is manufactured or prepared on the premises of the food establishment or at another food establishment or a food processing plant that is owned by the same person and is regulated by the food regulatory agency that has jurisdiction.

**2VAC5-585-910. Other forms of information.**

A. If required by law, consumer warnings shall be provided.

B. Food establishment or manufacturers' dating information on foods may not be concealed or altered.

C. The permit holder shall notify consumers by written notification of the presence of major allergens as an ingredient in unpackaged food items that are served or sold to the consumer.

**2VAC5-585-930. Consumer advisory; consumption of animal foods that are raw, undercooked, or not otherwise processed to eliminate pathogens.**

A. Except as specified in 2VAC5-585-700 C and 2VAC5-585-700 D 4 and under subdivision 3 of 2VAC5-585-950, if an animal food such as beef, eggs, fish, lamb, milk, pork, poultry, or shellfish is served or sold raw, undercooked, or without otherwise being processed to eliminate pathogens, either in ready-to-eat form or as an ingredient in another ready-to-eat food, the ~~operator~~ permit holder shall inform consumers of the significantly increased risk of consuming such foods by way of a disclosure and reminder, as specified in subsections B and C of this section, using brochures, deli case or menu advisories, label statements, table tents, placards, or other effective written means.<sup>Pf</sup>

B. Disclosure shall include:

1. A description of the animal-derived foods, such as "oysters on the half shell (raw oysters)," "raw-egg Caesar salad," and "hamburgers (can be cooked to order)";<sup>Pf</sup> or
2. Identification of the animal-derived foods by asterisking them to a footnote that states that the items are served raw or undercooked, or contain (or may contain) raw or undercooked ingredients.<sup>Pf</sup>

C. Reminder shall include asterisking the animal-derived foods requiring disclosure to a footnote that states:

1. Regarding the safety of these items, written information is available upon request;<sup>Pf</sup>
2. Consuming raw or undercooked meats, poultry, seafood, shellfish, or eggs may increase your risk of foodborne illness;<sup>Pf</sup> or
3. Consuming raw or undercooked meats, poultry, seafood, shellfish, or eggs may increase your risk of foodborne illness, especially if you have certain medical conditions.<sup>Pf</sup>



**2VAC5-585-950. Pasteurized foods, prohibited reservice, and prohibited food.**

In a food establishment that serves a highly susceptible population:

1. The following criteria apply to juice:
  - a. For the purposes of subdivision 1 of this section only, children who are age nine years or younger and receive food in a school, day care setting, or similar facility that provides custodial care are included as highly susceptible populations;
  - b. Prepackaged juice or a prepackaged beverage containing juice that bears a warning label as specified in 21 CFR 101.17(g) or a packaged juice or beverage containing juice that bears a warning label as specified under subdivision 2 of 2VAC5-585-765 may not be served or offered for sale;<sup>P</sup> and
  - c. Unpackaged juice that is prepared on the premises for service or sale in a ready-to-eat form shall be processed under a HACCP plan that contains the information specified in 2VAC5-585-3630 and as specified in 21 CFR 120.24.<sup>P</sup>
2. Pasteurized eggs or egg products shall be substituted for raw eggs in the preparation of:<sup>P</sup>
  - a. Foods such as Caesar salad, hollandaise or béarnaise sauce, mayonnaise, meringue, eggnog, ice cream, and egg-fortified beverages;<sup>P</sup> and
  - b. Except as specified in subdivision 6 of this section, recipes in which more than one egg is broken and the eggs are combined.<sup>P</sup>
3. The following foods may not be served or offered for sale in a ready-to-eat form:<sup>P</sup>
  - a. Raw animal foods such as raw fish, raw-marinated fish, raw molluscan shellfish, and steak tartare;<sup>P</sup>
  - b. A partially cooked animal food such as lightly cooked fish, rare meat, soft-cooked eggs that are made from raw eggs, and meringue;<sup>P</sup> and
  - c. Raw seed sprouts;<sup>P</sup> and
  - d. Packaged foods subject to 2VAC5-585-726 that are not cooked in accordance with that section.
4. Food employees may not contact ready-to-eat food as specified in 2VAC5-585-450 B and E.<sup>P</sup>
5. Time only, as the public health control as specified under 2VAC5-585-850 D, may not be used for raw eggs.<sup>P</sup>
6. Subdivision 2 b of this section does not apply if:
  - a. The raw eggs are combined immediately before cooking for one consumer's serving at a single meal, cooked as specified under 2VAC5-585-700 A 1, and served immediately, such as an omelet, soufflé, or scrambled eggs;
  - b. The raw eggs are combined as an ingredient immediately before baking and the eggs are thoroughly cooked to a ready-to-eat form, such as a cake, muffin, or bread; or
  - c. The preparation of the food is conducted under a HACCP plan that:
    - (1) Identifies the food to be prepared;
    - (2) Prohibits contacting ready-to-eat food with bare hands;
    - (3) Includes specifications and practices that ensure:
      - (a) Salmonella Enteritidis growth is controlled before and after cooking; and
      - (b) Salmonella Enteritidis is destroyed by cooking the eggs according to the temperature and time specified in 2VAC5-585-700 A 2;
    - (4) Contains the information specified under subdivision 5 of 2VAC5-585-3630 including procedures that:
      - (a) Control cross contamination of ready-to-eat food with raw eggs; and
      - (b) Delineate cleaning and sanitization procedures for food-contact surfaces; and
    - (5) Describes the training program that ensures that the food employee responsible for the preparation of the food understands the procedures to be used.
7. Except as specified in subdivision 8 of this section, food may be re-served as specified under 2VAC5-585-680 B 1 and 2.
8. Food may not be re-served under the following conditions:
  - a. Any food served to patients or clients who are under contact precautions in medical isolation or quarantine, or protective environment isolation may not be re-served to others outside.
  - b. Packages of food from any patients, clients, or other consumers should not be re-served to persons in protective environment isolation.

**2VAC5-585-1300. Molluscan shellfish tanks.**

A. Except as specified under subsection B of this section, molluscan shellfish life support system display tanks may not be used to store or display shellfish that are offered for human consumption and shall be conspicuously marked so that it is obvious to consumers that the shellfish are for display only.<sup>Pf</sup>

B. Molluscan shellfish life-support system display tanks that are used to store or display shellfish that are offered for human consumption shall be operated and maintained in accordance with a variance granted by the department as specified in 2VAC5-585-3540 and a HACCP plan that:<sup>Pf</sup>

1. Is submitted by the ~~operator~~ permit holder and approved as specified under 2VAC5-585-3541;<sup>Pf</sup> and
2. Ensures that:
  - a. Water used with fish other than molluscan shellfish does not flow into the molluscan tank;<sup>Pf</sup>
  - b. The safety and quality of the shellfish as they were received are not compromised by the use of the tank;<sup>Pf</sup> and
  - c. The identity of the source of the shellstock is retained as specified under 2VAC5-585-440.<sup>Pf</sup>

**2VAC5-585-1460. Manual warewashing, sink compartment requirements.**

A. Except as specified in subsection C of this section, a sink with at least three compartments shall be provided for manually washing, rinsing, and sanitizing equipment and utensils.<sup>Pf</sup>

B. Sink compartments shall be large enough to accommodate immersion of the largest equipment and utensils. If equipment or utensils are too large for the warewashing sink, a warewashing machine or alternative equipment as specified in subsection C of this section shall be used.<sup>Pf</sup>

C. Alternative manual warewashing equipment may be used when there are special cleaning needs or constraints and its use is approved. Alternative manual warewashing equipment may include:

1. High-pressure detergent sprayers;
2. Low-pressure or line-pressure spray detergent foamers;
3. Other task-specific cleaning equipment;
4. Brushes or other implements;
5. Two-compartment sinks as specified under subsections D and E of this section; or
6. Receptacles that substitute for the compartments of a multicompartment sink.

D. Before a two-compartment sink is used:

1. The ~~operator~~ permit holder shall have its use approved; and
2. The ~~operator~~ permit holder shall limit the number of kitchenware items cleaned and sanitized in the two-compartment sink, shall limit warewashing to batch operations for cleaning kitchenware such as between cutting one type of raw meat and another or cleanup at the end of a shift, and shall:
  - a. Make up the cleaning and sanitizing solutions immediately before use and drain them immediately after use; and
  - b. Use a detergent-sanitizer to sanitize and apply the detergent-sanitizer in accordance with the manufacturer's label instructions and as specified under 2VAC5-585-1710; or
  - c. Use a hot water sanitization immersion step as specified under subdivision 3 of 2VAC5-585-1860.

E. A two-compartment sink may not be used for warewashing operations where cleaning and sanitizing solutions are used for a continuous or intermittent flow of kitchenware or tableware in an ongoing warewashing process.

**2VAC5-585-1540. Equipment, clothes washers and dryers, and storage cabinets, contamination prevention.**

A. Except as specified in subsection B of this section, equipment, a cabinet used for the storage of food, or a cabinet used to store cleaned and sanitized equipment, utensils, laundered linens, and single-service and single-use articles may not be located:

1. In locker rooms;
2. In toilet rooms;<sup>Pf</sup>
3. In garbage rooms;
4. In mechanical rooms;
5. Under sewer lines that are not shielded to intercept potential drips;
6. Under leaking water lines including leaking automatic fire sprinkler heads or under lines on which

water has condensed;

7. Under open stairwells; or

8. Under other sources of contamination.

B. A storage cabinet used for linens or single-service or single-use articles may be stored in a locker room.

C. If a mechanical clothes washer or dryer is provided, it shall be located (i) so that the washer or dryer is protected from contamination and (ii) only where there is no exposed food; clean equipment, utensils, and linens; or unwrapped single-service and single-use articles.

**2VAC5-585-1700. Manual and mechanical warewashing equipment, chemical sanitization - temperature, pH, concentration, and hardness.**

A chemical sanitizer used in a sanitizing solution for a manual or mechanical operation at contact times specified under subdivision 3 of 2VAC5-585-1900 shall meet the criteria specified under 2VAC5-585-3380, shall be used in accordance with the EPA-registered label use instructions,<sup>P</sup> and shall be used as follows:

1. A chlorine solution shall have a minimum temperature based on the concentration and pH of the solution as listed in the following chart;<sup>P</sup>

Minimum Concentration mg/L (ppm)	Minimum Temperature	
	pH 10 or less °F (°C)	pH 8.0 or less °F (°C)
25-49	120 (49)	120 (49)
50-99	100 (38)	75 (24)
100	55 (13)	55 (13)

2. An iodine solution shall have a:

a. Minimum temperature of 68°F (20°C);<sup>P</sup>

b. pH of 5.0 or less or a pH no higher than the level for which the manufacturer specifies the solution is effective;<sup>P</sup> and

c. Concentration between 12.5 mg/L (ppm) and 25 mg/L (ppm);<sup>P</sup>

3. A quaternary ammonium compound solution shall:

a. Have a minimum temperature of 75°F (24°C);<sup>P</sup>

b. Have a concentration as specified under 2VAC5-585-3380 and as indicated by the manufacturer's use directions included in the labeling;<sup>P</sup> and

c. Be used only in water with 500 mg/L (ppm) hardness or less or in water having a hardness no greater than specified by the EPA-registered label use instructions;<sup>P</sup>

4. If another solution of a chemical specified under subdivisions 1 through 3 of this section is used, the ~~operator~~ permit holder shall demonstrate to the department that the solution achieves sanitization and the use of the solution shall be approved;<sup>P</sup> or

5. If a chemical sanitizer other than chlorine, iodine, or a quaternary ammonium compound is used, it shall be applied in accordance with the EPA-registered label use instructions;<sup>P</sup> and

6. If a chemical sanitizer is generated by a device located on site at the food establishment, it shall be used as specified in subdivisions 1 through 4 of this section and shall be produced by a device that:

a. Complies with regulation as specified in §§ 2(q)(1) and 12 of the Federal Insecticide, Fungicide, and Rodenticide Act (7 USC § 136(q)(1) and 7 USC § 136j);<sup>P</sup>

b. Complies with 40 CFR 152.500 and 40 CFR 156.10;<sup>P</sup>

c. Displays the EPA device manufacturing facility registration number on the device;<sup>Pf</sup> and

d. Is operated and maintained in accordance with manufacturer's instructions.<sup>Pf</sup>

**2VAC5-585-2010. Prohibitions.**

A. Except as specified in subsection B of this section, cleaned and sanitized equipment, utensils, laundered linens, and single-service and single-use articles may not be stored:

1. In locker rooms;

2. In toilet rooms;<sup>Pf</sup>

3. In garbage rooms;

4. In mechanical rooms;
5. Under sewer lines that are not shielded to intercept potential drips;
6. Under leaking water lines including leaking automatic fire sprinkler heads or under lines on which water has condensed;
7. Under open stairwells; or
8. Under other sources of contamination.

B. Laundered linens and single-service and single-use articles that are packaged or in a facility such as a cabinet may be stored in a locker room.

#### **2VAC5-585-2100. Sampling.**

<sup>Pf</sup> A. Water from a private well shall be sampled and tested at least annually for nitrate and total coliform.

B. If nitrate, which is reported as "N" on the test results, exceeds 10 mg/L (ppm), the ~~operator~~ permit holder shall notify the department within 24 hours from when the ~~operator~~ permit holder is notified of the nitrate positive test result.<sup>Pf</sup>

C. If a sample is total coliform positive, the positive culture medium shall be further analyzed to determine if E. coli is present. The ~~operator~~ permit holder shall notify the department within two calendar days from when the ~~operator~~ permit holder is notified of the coliform-positive test result.<sup>Pf</sup>

D. If E. coli is present, the ~~operator~~ permit holder shall notify the department within 24 hours from when the ~~operator~~ permit holder is notified of the E. coli positive test result.<sup>Pf</sup>

#### **2VAC5-585-2190. Handwashing sink, ~~water temperature, and flow~~ installation.**

A. A handwashing sink shall be equipped to provide water at a temperature of at least 100°F (38°C) ~~85°F (29.4°C)~~ through a mixing valve or combination faucet.<sup>Pf</sup>

B. A steam mixing valve may not be used at a handwashing sink.

C. A self-closing, slow-closing, or metering faucet shall provide a flow of water for at least 15 seconds without the need to reactivate the faucet.

D. An automatic handwashing facility shall be installed in accordance with manufacturer's instructions.

#### **2VAC5-585-3140. Employee accommodations, designated areas.**

A. Areas designated for employees to eat, drink, and use tobacco products shall be located so that food, equipment, linens, and single-service and single-use articles are protected from contamination.

B. Lockers or other suitable facilities shall be located in a designated room or area where contamination of food, equipment, utensils, linens, and single-service and single-use articles cannot occur.

#### **2VAC5-585-3150. Distressed merchandise, segregation and location.**

Products that are held by the ~~operator~~ permit holder for credit, redemption, or return to the distributor, such as damaged, spoiled, or recalled products, shall be segregated and held in designated areas that are separated from food, equipment, utensils, linens, and single-service and single-use articles.<sup>Pf</sup>

#### **2VAC5-585-3310. Prohibiting animals.**

A. Except as specified in subsections B, C, and D of this section, live animals may not be allowed on the premises of a food establishment.<sup>Pf</sup>

B. Live animals may be allowed in the following situations if the contamination of food; clean equipment, utensils, and linens; and unwrapped single-service and single-use articles cannot result:

1. Edible fish or decorative fish in aquariums, shellfish or crustacea on ice or under refrigeration, and shellfish and crustacea in display tank systems;
2. Patrol dogs accompanying police or security officers in offices and dining, sales, and storage areas, and sentry dogs running loose in outside fenced areas;
3. In areas that are not used for food preparation and that are usually open for customers, such as dining and sales areas, service animals that are controlled by the disabled employee or person, if a health or safety hazard will not result from the presence or activities of the service animal;
4. Pets in the common dining areas of institutional care facilities such as nursing homes, assisted living facilities, group homes, or residential care facilities at times other than during meals if:
  - a. Effective partitioning and self-closing doors separate the common dining areas from food storage or food preparation areas;
  - b. Condiments, equipment, and utensils are stored in enclosed cabinets or removed from the common dining areas when pets are present; and
  - c. Dining areas including tables, countertops, and similar surfaces are effectively cleaned before the next meal service;

5. In areas that are not used for food preparation, storage, sales, display, or dining, in which there are caged animals or animals that are similarly confined, such as in a variety store that sells pets or a tourist park that displays animals; and

6. Dogs in outdoor dining areas if:

- a. The outdoor dining area is not fully enclosed with floor to ceiling walls and is not considered a part of the interior physical facility.
- b. The outdoor dining area is equipped with an entrance that is separate from the main entrance to the food establishment, and the separate entrance serves as the sole means of entry for patrons accompanied by dogs.
- c. A sign stating that dogs are allowed in the outdoor dining area is posted at each entrance to the outdoor dining area in such a manner as to be clearly observable by the public.
- d. A sign within the outdoor dining area stating the requirements as specified in subdivisions 6 e, f, and g of this subsection is provided in such a manner as to be clearly observable by the public.
- e. Food and water provided to dogs is served using equipment that is not used for the service of food to a person or is served in single-use articles.
- f. Dogs are not allowed on chairs, seats, benches, or tables.
- g. Dogs are kept on a leash or within a pet carrier and under the control of an adult at all times.
- h. The establishment provides effective means for cleaning up dog vomitus and fecal matter.

C. A dog may be allowed within a designated area inside or on the premises of, except in any area used for the manufacture of food products, a distillery, winery, farm winery, brewery, or limited brewery licensed pursuant to ~~§ 4.1-206~~ § 4.1-206.1 of the Code of Virginia, ~~a winery or farm winery licensed pursuant to § 4.1-207 of the Code of Virginia, or a brewery or farm brewery licensed pursuant to § 4.1-208 of the Code of Virginia.~~

D. Live or dead fish bait may be stored if contamination of food; clean equipment, utensils, and linens; and unwrapped single-service and single-use articles cannot result.

#### **2VAC5-585-3360. Conditions of use.**

A. Poisonous or toxic materials shall be:

1. Used according to:

- a. Law and this chapter;
- b. Manufacturer's use directions included in labeling, and, for a pesticide, manufacturer's label instructions that state that use is allowed in a food establishment;<sup>P</sup>
- c. The conditions of certification, if certification is required, for use of the pest control materials;<sup>P</sup> and
- d. Additional conditions that may be established by the department; and

2. Applied so that:

- a. A hazard to employees or other persons is not constituted;<sup>P</sup> and
- b. Contamination including toxic residues due to drip, drain, fog, splash, or spray on food, equipment, utensils, linens, and single-service and single-use articles is prevented, ~~and for a restricted-use pesticide, this is achieved. Contamination shall be prevented by:~~<sup>P</sup>
  - (1) Removing the items;<sup>P</sup>
  - (2) Covering the items with impermeable covers;<sup>P</sup> or
  - ~~(3) Taking taking other appropriate preventive actions;~~<sup>P</sup> and
  - ~~(4) (3) Cleaning and sanitizing equipment and utensils after the application.~~<sup>P</sup>

B. A restricted use pesticide shall be applied only by an applicator certified as defined in 7 USC § 136(e); §§ 3.2-3929, 3.2-3930, and 3.2-3931 of the Code of Virginia (Virginia Pesticide Control Act); or a person under the direct supervision of a certified applicator.<sup>Pf</sup>

#### **2VAC5-585-3370. Poisonous or toxic material containers.**

A container previously used to store poisonous or toxic materials may not be used to store, transport, or dispense food, ~~equipment, utensils, linens, or single-service or single-use articles.~~<sup>P</sup>

#### **2VAC5-585-3510. Public health protection.**

A. The department shall apply this chapter to promote its underlying purpose, as specified in 2VAC5-585-20, of safeguarding public health and ensuring that food is safe, unadulterated, and honestly presented when offered to the consumer or donated.

B. In enforcing the provisions of this chapter, the department shall assess existing facilities or

equipment that were in use before the effective date of this chapter based on the following considerations:

1. Whether the facilities or equipment are in good repair and capable of being maintained in a sanitary condition;
2. Whether food-contact surfaces comply with 2VAC5-585-960 through 2VAC5-585-1060;
3. Whether the capacities of cooling, heating, and holding equipment are sufficient to comply with 2VAC5-585-1450; and
4. The existence of a documented agreement with the ~~establishment operator~~ permit holder that the facilities or equipment will be replaced as specified in subdivision ~~6~~7 of 2VAC5-585-3750.

**2VAC5-585-3520. Preventing health hazards, provision for conditions not addressed.**

A. If necessary to protect against public health hazards or nuisances, the department may impose specific requirements in addition to the requirements contained in this chapter that are authorized by law.

B. The department shall document the conditions that necessitate the imposition of additional requirements and the underlying public health rationale. The documentation shall be provided to the ~~establishment operator~~ permit applicant, permit holder, or person in charge and a copy shall be maintained in the department's file for the food establishment.

**2VAC5-585-3542. Conformance with approved procedures.**

If the department grants a variance as specified in 2VAC5-585-3540, or a HACCP plan is otherwise required as specified under 2VAC5-585-3620, the ~~operator~~ permit holder shall:

1. Maintain the approved variance at the food establishment;<sup>Pf</sup>
2. Comply with the HACCP plans and procedures that are submitted as specified under 2VAC5-585-3630 and approved as a basis for the modification or waiver;<sup>P</sup> and
3. Maintain and provide to the department, upon request, records specified under subdivisions 5 and 6 c of 2VAC5-585-3630 that demonstrate that the following are routinely employed:
  - a. Procedures for monitoring critical control points;<sup>Pf</sup>
  - b. Monitoring of the critical control points;<sup>Pf</sup>
  - c. Verification of the effectiveness of the operation or process;<sup>Pf</sup> and
  - d. Necessary corrective actions if there is failure at a critical control point.<sup>Pf</sup>

**2VAC5-585-3600. Facility and operating plans - when plans are required.**

~~An operator~~ A permit applicant or permit holder shall submit to the department properly prepared plans and specifications for review and approval before:

1. The construction of a food establishment;<sup>Pf</sup>
2. The conversion of an existing structure for use as a food establishment;<sup>Pf</sup> or
3. The remodeling of a food establishment or a change of type of food establishment or food operation if the department determines that plans and specifications are necessary to ensure compliance with this chapter.<sup>Pf</sup>

**2VAC5-585-3620. When a HACCP plan is required.**

A. Before engaging in an activity that requires a HACCP plan, ~~an operator~~ a permit applicant or permit holder shall submit to the department for approval a properly prepared HACCP plan as specified under 2VAC5-585-3630 and the relevant provisions of this chapter if:

1. Submission of a HACCP plan is required according to law;
2. A variance is required as specified under 2VAC5-585-700 D 4, 2VAC5-585-860, or 2VAC5-585-1300 B; or
3. The department determines that a food preparation or processing method requires a variance based on a plan submittal specified under 2VAC5-585-3610, an inspectional finding, or a variance request.

B. Before engaging in reduced oxygen packaging without a variance as specified under 2VAC5-585-870, ~~an operator~~ a permit applicant or permit holder shall submit a properly prepared HACCP plan to the department.

**2VAC5-585-3630. Contents of a HACCP plan.**

For a food establishment that is required under 2VAC5-585-3620 to have a HACCP plan, the ~~operator~~ permit applicant or permit holder shall submit to the department a properly prepared HACCP plan that includes:

1. General information such as the name of the ~~operator~~ permit applicant or permit holder, the food establishment address, and contact information;

2. A categorization of the types of time/temperature control for safety foods that are to be controlled under the HACCP plan;<sup>Pf</sup>
3. A flow diagram or chart for each specific food or category type that identifies:
  - a. Each step in the process;<sup>Pf</sup> and
  - b. The steps that are critical control points;<sup>Pf</sup>
4. The ingredients, recipes, or formulations; materials and equipment used in the preparation of each specific food or category type; and methods and procedural control measures that address the food safety concerns involved;<sup>Pf</sup>
5. A critical control points summary for each specific food category type that clearly identifies:
  - a. Each critical control point;<sup>Pf</sup>
  - b. The significant hazards for each critical control point;<sup>Pf</sup>
  - c. The critical limits for each critical control point;<sup>Pf</sup>
  - d. The method and frequency for monitoring and controlling each critical control point by the designated food employee or the person in charge;<sup>Pf</sup>
  - e. Action to be taken by the designated food employee or person in charge if the critical limits for each critical control point are not met;<sup>Pf</sup>
  - f. The method and frequency for the person in charge to routinely verify that the food employee is following standard operating procedures and monitoring critical control points;<sup>Pf</sup> and
  - g. Records to be maintained by the person in charge to demonstrate that the HACCP plan is properly operated and managed;<sup>Pf</sup>
6. Supporting documents such as:
  - a. Food employee and supervisory training plan and operating procedures that address the food safety issues of concern;<sup>Pf</sup>
  - b. Copies of blank record forms that are necessary to implement the HACCP plan;<sup>Pf</sup>
  - c. Additional scientific data or other information, as required by the department, supporting the determination that food safety is not compromised by the proposal;<sup>Pf</sup> and
7. Any other information required by the department.

**2VAC5-585-3670. Submission 30 calendar days before proposed opening.**

A person seeking to operate a food establishment shall submit an application for a permit at least 30 calendar days before the date planned for opening the food establishment.

**2VAC5-585-3680. Form of submission.**

A person seeking to operate a food establishment shall submit to the department a written application for a permit on a form provided by the department.

**2VAC5-585-3690. Qualifications and responsibilities of applicants.**

To qualify for a permit, an applicant shall:

1. Be an owner of the food establishment or an officer of the establishment's legal ownership;
2. Comply with the requirements of this chapter; and
3. As specified under 2VAC5-585-3820, allow the department access to the food establishment and provide the department with required information and records.

**2VAC5-585-3700. Contents of the application.**

The application for a permit shall include:

1. The name, mailing address, telephone number, and signature of the person applying for the permit;
2. The name, mailing address, and location of the food establishment; and
3. Other information required by the department.

**2VAC5-585-3710. New, converted, or remodeled establishments.**

The department shall issue a permit to an applicant that is required to submit plans as specified in 2VAC5-585-3600 after:

1. The applicant submits a properly completed application;
2. The department reviews and approves the required plans, specifications, and information; and
3. A preoperational inspection required by 2VAC5-585-3650 shows that the establishment is built or remodeled in accordance with the approved plans and specifications and that the establishment is in compliance with this chapter.

**2VAC5-585-3720. Existing establishments, change of ownership, or termination.**

A. The department may issue a permit to a new owner of an existing food establishment after a properly-completed application is submitted, reviewed, and approved and an inspection shows that the establishment is in compliance with this chapter.

B. An existing food establishment shall notify the department in writing of a transfer of legal ownership or termination of business operations. Such notice shall be submitted in writing to the department at least 30 days prior to the transfer of legal ownership or termination of business operation.

**2VAC5-585-3740. Responsibilities of the department.**

A. At the time of the initial inspection, the department shall provide to the ~~operator~~ permit holder a copy of this chapter so that the ~~operator~~ permit holder is notified of the compliance requirements and the conditions of retention, as specified under 2VAC5-585-3750, that are applicable to the food establishment.

B. Failure to provide the information specified in subsection A of this section does not prevent the department from taking authorized action or seeking remedies if the ~~operator~~ permit holder fails to comply with this chapter or an order, warning, or directive of the department.

**2VAC5-585-3750. Responsibilities of the ~~operator~~ permit holder.**

The ~~operator~~ permit holder shall:

1. Post the permit in a location in the food establishment that is conspicuous to consumers;
2. Comply with the provisions of this chapter including the conditions of a granted variance as specified under 2VAC5-585-3542 and approved plans as specified under 2VAC5-585-3610;
- ~~2.~~ 3. If a food establishment is required under 2VAC5-585-3620 to operate under a HACCP plan, comply with the plan as specified under 2VAC5-585-3542;
- ~~3.~~ 4. Immediately contact the department to report an illness of a food employee or conditional employee as specified under 2VAC5-585-80 B;
4. 5. Immediately discontinue operations and notify the department if an imminent health hazard may exist as specified under 2VAC5-585-3910;
- ~~5.~~ 6. Allow authorized representatives of the commissioner access to the food establishment as specified under 2VAC5-585-3820;
- ~~6.~~ 7. Replace existing facilities and equipment specified in 2VAC5-585-3510 with facilities and equipment that comply with this chapter if:
  - a. The department directs the replacement because the facilities and equipment constitute a public health hazard or nuisance or no longer comply with the criteria upon which the facilities and equipment were accepted;
  - b. The department directs the replacement of the facilities and equipment because of a change of ownership; or
  - c. The facilities and equipment are replaced in the normal course of operation;
- ~~7.~~ 8. Comply with directives of the department, including timeframes for corrective actions specified in inspection reports, notices, orders, warnings, and other directives issued by the department in regard to the ~~operator's~~ permit holder's food establishment or in response to community emergencies;
- ~~8.~~ 9. Accept notices issued and served by the department according to law;
- ~~9.~~ 10. Be subject to the administrative, civil, injunctive, and criminal remedies authorized in law for failure to comply with this chapter or a directive of the department, including timeframes for corrective actions specified in inspection reports, notices, orders, warnings, and other directives; and
- ~~10.~~ 11. Notify customers that a copy of the most recent establishment inspection report is available upon request by posting a sign or placard in a location in the food establishment that is conspicuous to customers or by another method acceptable to the department.

**2VAC5-585-3760. Permits not transferable.**

A permit shall not be transferred from:

1. One person to another person;
2. One food establishment to another food establishment; or
3. One type of food operation to another type of food operation, if the food operation changes from the type of operation specified in the application as specified under 2VAC5-585-3700 and the change in operation is not approved.



**2VAC5-585-3860. Documenting information and observations.**

The authorized representative of the commissioner shall document :

1. Administrative information about the food establishment's legal identity, street and mailing addresses, type of establishment and operation, inspection date, and other information such as type of water supply and sewage disposal, and personnel certificates that may be required; and
2. Specific factual observations of violative conditions or other deviations from this chapter that require correction by the establishment ~~operator~~ permit holder including:
  - a. Failure of the person in charge to demonstrate the knowledge of foodborne illness prevention, application of HACCP principles, and the requirements of this chapter specified under 2VAC5-585-60;
  - b. Failure of food employees, conditional employees, and the person in charge to report a disease or medical condition as specified under 2VAC5-585-80 B and D;
  - c. Nonconformance with priority items and priority foundation items of this chapter;
  - d. Failure of the appropriate food employees to demonstrate their knowledge of, and ability to perform in accordance with, the procedural, monitoring, verification, and corrective action practices required by the department as specified under 2VAC5-585-3542;
  - e. Failure of the person in charge to provide records required by the department for determining conformance with a HACCP plan as specified under subdivision 5 g of 2VAC5-585-3630; and
  - f. Nonconformance with critical limits of a HACCP plan.

**2VAC5-585-3890. Refusal to sign acknowledgment.**

The authorized representative of the commissioner shall:

1. Inform a person who declines to sign an acknowledgment of receipt of inspectional findings as specified in 2VAC5-585-3880 that:
  - a. An acknowledgment of receipt is not an agreement with findings;
  - b. Refusal to sign an acknowledgment of receipt will not affect the ~~operator's~~ permit holder's obligation to correct the violations noted in the inspection report within the time frames specified; and
  - c. A refusal to sign an acknowledgment of receipt is noted in the inspection report and conveyed to the department's historical record for the food establishment; and
2. Make a final request that the person in charge sign an acknowledgment receipt of inspectional findings.

**2VAC5-585-3910. Imminent health hazard, ceasing operations and reporting.**

A. Except as specified in subsections B and C of this section, ~~an operator~~ a permit holder shall immediately discontinue operations and notify the department if an imminent health hazard may exist because of an emergency such as a fire, flood, extended interruption of electrical or water service, sewage backup, misuse of poisonous or toxic materials, onset of an apparent foodborne illness outbreak, gross insanitary occurrence or condition, or other circumstance that may endanger public health.<sup>P</sup>

B. ~~An operator~~ A permit holder need not discontinue operations in an area of an establishment that is unaffected by the imminent health hazard.

C. Considering the nature of the potential hazard involved and the complexity of the corrective action needed, the department may agree to continuing operations in the event of an extended interruption of electrical or water service if:

1. A written emergency operating plan has been approved by the department;
2. Immediate corrective action is taken to eliminate, prevent, or control any food safety risk and imminent health hazard associated with the electrical or water service interruption; and
3. The department is informed upon implementation of the written emergency operating plan.

**2VAC5-585-3920. Resumption of operations.**

If operations are discontinued as specified under 2VAC5-585-3910 or otherwise according to law, the ~~operator~~ permit holder shall obtain approval from the department before resuming operations.

**2VAC5-585-3930. Priority or priority foundation item, timely correction.**

A. Except as specified in subsection B of this section, ~~an operator~~ a permit holder or person in charge shall at the time of inspection correct a violation of a priority item or priority foundation item of this chapter and implement corrective actions for a HACCP plan provision that is not in compliance with its critical limit.<sup>Pf</sup>

B. Considering the nature of the potential hazard involved and the complexity of the corrective action

needed, the department may agree to or specify a longer timeframe, not to exceed:

1. 72 hours after the inspection, for the ~~operator~~ permit holder to correct violations of a priority item; or
2. 10 calendar days after the inspection, for the ~~operator~~ permit holder to correct violations of a priority foundation item or HACCP plan deviations.

**2VAC5-585-3940. Verification and documentation of correction.**

A. After observing at the time of inspection a correction of a violation of a priority item or priority foundation item or a HACCP plan deviation, the authorized representative of the commissioner shall enter the violation and information about the corrective action on the inspection report.

B. As specified under 2VAC5-585-3930 B, after receiving notification that the ~~operator~~ permit holder has corrected a violation of a priority item or priority foundation item or HACCP plan deviation, or at the end of the specified period of time, the authorized representative shall verify correction of the violation or deviation during the next inspection of the establishment and shall document the information on an inspection report, and enter the report in the department's records.

**2VAC5-585-3950. Core items, timely correction.**

A. Except as specified in subsection B of this section, the ~~operator~~ permit holder or person in charge shall correct core items by a date and time agreed to or specified by the department but no later than 90 calendar days after the inspection.

B. The department may approve a compliance schedule that extends beyond the time limits specified under subsection A of this section if a written schedule of compliance is submitted by the ~~operator~~ permit holder and no health hazard exists or will result from allowing an extended schedule for compliance.

**2VAC5-585-4050. Restriction or exclusion of food employee or closure of food establishment.**

Based on the findings of an investigation related to a food employee or conditional employee who is suspected of being infected or diseased, the department may issue an order to the suspected food employee, conditional employee, or ~~operator~~ permit holder instituting one or more of the following control measures:

1. Restricting the food employee or conditional employee;
2. Excluding the food employee or conditional employee; or
3. Closing the food establishment in accordance with law.

**2VAC5-585-4060. Restriction or exclusion order: warning or hearing not required, information required in order.**

Based on the findings of the investigation as specified in 2VAC5-585-4040 and to control disease transmission, the department may issue an order of restriction or exclusion to the suspected food employee or the ~~operator~~ permit holder without prior warning, notice of hearing, or a hearing if the order:

1. States the reasons for the restriction or exclusion that is ordered;
2. States the evidence that the food employee or ~~operator~~ permit holder shall provide in order to demonstrate that the reasons for the restriction or exclusion are eliminated;
3. States that the suspected food employee or the ~~operator~~ permit holder may request an appeal hearing by submitting a timely request as provided in law; and
4. Provides the name and address of the authorized representative of the commissioner to whom a request for appeal hearing be made.

Documents Incorporated by Reference (2VAC5-585)

[Approved Drug Products with Therapeutic Equivalence Evaluations, 39th Edition, 2019, U.S. Department of Health and Human Services, Food and Drug Administration, Center for Drug Evaluation and Research, Office of Pharmaceutical Science, Office of Generic Drugs at <http://www.fda.gov/cder/ob/default.htm>](http://www.fda.gov/cder/ob/default.htm)

[Conference for Food Protection Standards for Accreditation of Food Protection Manager Certification Programs, April 2018, Conference for Food Protection, 30 Elliott Court, Martinsville, IN 46151-1331](#)

[Conference for Food Protection Standard for Accreditation of Food Protection Manager Certification Programs, April 2023, Conference for Food Protection, 30 Elliott Court, Martinsville, IN 46151-1331](#)

[Grade "A" Pasteurized Milk Ordinance, 2017 Revision, U.S. Department of Health and Human Services, Public Health Service, Food and Drug Administration, Milk Safety Branch \(HFS-626\), 5100 Paint Branch Parkway, College Park, MD 20740-3835](#)

Interstate Certified Shellfish Shippers List (updated monthly), published by the U.S. Department of

Health and Human Services, Public Health Service, Food and Drug Administration, Office of Seafood (HFS-417), 5100 Paint Branch Parkway, College Park, MD 20740-3835

[National Shellfish Sanitation Program \(NSSP\) Guide for the Control of Molluscan Shellfish, 2017 Revision, U.S. Department of Health and Human Services, Public Health Service, Food and Drug Administration, Office of Seafood \(HFS-417\), 5100 Paint Branch Parkway, College Park, MD 20740-3835](#)

[NSF/ANSI 18-2016 Manual Food and Beverage Dispensing Equipment, 2012, NSF International, 789 North Dixboro Road, P.O. Box 130140, Ann Arbor, MI 48113-0140, \[www.nsf.org\]\(http://www.nsf.org\)](#)

[United States Standards, Grades, and Weight Classes for Shell Eggs, AMS-56, effective July 20, 2000, U.S. Department of Agriculture, Agricultural Marketing Service, Poultry Programs, STOP 0259, Room 3944-South, 1400 Independence Avenue, SW, Washington, DC 20250-0259](#)

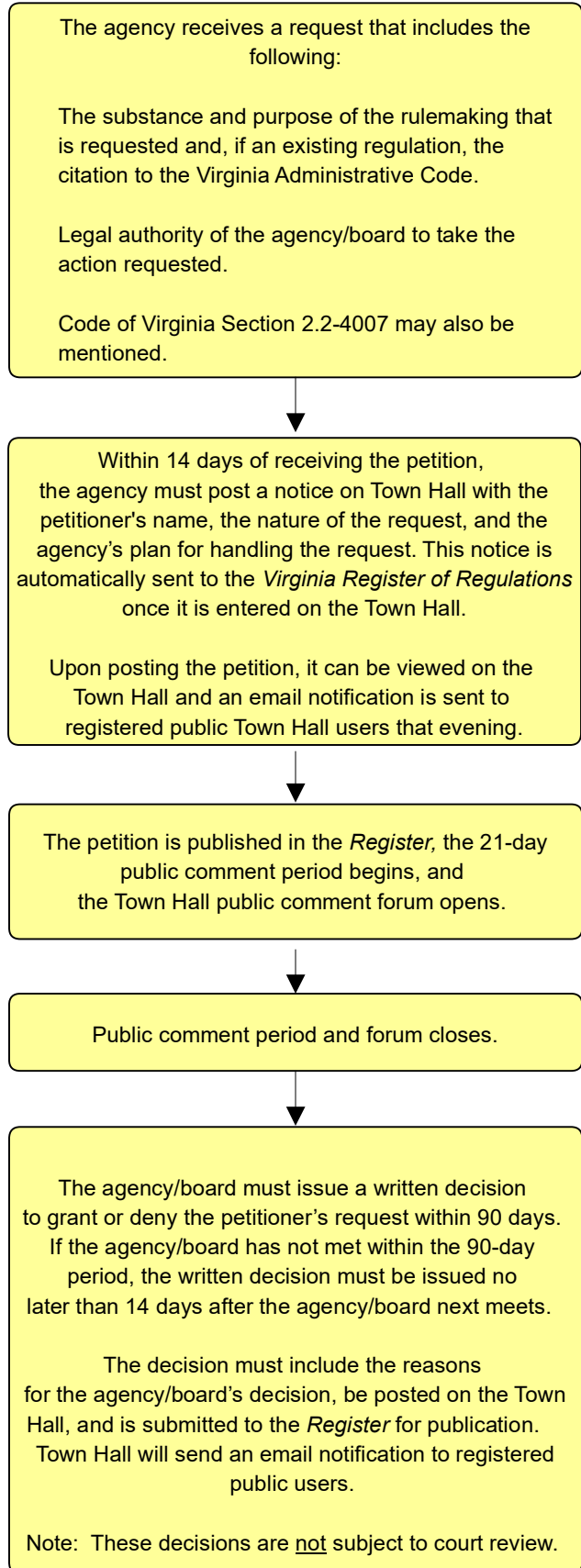
# State Agency Guide to Petitions for Rulemaking

A petition for rulemaking is a request to an agency/board to promulgate a new regulation, or amend or repeal an existing regulation.

Sources: Section 2.2-4007 of the Code of Virginia and Office of Regulatory Management Procedures (2022) to implement Executive Order 19 (2022)

For more information, visit the Virginia Regulatory Town Hall at [townhall.virginia.gov](https://townhall.virginia.gov)

## Petition Process:



To view a petition for rulemaking on Town Hall: <https://townhall.virginia.gov/L/ViewPetition.cfm?petitionId=344>

This chart was produced by the Virginia Department of Planning and Budget's Planning, Evaluation, and Regulation Division, 12/22



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August 1, 2023

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**Petition for Rulemaking Pursuant to Virginia Code § 2.2-4007(A):**  
**Minimum Welfare Standards for the Transport of Live Poultry to Slaughter**

**I. Background**

Petitioner formally requests that the Virginia Board of Agriculture and Consumer Services (the “Board”) adopt regulations setting minimum welfare standards for the transport of live poultry to slaughter. Petitioner is a legal advocacy organization whose mission is to end the suffering of animals in slaughterhouses, farms, and laboratories by discovering, exposing, and challenging unlawful conduct in all its forms.<sup>1</sup> Petitioner is incorporated and headquartered in Virginia<sup>2</sup> and regularly engages in legal actions aimed at mitigating cruelty inflicted upon animals in the Commonwealth.<sup>3</sup>

Each year, nearly 300 million chickens and turkeys are transported, processed, and sold in Virginia.<sup>4</sup> In the United States, poultry sales exceed those of either beef, pork, or mutton by weight,<sup>5</sup> while the number of individual birds processed dwarfs that of all other slaughtered livestock combined.<sup>6</sup> Despite this, poultry are often excluded from state and federal laws governing welfare standards for animals in agriculture.<sup>7</sup> Furthermore, state and federal animal

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<sup>1</sup> Home, Animal Partisan, <https://www.animalpartisan.org/> (last visited Aug. 1, 2023).

<sup>2</sup> Animal Partisan, Inc., Virginia State Corporation Commission, <https://cis.scc.virginia.gov/EntitySearch/BusinessInformation?businessId=11433943&source=FromEntityResult&isSeries%20=%20false> (last visited Aug. 1, 2023).

<sup>3</sup> Cruelty complaint filed against Virginia slaughterhouse for shooting pig four times in the head, Animal Partisan, <https://www.animalpartisan.org/news/cruelty-complaint-filed-against-virginia-slaughterhouse-for-shooting-pig-four-times-in-head> (last visited Aug. 1, 2023); Lawsuit filed to compel VCU to turn over public records related to school’s animal research, Animal Partisan, <https://www.animalpartisan.org/news/lawsuit-filed-to-compel-vcu-to-turn-over-public-records-related-to-schools-animal-research> (last visited Aug. 1, 2023).

<sup>4</sup> See NAT’L AGRIC. STAT. SERV., U.S. DEP’T OF AGRIC., AC-17-A-46, 2017 CENSUS OF AGRICULTURE (2019).

<sup>5</sup> The United States Meat Industry at a Glance, N. AM. MEAT INST., <https://www.meat institute.org/index.php?ht=d/sp/i/47465/pid/47465> (last visited June 7, 2023).

<sup>6</sup> See ANIMAL WELFARE INST., HUMANE SLAUGHTER UPDATE: FEDERAL AND STATE OVERSIGHT OF THE WELFARE OF FARM ANIMALS AT SLAUGHTER 2 (2020) [hereinafter HUMANE SLAUGHTER UPDATE].

<sup>7</sup> See, e.g., 9 C.F.R. § 313.1-313.50 (regulating humane methods of slaughter for “livestock” but not for poultry); 2 VA. ADMIN. CODE 5-210-30 (2022) (incorporating by reference 9 C.F.R. § 313).

cruelty laws often exempt certain agricultural activities,<sup>8</sup> making domestic fowl raised for food simultaneously one of the most abundant animal groups in the United States and one of the least protected.

Researchers have long recognized the potential for transport to subject livestock and poultry to unnecessary stress and suffering.<sup>9</sup> However, regulations setting minimum welfare standards for transport remain underdeveloped compared to those regulating activities within slaughterhouses.<sup>10</sup> Currently, the only Virginia law setting standards for the transport of live poultry is Virginia Code § 3.2-6508, which sets a maximum twenty-four-hour transport time without providing animals an opportunity to be "exercised, properly rested, fed and watered as necessary."<sup>11</sup> The law also requires that "[a]dequate space in the primary enclosure within any type of conveyance . . . be provided each animal depending upon the particular type and species of animal."<sup>12</sup> It does not, however, offer specific guidance for the size or features of enclosures, the nature and duration of feeding, rest, and exercise stops, or techniques for safely and humanely handling birds.<sup>13</sup> It also does not contain any requirements pertaining to proper ventilation or protection against the extreme heat or cold often experienced by poultry in transport.<sup>14</sup>

As industry consolidation has decreased the number of federal- and state-inspected slaughterhouses in recent decades, the average distance of each trip from farm to slaughter has increased.<sup>15</sup> Furthermore, the number of birds processed per year continues to grow both in Virginia<sup>16</sup> and the United States.<sup>17</sup> Finally, record heat waves in the U.S. increase the likelihood that poultry will be exposed to extreme temperatures during transport. Accordingly, as more and more birds are subject to more extreme temperatures and more hours in transport, the need to set minimum protections grows more urgent. The Board is uniquely poised to address this need by adopting regulations setting minimum standards for compliance with § 6508 and otherwise governing vehicles, equipment, and practices used to transport live poultry, pursuant to its powers under Virginia Code § 3.2-6501.<sup>18</sup>

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<sup>8</sup> See, e.g., VA. CODE ANN. § 3.2-6570 (2023) ("This section shall not prohibit . . . farming activities as provided by this title or regulations adopted hereunder."); VA. CODE ANN. § 3.2-6501.1 (2023) ("Such regulations shall not apply to agricultural animals."); GA. CODE ANN. § 16-12-4(g) (2023); N.C. GEN. STAT. § 14-360(c)(2a) (2023); W. VA. CODE § 61-8-19(f) (2023); Animal Welfare Act, 7 U.S.C. § 2131.

<sup>9</sup> See ANIMAL WELFARE INST., LEGAL PROTECTIONS FOR FARM ANIMALS DURING TRANSPORT 1 (2021) [hereinafter LEGAL PROTECTIONS].

<sup>10</sup> See *id.* ("[N]o federal law in the United States governs conditions during domestic transport, other than the maximum duration of travel before rest . . .").

<sup>11</sup> VA. CODE ANN. § 3.2-6508 (2023).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> See HUMANE SLAUGHTER UPDATE, *supra* note 3, at 3.

<sup>16</sup> See NAT'L AGRIC. STAT. SERV., U.S. DEP'T OF AGRIC., AC-17-A-46, 2017 CENSUS OF AGRICULTURE: UNITED STATES (2019).

<sup>17</sup> See NAT'L AGRIC. STAT. SERV., U.S. DEP'T OF AGRIC., AC-17-A-46, 2017 CENSUS OF AGRICULTURE: VIRGINIA (2019).

<sup>18</sup> "The Board may adopt regulations and guidelines consistent with the objectives and intent of this chapter concerning the care and transportation of animals." VA. CODE ANN. § 3.2-6501 (2023).

## II. Summary of Requested Action

This petition for rulemaking requests the Board to adopt regulations setting minimum welfare standards for the transport of live poultry to slaughter, pursuant to its powers under Virginia Code §§ 3.2-109; 3.2-5404(1) and (5); 3.2-6001; 3.2-6501; and 3.2-6508. The petition is submitted pursuant to Virginia Code § 2.2-4007<sup>19</sup> and 2 Virginia Administrative Code 5-11-60.<sup>20</sup>

Specifically, Petitioner requests that the Board promulgates regulations detailing required enclosure specifications and features; minimum ventilation standards and temperature-monitoring hardware and temperature tolerances for conveyances; and guidance for the safe and humane handling of birds by employees and contractors. The exact requested specifications are detailed in section IV, “Text of the Proposed Rule,” below.



*A typical poultry transport truck.<sup>21</sup>*

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<sup>19</sup> “Any person may petition an agency to request the agency to develop a new regulation or amend an existing regulation.” VA. CODE ANN. § 2.2-4007 (2023).

<sup>20</sup> “[A]ny person may petition the agency to consider a regulatory action.” 2 VA. ADMIN. CODE 5-11-60.

<sup>21</sup> © 2008 by b3nscott. b3nscott, FLICKR (May 22, 2008), <https://www.flickr.com/photos/16693144@N00/2512789670>.

### **III. The Board Should Adopt Regulations Setting Minimum Welfare Standards for the Transport of Live Poultry to Slaughter**

#### **A. The Board Has Statutory Authority to Adopt Regulations Setting Minimum Welfare Standards for the Transport of Live Poultry to Slaughter**

Va. Code Ann. § 3.2-109 authorizes the Board to “adopt regulations in accordance with the provisions” of Title 3.2 of the Virginia Code, titled “Agriculture, Animal Care, and Food.” Within Title 3.2, Chapter 65, titled “Comprehensive Animal Care,” provides prohibitions and requirements regarding animal care<sup>22</sup> and authorizes the Board to “adopt regulations and guidelines consistent with the objectives and intent of [Chapter 65] concerning the care and transportation of animals.”<sup>23</sup>

The text of Chapter 65 makes clear that its provisions were intended to apply to poultry. The chapter defines “animal” as “any nonhuman vertebrate species except fish,”<sup>24</sup> while Subtitle V, which contains Chapter 65, defines “animal” as “any organism of the kingdom Animalia, other than a human being.”<sup>25</sup> While certain provisions of Chapter 65 explicitly exclude agricultural animals from applicability,<sup>26</sup> neither Chapter 65 nor Subtitle V contains any general provision suggesting the legislature intended to exclude poultry or agricultural animals from regulation.<sup>27</sup> In fact, the inclusion in Chapter 65 of a definition of “agricultural animals”<sup>28</sup> and a provision specifically addressing care of agricultural animals by owners<sup>29</sup> confirms the legislature intended Chapter 65 to apply to agricultural animals. Accordingly, poultry raised for slaughter are proper subjects for regulation by the Board.

Furthermore, transportation is also clearly within the scope of the Board’s authority under Chapter 65. The chapter defines “care” as “the responsible practice of good animal husbandry, handling, production, management, confinement, feeding, watering, protection, shelter, transportation, [and] treatment . . . appropriate for the age, species, condition, size and type of the animal and the provision of veterinary care when needed to prevent suffering or impairment of health.”<sup>30</sup> Regulations setting minimum welfare standards for the transport of live poultry would concern the practice of good animal husbandry, handling, confinement, feeding, watering, protection, shelter, transportation, and treatment of poultry, which are cognizable subjects for regulation by the Board.

Finally, the above definition of “care,” in addition to Chapter 65’s inclusion of generally applicable anti-cruelty provisions<sup>31</sup> and contemplation of such concepts as the “protection,”

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<sup>22</sup> VA. CODE ANN. §§ 3.2-6500 to -6596 (2023).

<sup>23</sup> *Id.* § 6501 (emphasis added).

<sup>24</sup> *Id.* § 6500.

<sup>25</sup> VA. CODE ANN. § 3.2-5900 (2023).

<sup>26</sup> *See, e.g.,* VA. CODE ANN. § 3.2-6570(D) (2023) (“This section shall not prohibit . . . farming activities as provided under this title or regulations adopted hereunder.”).

<sup>27</sup> *See* VA. CODE ANN. §§ 3.2-6500 to -6596 (2023).

<sup>28</sup> *See id.* § 6500 (Defining “agricultural animals” as “all livestock and poultry”).

<sup>29</sup> *Id.* § 6503.1. Further addressed below, section D.

<sup>30</sup> *Id.* § 6500 (emphasis added).

<sup>31</sup> VA. CODE ANN. §§ 3.2-6570 to -6573 (2023).



“treatment,” and “comfort[]” of animals, demonstrates that ensuring the humane treatment of animals is one of the Board’s principal duties and one of Chapter 65’s principal goals.

In sum, regulations setting minimum welfare standards for the transport of live poultry to slaughter are “consistent with the objectives and intent” of Chapter 65 of the Virginia Code and “concern[] the care and transportation of animals,” and the Board is therefore authorized by Virginia Code § 3.2-6501 to adopt them. Furthermore, while the Virginia Code authorizes localities to prohibit “cruelty to and abuse of animals and fowl,”<sup>32</sup> local ordinances are unlikely to be an effective means of improving the welfare of poultry during transport as poultry production is an industry involving large amounts of inter-locality movement,<sup>33</sup> making the Virginia state government the proper entity to adopt uniform requirements. Accordingly, the Board is the appropriate body to effectively take the requested action.

### **B. Adopting Minimum Welfare Standards for the Transport of Live Poultry to Slaughter Would Improve Poultry Health and Wellbeing**

According to the Food and Agriculture Organization of the United Nations, “[t]ransport of livestock [including poultry]<sup>34</sup> is undoubtedly the most stressful and injurious stage in the chain of operations between farm and slaughterhouse and contributes significantly to poor animal welfare and loss of production.”<sup>35</sup> Potential effects of transport stress include emotional distress, bruising, suffocation, heat stroke, dehydration, exhaustion, and broken limbs.<sup>36</sup> These effects are caused by a variety of potential stressors including “acceleration, vibration, motion, impacts, fasting, withdrawal of water, social disruption and noise.”<sup>37</sup> However, extreme temperatures, and in particular heat stress, are the stressors generally considered most threatening to birds’ welfare.<sup>38</sup> Extreme temperatures and other causes of stress and injury can occur during the loading/handling, transit, and lairage phases of transport, with each phase presenting its own risks.<sup>39</sup>

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<sup>32</sup> VA. CODE ANN. § 3.2-6544(B) (2023).

<sup>33</sup> For instance, while data specific to Virginia operations was unavailable, a 2008 study found the average distance for livestock to slaughter in Massachusetts was fifty-two miles. *See* COMMUNITY INVOLVED IN SUSTAINING AGRICULTURE, DEMAND STUDY: ASSESSING VOLUME AND ATTRIBUTES OF FARMER DEMAND FOR SLAUGHTER AND MEAT PROCESSING SERVICES IN MASSACHUSETTS 11 (2008).

<sup>34</sup> While the term “livestock” is often defined as excluding poultry, the cited FAO guidelines refer to “cattle, goats, sheep, pigs, poultry, and ostriches.” FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS, GUIDELINES FOR HUMANE HANDLING, TRANSPORT AND SLAUGHTER OF LIVESTOCK v [hereinafter FAO GUIDELINES].

<sup>35</sup> *Id.* at 33; *see also* *The Critical Relationship Between Farm Animal Health and Welfare*, Animal Welfare Institute, <https://awionline.org/sites/default/files/uploads/documents/FA-AWI-Animal-Health-Welfare-Report-04022018.pdf> (last visited Aug. 1, 2023)

<sup>36</sup> *See id.* at 33-34.

<sup>37</sup> M.A. MITCHELL & P.J. KETTLEWELL, WELFARE OF POULTRY DURING TRANSPORT: A REVIEW 91 (2009).

<sup>38</sup> *See id.*

<sup>39</sup> *See id.* at 92.

## 1. Handling

Catching, handling, and loading birds for transport to slaughter can potentially cause a number of injuries, including bone fractures, dislocations, ruptured organs, bruising, and head trauma.<sup>40</sup> Injuries during this phase of transport contribute significantly to the overall number of birds that are dead-on-arrival to the processing facility (“DOA” birds), and can occur during pre-catch movement or driving of birds, catching, carrying, transfer between handlers, loading into crates, loading of crates onto the vehicle, transit, unloading of crates, removal of birds from crates, and pre-slaughter handling.<sup>41</sup> In fact, a 2022 Animal Outlook investigation of a Virginia poultry farm owned by Tyson Foods documented catch crews brutalizing chickens, including one who “ripped off the head of a chicken” as well as others who threw and kicked chickens.<sup>42</sup>

Virginia Cooperative Extension, an agricultural partnership between Virginia Tech and Virginia State University with 107 offices throughout the commonwealth,<sup>43</sup> recommends the following best practices for the humane catching and handling of poultry:

Noisy, aggressive catching can cause panic and injury. Approach the birds quietly and calmly, possibly under dim lighting. For larger bird-types, always have two points of contact when catching a bird, for instance by holding the legs and the body. Never catch birds by their neck, head, or tail. Avoid catching by their legs or wings alone. Do not hold birds upside down, [as] they get stressed, fearful and may even die because of inverted restraint.<sup>44</sup>

Additionally, the National Chicken Council, a national trade group which advocates for the broiler chicken industry,<sup>45</sup> states in its “widely adopted”<sup>46</sup> *Animal Welfare Guidelines and Audit Checklist* that birds must never be thrown, that transport modules or crates should be regularly assessed for damage that can cause injury to birds, and that “potential for temperature and climatic stress should be considered when scheduling catching, transport, and holding.”<sup>47</sup>

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<sup>40</sup> See Michael S. Cockram & Ketan Jung Dulal, *Injury and Mortality in Broilers During Handling and Transport to Slaughter*, 98 CAN. J. ANIMAL SCI. 416, 419 (2018) [hereinafter *Injury and Mortality*].

<sup>41</sup> See *id.*

<sup>42</sup> Investigation of Tyson Grower Reveals Mass, Systemic Cruelty, Animal Outlook, <https://animaloutlook.org/investigations/investigation-of-tyson-grower-reveals-mass-systemic-cruelty/> (last visited Aug. 1, 2023).

<sup>43</sup> See VA. COOP. EXTENSION, *About Virginia Cooperative Extension*, <https://ext.vt.edu/about.html> (last visited July 11, 2023).

<sup>44</sup> PHILIP J. CLAUER, VA. COOP. EXTENSION, *TRANSPORTING POULTRY IN A HUMANE MANNER 1* (2018).

<sup>45</sup> See *About NCC*, NAT’L CHICKEN COUNCIL, <https://www.nationalchickencouncil.org/about/> (last visited July 11, 2023).

<sup>46</sup> See *Animal Welfare for Broiler Chickens*, NAT’L CHICKEN COUNCIL, <https://www.nationalchickencouncil.org/policy/animal-welfare/> (last visited July 11, 2023) (“[P]roper treatment [of chickens] is . . . an ethical obligation . . .”).

<sup>47</sup> NAT’L CHICKEN COUNCIL, *NATIONAL CHICKEN COUNCIL ANIMAL WELFARE GUIDELINES AND AUDIT CHECKLIST FOR BROILERS 13* (2017).

Moreover, the World Organization for Animal Health’s Terrestrial Animal Code states that “[a]nimals should be grasped or lifted in a manner which avoids pain or suffering and physical damage” and that “[c]onscious animals should not be thrown, dragged or dropped.”<sup>48</sup>

Finally, stresses and trauma during the catching and loading process have been shown to make birds more susceptible to the negative effects of stress and trauma during the transit phase.<sup>49</sup>



An example of improper handling captured during a 2016 Animal Outlook investigation at a Virginia farm that would be prohibited under this proposal.<sup>50</sup>

## 2. Transit

As stated above, the primary cause of stress and injury during transit is extreme temperature. Temperatures inside conveyances are a result of a number of factors, including ambient outdoor temperatures, quality of ventilation, and stocking density.<sup>51</sup> Ventilation patterns and internal trailer temperatures can be influenced by vehicle design, crate configuration, and ventilation

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<sup>48</sup> Terrestrial Animal Code, World Organization of Animal Health, [https://www.woah.org/en/what-we-do/standards/codes-and-manuals/terrestrial-code-online-access/?id=169&L=1&htmlfile=chapitre\\_aw\\_land\\_transpt.htm](https://www.woah.org/en/what-we-do/standards/codes-and-manuals/terrestrial-code-online-access/?id=169&L=1&htmlfile=chapitre_aw_land_transpt.htm) (last visited Aug. 1, 2023).

<sup>49</sup> See K.S. Schwartzkopf-Genswein et al., *Road Transport of Cattle, Swine and Poultry in North America and Its Impact on Animal Welfare, Carcass and Meat Quality: A Review*, 92 MEAT SCI. 227, 238 (2012).

<sup>50</sup> *Victory: COK Video of Cruelty to Chickens Prompts Groundbreaking Charges & Convictions*, ANIMAL OUTLOOK (Aug. 29, 2017), <https://animaloutlook.org/cok-victory-tyson-convictions/>.

<sup>51</sup> See *Injury and Mortality*, *supra* note 37, at 423.

configuration (i.e., the number and arrangement of open ventilation channels vs. closed ventilation channels).<sup>52</sup>

Additionally, temperatures can vary drastically between different areas of the same conveyance.<sup>53</sup> For instance, during seasons with cold outdoor temperatures, a “paradoxical heat stress” has been observed in conditions where ventilation channels have been closed to protect birds from extreme cold, causing moisture created by the birds’ panting and other physiological stress responses to accumulate and create a “thermal core” in the heart of the conveyance.<sup>54</sup> These thermal cores often occur in the top and front regions of the trailer.<sup>55</sup> Birds located within the thermal core can be subject to extreme heat, while at the same time, birds in the outer-most regions of the same conveyance can experience extreme cold.<sup>56</sup>

In poultry, heat stress can result in physiological responses such as oxidative stress, acid-base imbalance, weight loss, dysregulated metabolism, and suppressed immune system.<sup>57</sup> These severe physiological disruptions can lead to discomfort, pain, and mortality, as well as reduced meat and egg production.<sup>58</sup> Forty percent of DOA birds are the result of thermal stress.<sup>59</sup>

The recommended maximum temperature for the safe transport of mature broilers is about 84°F.<sup>60</sup> Above this limit and without proper precautions, birds will likely produce additional heat and moisture by attempting to regulate their internal temperature through panting, which can lead to moisture accumulation and further temperature increases in poorly ventilated conveyances.<sup>61</sup> A significant increase in stress-indicating hormones has also been shown where the ambient air temperature during transport is below about 41°F.<sup>62</sup>

Overcrowding of crates can also contribute to stress and mortality through piling, reduced circulation, and body heat accumulation.<sup>63</sup> Virginia Cooperative Extension recommends between one-half and one square foot of space per bird for chickens, and two to three square feet of space for ducks, geese, and turkeys, and notes that “leaving the birds packed in the carrying crates is inhumane.”<sup>64</sup>

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<sup>52</sup> See *id.*

<sup>53</sup> See *id.*

<sup>54</sup> See M.A. Mitchell & P.J. Kettlewell, *Physiological Stress and Welfare of Broiler Chickens in Transit: Solutions Not Problems!*, 77 *POULTRY SCIENCE* 1803, 1810-11 (1998) (“Any impairment of airflow through the structure will result in the accumulation of heat and moisture that in combination will impose heat stress upon the birds.”).

<sup>55</sup> See *Injury and Mortality*, *supra* note 37, at 423.

<sup>56</sup> See *id.*

<sup>57</sup> See Abdul Rahman Sesay, *Impact of Heat Stress on Chicken Performance, Welfare, and Probable Mitigation Strategies*, 12 *INT’L J. ENV’T AND CLIMATE CHANGE* 3120, 3127 (2022); Mark W. Bohler et al., *Heat Stress Responses in Birds: A Review of the Neural Components*, 2021, 10 *BIOLOGY* 1095 (2021).

<sup>58</sup> Heat stress is estimated to account for \$165 million in poultry product losses per year in the United States. See *id.* at 1096.

<sup>59</sup> See Schwartzkopf-Genswein et al., *supra* note 44, at 236.

<sup>60</sup> See *id.*

<sup>61</sup> See *id.* (“[A]n important factor in the design of future broiler transport trailers is the inclusion of active ventilation to reduce large temperature gradients and high humidity levels inside the trailer.”).

<sup>62</sup> See Bulent Teke, *Survey on Dead on Arrival of Broiler Chickens Under Commercial Transport Conditions*, 25 *LARGE ANIMAL REV.* 237, 241 (2019).

<sup>63</sup> See CLAUER, *supra* note 40, at 3.

<sup>64</sup> See *id.*



*An example of dangerous overcrowding captured during a 2016 Animal Outlook investigation at a Virginia farm.<sup>65</sup>*

### 3. Lairage

Lairage is defined as the period between the arrival of poultry to the slaughterhouse and slaughter.<sup>66</sup> Heat and cold stress are also common during lairage;<sup>67</sup> however, lairage under appropriate conditions and for appropriate lengths of time has been shown to reduce stress before slaughter and increase broiler welfare.<sup>68</sup> The majority of studies suggest the ideal amount of time spent in lairage is between one and four hours.<sup>69</sup> However, the USDA's Food Safety and Inspection Service has documented numerous instances of poultry being left in lairage for many hours, often during extreme weather, leading to unnecessary suffering and death.<sup>70</sup> The Poultry Service Association, a Canada-based trade group representing poultry transporters,<sup>71</sup> recommends that poultry in lairage always be protected from extreme weather and temperature, given adequate ventilation, and monitored for signs of stress.<sup>72</sup>

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<sup>65</sup> *Tyson Exposed: A Tradition of Torture*, Animal Outlook, <https://animaloutlook.org/tyson-exposed-a-tradition-of-torture/#group> (last visited Aug. 1, 2023).

<sup>66</sup> See Teke, *supra* note 57.

<sup>67</sup> See MITCHELL & KETTLEWELL, *supra* note 34; *Cold Temperatures Can Have Severe Consequences for Poultry Health and Welfare*, POULTRY EXTENSION COLLABORATIVE NEWSL (Poultry Extension Collaborative), Feb. 2023, at 1.

<sup>68</sup> See Teke, *supra* note 57.

<sup>69</sup> See Schwartzkopf-Genswein et al., *supra* note 44.

<sup>70</sup> See *Report: USDA Fails to Protect Birds Who Are Neglected, Abandoned During Transport and At Slaughterhouse*, ANIMAL WELFARE INST. (Aug. 9, 2018), <https://awionline.org/press-releases/report-usda-fails-protect-birds-who-are-neglected-abandoned-during-transport-and>.

<sup>71</sup> See *About*, POULTRY SERV. ASSOC., <http://www.poultryserviceassociation.com/about.html> (last visited Aug. 1, 2023).

<sup>72</sup> POULTRY SERV. ASSOC., *POULTRY HANDLING AND TRANSPORTATION MANUAL 87* (Al Dam & Susan Fitzgerald, eds., 2017).

### C. No Federal Law Currently Sets Minimum Welfare Standards for the Transport of Live Poultry to Slaughter in Virginia

The primary federal statute governing animal welfare during transport is 49 U.S.C. § 80502 (“The Twenty-Eight Hour Law”), which sets a maximum of twenty-eight hours of confinement for animals in transport without proper feeding, watering, and rest.<sup>73</sup> However, the USDA has interpreted the Twenty-Eight Hour Law as applying to cattle, pigs, and other mammals but not to poultry,<sup>74</sup> and currently no other federal statute governs the welfare of poultry during transport.<sup>75</sup> Furthermore, the USDA focuses its enforcement of the Twenty-Eight Hour Law on animals being moved across state lines or being imported into the US from abroad,<sup>76</sup> meaning that even if the USDA expanded the Twenty-Eight Hour Law to reach poultry — and there is no indication it will — it would likely not focus enforcement efforts on the intrastate movement of poultry in Virginia.

The Animal Health Protection Act (“AHPA”),<sup>77</sup> another federal statute, empowers the Secretary of Agriculture to “prohibit or restrict the use of any means of conveyance . . . [which] has not been maintained in a clean and sanitary condition or does not have accommodations for the safe and proper movement and humane treatment of livestock.”<sup>78</sup> However, while the AHPA explicitly pertains to animals moved in interstate or international commerce,<sup>79</sup> the USDA “has not used this authority to regulate the interstate transport of animals within the United States” but has instead applied it only to imports and exports.<sup>80</sup> Accordingly, the AHPA does not regulate poultry moved purely intrastate in Virginia and is unlikely to be applied to poultry moved interstate through Virginia.

Finally, the Animal Welfare Act (“AWA”) is a broad federal statute providing many welfare protections for animals, including those moved in commerce.<sup>81</sup> However, the AWA explicitly excludes agricultural animals used for food or fiber from applicability.<sup>82</sup>

In sum, the current federal statutory framework provides no minimum welfare standards for the transport (either interstate or intrastate) of live poultry to slaughter in Virginia.

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<sup>73</sup> 49 U.S.C. § 80502; *see* LEGAL PROTECTIONS, *supra* note 6.

<sup>74</sup> *See* U.S. DEP’T OF AGRIC., *Twenty-Eight Hour Law*, NAT’L AGRIC. LIBR. <https://www.nal.usda.gov/animal-health-and-welfare/twenty-eight-hour-law#:~:text=If%20livestock%20are%20being%20transported,of%20Agriculture%20enforces%20the%20Law> (last visited June 8, 2023).

<sup>75</sup> *See* ANIMAL WELFARE INST., *THE WELFARE OF BIRDS AT SLAUGHTER IN THE UNITED STATES: THE NEED FOR GOVERNMENT REGULATION* 3 (2020).

<sup>76</sup> ANIMAL WELFARE INST., *A REVIEW: THE TWENTY-EIGHT HOUR LAW AND ITS ENFORCEMENT* 7 (2020) (“The current Twenty-Eight Hour Law enforcement strategy only applies to animals being transported interstate to slaughter and animals transported across the national border.”).

<sup>77</sup> 7 U.S.C. §§ 8301-8322.

<sup>78</sup> *Id.* § 8304.

<sup>79</sup> *See id.* § 8301.

<sup>80</sup> LEGAL PROTECTIONS, *supra* note 6, at 3.

<sup>81</sup> 7 U.S.C. §§ 2131-2160.

<sup>82</sup> *See id.* § 2132(g) (excluding “farm animals, such as, but not limited to livestock or poultry”).

## D. Virginia Law Governing Welfare Standards for the Transport of Live Poultry to Slaughter Lacks Specificity and Reach

### 1. The Virginia Code

As noted above, the primary Virginia statute governing the treatment of poultry during transport to slaughter is Virginia Code § 3.2-6508 (“The Twenty-Four Hour Law”).<sup>83</sup> The Twenty-Four Hour Law is a loose analog to the federal Twenty-Eight Hour Law, prohibiting the confinement for transport of “any animal” for longer than twenty-four hours without exercise, rest, feed, and water “as necessary for that particular type and species of animal.”<sup>84</sup> The law also requires “adequate space” for each animal according to its species. Chapter 65 of the Virginia Code defines “adequate space” as

sufficient space to allow each animal to (i) easily stand, sit, lie, turn about, and make all other normal body movements in a comfortable, normal position for the animal and (ii) interact safely with other animals in the enclosure. . . . When freedom of movement would endanger the animal, temporarily and appropriately restricting movement of the animal according to professionally accepted standards for the species is considered provision of adequate space.<sup>85</sup>

Neither the Twenty-Four Hour Law nor Chapter 65’s definitions section provides exact specifications for compliance with regard to any species.<sup>86</sup> The law also does not address temperature, ventilation, handling, or lairage.<sup>87</sup> While adequate restraint and loading density are an important component of humane transport,<sup>88</sup> providing adequate space by itself does not ensure safe temperatures will be maintained in a conveyance. Similarly, while adequate exercise, rest, feed, and water are necessary components of good animal husbandry practices, the twenty-four hour maximum imposed by the law has little tangible impact on poultry welfare when

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<sup>83</sup> VA. CODE ANN. § 3.2-6508 (2023).

<sup>84</sup> *Id.* This language differs from that of provisions such as § 3.2-6503 which govern treatment of companion animals to the exclusion of agricultural animals. That provision requires “adequate” feed, water, shelter, etc., where each of those terms is defined explicitly in the chapter’s definitions section. For instance, “adequate feed” is defined as

access to and the provision of food that is of sufficient quantity and nutritive value to maintain each animal in good health; is accessible to each animal; is prepared so as to permit ease of consumption for the age, species, condition, size and type of each animal; is provided in a clean and sanitary manner; is placed so as to minimize contamination by excrement and pests; and is provided at suitable intervals for the species, age, and condition of the animal, but at least once daily, except as prescribed by a veterinarian or as dictated by naturally occurring states of hibernation or fasting normal for the species.

VA. CODE ANN. § 3.2-6500 (2023). The Twenty-Four Hour Law does, however, require “adequate space” for each regulated animal, a term which is also included in Chapter 65’s definitions section and is elaborated above.

<sup>85</sup> *Id.*

<sup>86</sup> *See* VA. CODE ANN. § 3.2-6508 (2023).

<sup>87</sup> *See id.*

<sup>88</sup> *See* K.S. Schwartzkopf-Genswein et al., *supra* note 44, at 228.

increases in DOA percentage have been observed after only fifteen minutes of transit time<sup>89</sup> and when a complete transit of the Commonwealth (from the Cumberland Gap to Washington, D.C.) takes only seven to ten hours.

Additionally, other sections of Chapter 65 provide general, non-transportation-oriented requirements for the care of companion animals and agricultural animals.<sup>90</sup> The provision pertaining to agricultural animals requires, as relevant here, “[f]eed to prevent malnourishment,” “[w]ater to prevent dehydration,” and “[v]eterinary treatment as needed to address impairment of health or bodily function when such impairment cannot be otherwise addressed through animal husbandry.”<sup>91</sup> This provision represents only the most basic requirements of proper animal care which, while their codification is a necessary and important starting point for ensuring the humane treatment of agricultural animals within the Commonwealth, are not calculated to address the particular issues facing poultry during transport.

Finally, while the Virginia animal cruelty statute nominally applies to “any animal,” it also states that it shall not apply to “farming activities.”<sup>92</sup> As Chapter 65’s broad definition of “farming activities” requires only that an activity be “consistent with standard animal husbandry practices,” the statute is unlikely to apply to the treatment of poultry during transport as long as the behavior in question is consistent with standard animal husbandry practices.

## 2. The Virginia Administrative Code

While the Virginia Administrative Code contains extensive regulations governing the control and eradication of diseases among livestock and poultry,<sup>93</sup> it does not contain any regulations significantly affecting poultry welfare during transport. The only regulations potentially affecting the conditions of poultry during transport are those setting sanitation requirements for conveyances.<sup>94</sup> However, no regulations elaborate on the requirements of the Twenty-Four Hour Law or otherwise offer standards for the welfare of poultry during transport.

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<sup>89</sup> See E. Nijdam et al., *Factors Influencing Bruises and Mortality of Broilers During Catching, Transport, and Lairage*, 2004 POULTRY SCI. 83:1610, 1612 (2004).

<sup>90</sup> See VA. CODE ANN. § 3.2-6503 (2023) (governing “[c]are of companion animals by owner”); VA. CODE ANN. § 3.2-6503.1 (governing “care of agricultural animals by owner”).

<sup>91</sup> *Id.* As noted in note 78, *supra*, this language creates less stringent requirements than those pertaining to companion animals in § 3.2-6503.

<sup>92</sup> See VA. CODE ANN. § 3.2-6500 (2023).

<sup>93</sup> See, e.g., 2 VA. ADMIN. CODE 5-30-20 (2023) (requiring veterinarians and laboratory operators to report the diagnosis of poultry diseases to the State Veterinarian); 2 VA. ADMIN. CODE 5-90-30 (2023) (requiring all Virginia to comply with pullorum-typhoid provisions of the National Poultry Improvement Plan for Breeding Poultry, setting minimum sanitation standards); 2 VA. ADMIN. CODE 5-141-60 (2023) (requiring all poultry to undergo certain health and infectious disease tests before entry into Virginia); 2 VA. ADMIN. CODE 5-210-10 (2023) (adopting by reference meat inspection provisions of the Code of Federal Regulations).

<sup>94</sup> See 2 VA. ADMIN. CODE 5-141-50 (2023) (requiring all conveyances to be “kept in a sanitary condition”); 2 VA. ADMIN. CODE 5-195-90 (2023) (requiring vehicles, bird-holding devices, “and any premises where birds may be held” in live-bird markets to be kept “clean and sanitary”; requiring the use of state-approved “crate and conveyance washing equipment” within the live-bird marketing system);



## E. Other Jurisdictions Have Adopted Minimum Welfare Standards for the Transport of Live Poultry to Slaughter

Jurisdictions other than Virginia, including Kentucky, Louisiana, New Jersey, Wisconsin, Pennsylvania, Rhode Island, and Connecticut, have effectively implemented minimum welfare standards for poultry during transport both via statute and via administrative rulemaking. A brief summation of the laws governing poultry welfare during transport follows:

- **Connecticut:** Connecticut’s animal cruelty statute includes a provision requiring “reasonable care” to be taken to “prevent unnecessary suffering” of poultry during transport:

Any crate or other container used for the purpose of transporting, shipping or holding for sale any live poultry shall be in a sanitary condition and shall be constructed so as to provide sufficient ventilation and warmth, and such poultry, while in such container, shall receive such reasonable care as may be required to prevent unnecessary suffering.<sup>95</sup>

- **Rhode Island:** Rhode Island’s animal cruelty statute provides similar protections, requiring sufficient sanitation, ventilation, and warmth, and requiring “reasonable care” to “prevent unnecessary suffering.”<sup>96</sup>
- **Pennsylvania:** Pennsylvania’s animal cruelty statute requires at least one cubic foot of crate space to be allocated per fifteen pounds of poultry being transported.<sup>97</sup>
- **Louisiana:** Louisiana’s administrative code requires that all conveyances used for the transportation of live poultry by land have “stocking density that allows all poultry to lie down simultaneously without being forced to lie on top of other poultry,” “transportation vehicle design, maintenance, arrangement of poultry, and time of transport to minimize injury, distress, or death to the poultry,” and “vehicles transporting poultry designed to provide adequate ventilation to minimize injury, distress, heat or cold stress, or death to the poultry.”<sup>98</sup>
- **Kentucky:** Kentucky’s administrative code requires that poultry be handled, loaded, and unloaded “in a manner that minimizes the risk of injury” and given “feed and water so as to maintain a body condition appropriate for . . . weather condition[s].”<sup>99</sup>

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<sup>95</sup> CONN. GEN. STAT. § 53-249 (2022).

<sup>96</sup> 4 R.I. GEN. LAWS § 4-1-7 (2023).

<sup>97</sup> 18 PA. CONS. STAT. § 5538(b) (2023).

<sup>98</sup> LA. ADMIN. CODE tit. 7, pt. XXI, § 2109(G) (2023).

<sup>99</sup> 302 KY. ADMIN. REGS. 21:020 (2023).

- **Wisconsin:** A Wisconsin statute sets specific minimum crate heights of thirteen inches for poultry transport and deems any “crowding or congesting of chickens . . . so as to impair or endanger the well-being of such chickens” as animal cruelty.<sup>100</sup>
- **New Jersey:** The New Jersey administrative code requires catching and transport protocols which minimize “the number of times a bird is handled between capture and rehousing or slaughter” as well as the “time between capture and slaughter.”<sup>101</sup>

The variety of approaches taken in these jurisdictions demonstrates that poultry welfare during transport is a matter of concern for U.S. citizens and is a proper subject of legislation and regulation by the States. These approaches also demonstrate that positive poultry welfare outcomes can be achieved through the imposition of standards of conduct such as the reasonable care standard, or through the promulgation of more specific guidelines pertaining to the equipment and practices employed by commercial agriculture. Finally, they can serve as useful models for state laws which are sensitive to temperature, ventilation, handling, and other aspects of poultry transport that are likely to lead to stress and injury.

#### **F. Virginia Has Regulated the Welfare of Other Animals During Transport**

The Board has previously adopted regulations governing standards for transport of numerous types of animals other than poultry. For instance, Chapter 150 of the Virginia Administrative Code contains extensive regulations governing the transportation of companion animals, including birds.<sup>102</sup> However, Chapter 150 explicitly excludes agricultural animals from its definition of “companion animal,”<sup>103</sup> and thus does not govern poultry transport. The chapter’s sections governing the transport of birds provide specifications for the construction of primary enclosures,<sup>104</sup> guidance for ventilation, temperature tolerances, and required visual observation by the driver during transport,<sup>105</sup> guidance for minimizing injury during handling and lairage at terminal facilities,<sup>106</sup> and required access to adequate food and water.<sup>107</sup>

As noted above, the Virginia Code also contains statutes such as the Twenty-Four Hour Law which set some minimum standards for the transportation of agricultural animals, including poultry.

That the Virginia General Assembly and the Board have both effectuated laws governing the welfare during transport of non-agricultural birds and other animals demonstrates that animal

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<sup>100</sup> WIS. STAT. § 134.52 (2023).

<sup>101</sup> N.J. ADMIN. CODE § 2:8-4.7 (2023).

<sup>102</sup> See 2 VA. ADMIN. CODE 5-150-70 (2023).

<sup>103</sup> See 2 VA. ADMIN. CODE 5-150-10 (2023).

<sup>104</sup> See 2 VA. ADMIN. CODE 5-150-180 (2023).

<sup>105</sup> See 2 VA. ADMIN. CODE 5-150-190 (2023) (“Temperatures in primary conveyances shall not exceed 75 °F for more than 45 minutes without supplemental ventilation through natural or automatic ventilation or air conditioning nor fall below 45 °F without auxiliary heat . . . .”); 2 VA. ADMIN. CODE 5-150-220 (2023) (requiring driver to visually observe birds for signs distress “not less than once every four hours,” make temperature observations and adjust ventilation accordingly, and ensure birds can breath properly, among other things).

<sup>106</sup> See 2 VA. ADMIN. CODE 5-150-230 (2023) (requiring birds be moved “as expeditiously as possible” and not exposed to temperatures greater than 85 °F for longer than 45 minutes while in lairage, among other things).

<sup>107</sup> See 2 VA. ADMIN. CODE 5-150-210 (2023).

welfare, including the welfare of birds during transport, is a subject of concern for the Virginia citizenry and one which has been deemed worthy of attention by the state’s highest authorities. Accordingly, the proposed rulemaking represents only an extension of an already established priority within the Virginia government rather than a fundamentally new sphere of regulation.

### **G. Adopting Minimum Standards for the Welfare of Live Poultry During Transport to Slaughter Improves Food Safety and Protects Consumers**

The effects of transport stress on poultry are not limited to physical discomfort, distress, and mortality for birds, but also implicate food safety concerns for consumers.

Physiological responses to stress have been shown to result in undesirable and dangerous changes in meat products. Stress and lack of rest prior to slaughter can lead to lowered levels of lactic acid,<sup>108</sup> a chemical which plays an important role in maintaining ideal muscle pH and delaying spoilage in meat by impairing the growth of harmful bacteria.<sup>109</sup> Thus, meat from animals “which have suffered from stress or injuries during handling, transport and slaughter” is “likely to have a shorter shelf life due to spoilage,” leading to “off-smells, color changes, rancidity and slime.”<sup>110</sup> As with all food spoilage, these problems lead to products that are not only undesirable but also potentially dangerous. Indeed, transport stress may even increase the prevalence of pathogenic bacteria known to cause illness in humans, such as *Campylobacters*, in the fecal matter of poultry prior to slaughter.<sup>111</sup> This increase in microbial contamination further increases the risk of illness for the consumer.<sup>112</sup>

A primary mechanism through which many of these undesirable and dangerous changes occur is through the escape of blood from blood vessels into muscle tissue, known as “bruising.”<sup>113</sup> Bruising is typically caused by physical impacts<sup>114</sup> such as those that can occur during improper handling and loading, bumpy transit, or the use of inadequate enclosures during transit. Bruised muscle is an “ideal medium for the growth of contaminating bacteria” and is therefore “not suitable for use as food.”<sup>115</sup> However, bruising “can be significantly reduced by following the recommended techniques of handling, transport, and slaughter.”<sup>116</sup>

Similarly, heat stress has also been shown to affect food safety and quality in poultry products. Oxidative stress caused by excessive heat is thought to increase intestinal permeability, which allows for the movement of bacteria from the digestive tract into the muscle tissue that will later

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<sup>108</sup> See FAO GUIDELINES, *supra* note 31, at 5.

<sup>109</sup> “If the contaminating bacteria are those of the food poisoning type, the consumers of the meat become sick, resulting in costly treatment . . .” *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> See P. Whyte et al., *The Effect of Transportation Stress on Excretion Rates of Campylobacters in Market-age Broilers*, 80 POULTRY SCI. 817, 817 (2001).

<sup>112</sup> See Aijuan Zheng et al., *Stress Associated with Simulated Transport, Changes Serum Biochemistry, Postmortem Muscle Metabolism, and Meat Quality of Broilers*, 2020 ANIMALS 10, 1442 (2020).

<sup>113</sup> See FAO GUIDELINES, *supra* note 31, at 6-7.

<sup>114</sup> See *id.* at 7.

<sup>115</sup> See *id.* at 6.

<sup>116</sup> See *id.* at 7.

be sold as meat.<sup>117</sup> In addition to increased risk of product contamination,<sup>118</sup> heat stress can accelerate the process of rigor mortis and glycolysis after slaughter, which can lead to meat characteristics that are undesirable to consumers such as pH decline, reduced ability to hold water, and tough meat.<sup>119</sup> Finally, heat stress also renders poultry more susceptible to bruising,<sup>120</sup> further compounding these risks and making humane transport an especially crucial component of protecting consumers.

As noted above, heat stress and physical impacts are common consequences of current poultry transport practices. These conditions not only negatively affect the welfare of poultry, but also that of poultry consumers. However, the Board is poised to meaningfully address these concerns by adopting regulations governing proper techniques and equipment to minimize heat stress and bruising in poultry. As the USDA estimates that the average American will eat almost seventy pounds of chicken during a given year,<sup>121</sup> these consumer protection issues present serious risks to a huge portion of Virginia’s population and necessitate a multi-faceted response of which transport welfare regulations are a key part.

#### **IV. Text of the Proposed Rule**

Petitioner proposes that the Board promulgate a new chapter of Title 2 of the Virginia Administrative Code, to be contained within “Agency 5: Department of Agriculture and Consumer Services,” and entitled, “CHAPTER 151. RULES AND REGULATIONS GOVERNING THE TRANSPORT OF LIVE POULTRY.” The text of the proposed rule is as follows:

##### **PART I GENERAL PROVISIONS**

##### **2 VAC 5-151-10. Definitions.**

The following words and terms, when used in this chapter, shall have the following meaning, unless the context clearly indicates otherwise:

"Conveyance" means any car, truck, trailer, train car, or other vehicle being used for the commercial transport of poultry.

“Lairage” means the temporary holding of poultry after arrival to slaughter but before slaughter.

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<sup>117</sup> See Lucas J. Lara & Marcos H. Rostagno, *Impact of Heat Stress on Poultry Production*, 2013 3 ANIMALS 356, 362 (2013).

<sup>118</sup> See *id.* at 361.

<sup>119</sup> See Schwartzkopf-Genswein et al., *supra* note 44, at 236.

<sup>120</sup> See Lucas J. Lara & Marcos H. Rostagno, *Impact of Heat Stress on Poultry Production*, 2013 3 ANIMALS 356, 360 (2013) (“In a study to determine the factors influencing bruises and mortality of broilers at harvest, percentage of bruises was associated with season, moment of transport, and ambient temperature . . .”).

<sup>121</sup> See U.S. DEP’T OF AGRIC., *Food Availability and Consumption*, ECON. RSCH. SERV., <https://www.ers.usda.gov/data-products/ag-and-food-statistics-charting-the-essentials/food-availability-and-consumption/> (last visited June 30, 2023).

"Lairage area" means any enclosure or facility for the temporary holding of birds after unloading from transport.

"Mechanical ventilation system" means a system of fans and/or air conditioners adequate to provide proper ventilation to every primary enclosure in a given conveyance.

"Poultry" means any breed of chicken, turkey, goose, duck, emu, or other fowl raised for the purpose of providing meat or eggs.

"Primary conveyance" means the main method of transportation used to convey an animal from origin to destination, such as a motor vehicle, plane, ship, or train.

"Primary enclosure" means any structure used to immediately restrict an animal or animals to a limited amount of space, such as a room, pen, cage, compartment or hutch. For tethered animals, the term includes the shelter and the area within reach of the tether.

"Proper ventilation" means the movement of air sufficient to prevent the accumulation of moisture in primary conveyances and ensure the body temperatures of poultry stay within healthy limits.

"Relative humidity" means a measure of the amount of water vapor in the air expressed as a percentage.

"Thermometer" means any device capable of measuring air temperature and relative humidity and relaying that information to the driver of the conveyance at least once every four hours.

## PART II STANDARDS FOR THE TRANSPORTATION OF LIVE POULTRY

### 2 VAC 5-151-20. Handling and loading.

During catching, loading, and unloading of poultry, handlers shall not:

1. Hold or carry poultry in an upside-down position;
2. Catch or hold birds by the head, neck, wing(s), tail, or a single leg, without an additional point of contact to distribute weight;
3. Throw birds;
4. Hold more than two birds in one hand at a given time;
5. Load any bird that is not dry.

2 VAC 5-151-30. Primary conveyances.

A. Poultry shall be transported in a primary conveyance equipped with either:

1. A mechanical ventilation system that ensures proper ventilation throughout all poultry enclosures; or
2. A system of thermometers for monitoring temperature and relative humidity throughout the conveyance, reasonably spaced as to provide accurate readings of each portion of the conveyance which contains primary enclosures.

B. The driver of any conveyance shall observe enclosure temperatures at least once every four hours and take all reasonable measures to ensure, through the use of proper ventilation, that temperatures and relative humidities inside primary enclosures are safe and comfortable for all poultry contained therein.

2 VAC 5-151-40. Primary enclosures.

Poultry shall be transported in a primary enclosure that shall be constructed in such a manner that:

1. The structural strength of the enclosure is sufficient to contain the birds and to withstand the normal rigors of transporting;
2. The interior of the enclosure is free from any protrusions that could be injurious to the birds contained therein;
3. The openings of such enclosures are easily accessible at all times for emergency removal of the birds;
4. Openings are sufficient to provide for proper ventilation and normal breathing;
5. The primary enclosures contain rims or other devices on those faces of the outside walls that contain ventilation openings to prevent obstruction of those openings and to provide a minimum air circulation space of 0.75 inches between the primary enclosure and any adjacent cargo or conveyance wall;
6. Are large enough to ensure that each bird contained therein has sufficient space to turn about freely in a standing position using normal body movements; however, certain species may be restricted in their movements according to professionally acceptable standards when such

freedom of movement would constitute a danger to the animals, their handlers, or other persons; and

7. They allow excreta to be absorbed, covered or separated from the birds by use of a wire mesh flooring above the solid floor or of a clean litter that is safe and nontoxic to the birds, except where these methods pose a threat to the safety of the birds.

2 VAC 5-151-50. Lairage.

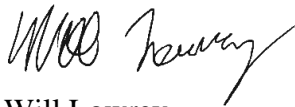
Poultry shall be provided with at least one hour and no more than eight hours of lairage time in a lairage area with proper ventilation and a maintained temperature between 65°F and 85°F.

## V. Conclusion

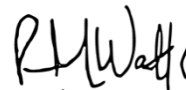
As detailed above, transport represents a crucial but oft-overlooked component of the poultry production process, and its regulation serves as an opportunity to meaningfully improve the welfare of the nearly 300 million birds processed per year in Virginia. Not only would such regulations reduce suffering on a vast scale, but they would also do much to protect Virginia's consumers from food-borne illness. The current state of Virginia and federal law presents a void which the Board is uniquely poised to fill by using its statutory authority, entrusted to it by the people of the Commonwealth, to follow other states such as Kentucky, New Jersey, and Louisiana in regulating on this matter.

The Supreme Court of the United States has recently reiterated in *National Pork Producers Council v. Ross* that animal welfare is a matter of public morals that it is within the power of the States to regulate.<sup>122</sup> Meanwhile, Americans have demonstrated a growing concern with the conditions in which agricultural animals are raised, transported, and slaughtered.<sup>123</sup> By adopting minimum standards for poultry welfare during transport to slaughter, the Board can simultaneously improve the lives of millions of vulnerable animals and demonstrate the moral progress of the people of the Commonwealth.

If you have any questions on this request, please contact me at [wlowrey@animalpartisan.org](mailto:wlowrey@animalpartisan.org) or (804) 307-4102. Thank you in advance for your assistance with this matter.



Will Lowrey  
Legal Counsel, Animal Partisan  
[wlowrey@animalpartisan.org](mailto:wlowrey@animalpartisan.org)  
(804) 307-4102



R. Matthew Watts  
Law Clerk, Animal Partisan

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<sup>122</sup> See *Nat'l Pork Producers Council v. Ross*, 143 S. Ct. 1142, 1160 (2023).

<sup>123</sup> See AM. SOC'Y FOR THE PREVENTION OF CRUELTY TO ANIMALS, *2023 Industrial Animal Agriculture Opinion Survey 1* (2023) (indicating seventy-nine per cent of respondents are "somewhat or very concerned about the negative impacts of industrial animal agriculture on animal welfare").



**Secretariat** Agriculture and Forestry

**Agency** Department of Agriculture and Consumer Services

**Board** Department of Agriculture and Consumer Services

Petition 397

Petition Information	
<b>Petition Title</b>	Regulation for the Transportation of Poultry
<b>Date Filed</b>	8/7/2023 <a href="#">[Transmittal Sheet]</a>
<b>Petitioner</b>	Animal Partisan
<b>Petitioner's Request</b>	Petitioner requests that the Board of Agriculture and Consumer Services promulgate regulations setting minimum standards of care for the transportation, handling, and lairage of poultry prior to slaughter within the Commonwealth.
<b>Agency's Plan</b>	The Board of Agriculture and Consumer Services will consider this request at its next scheduled meeting following the public comment period. This meeting will occur on December 7, 2023.
<b>Comment Period</b>	Ended 9/18/2023 <a href="#">31 comments</a>
<b>Agency Decision</b>	Pending
Contact Information	
<b>Name / Title:</b>	Dr.Carolynn Bissett / <i>Program Manager, Office of Veterinary Services</i>
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<b>Telephone:</b>	(804)786-4560 FAX: (-) TDD: (-)





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[\[2 VAC 5 - \]](#)**Public Comment Forum**Public Petition for Rulemaking: [Regulation for the Transportation of Poultry](#)[View petition details](#)

CLOSED Opened on 8/28/2023 and Ended on 9/18/2023

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31 comments

Comment Title	Commenter	Date
<a href="#">Minimum Welfare Standards for the Transport of Live Poultry to Slaughter: Farm Sanctuary Comment</a>	Farm Sanctuary	9/18/23 9:51 pm
<a href="#">Public Comment on Petition 397: "Regulation for the Transportation of Poultry"</a>	People for the Ethical Treatment of Animals	9/18/23 9:36 am
<a href="#">Animal Equality Supports Animal Partisan's Petition</a>	Animal Equality	9/15/23 5:41 pm
<a href="#">In favor of welfare protections</a>	Anonymous (220314)	9/13/23 1:58 pm
<a href="#">I support this Bill.</a>	Jami Cooper	9/11/23 3:45 pm
<a href="#">In favor</a>	Anonymous (220207)	9/11/23 3:43 pm
<a href="#">In favor of welfare improvements for poultry</a>	Jackson	9/10/23 7:13 pm
<a href="#">Less cruelty</a>	Kennedy	9/10/23 12:14 pm
<a href="#">In favor of welfare improvements for poultry</a>	M. Bruggeman	9/9/23 8:52 pm
<a href="#">Regulation for the Transportation of Poultry</a>	Anonymous (220186)	9/8/23 11:11 pm
<a href="#">In favor</a>	Wendy Harper	9/8/23 7:54 pm
<a href="#">In favor</a>	M Kelley Moreland	9/8/23 7:05 am
<a href="#">In Favor</a>	Stacie Woodward	9/7/23 6:54 am
<a href="#">Regarding improvements in care for Virginia poultry</a>	Stacey Norris	9/6/23 7:26 pm
<a href="#">In favor</a>	A. Ahern	9/5/23 1:30 pm

<a href="#">Need more protections for poultry.</a>	Amy Bergmann	9/5/23 1:58 am
<a href="#">In Favor</a>	C Lane	9/4/23 4:20 pm
<a href="#">In Favor</a>	Kayla Baker	9/4/23 1:43 pm
<a href="#">Poultry laws</a>	Holly Nielsen	9/4/23 10:54 am
<a href="#">In Favor</a>	Anonymous (220131)	9/4/23 10:51 am
<a href="#">In favor</a>	Cara Frye	9/4/23 10:46 am
<a href="#">In favor</a>	Anonymous (220129)	9/4/23 10:41 am
<a href="#">In Favor</a>	Janette Reeve	9/4/23 10:41 am
<a href="#">In Favor</a>	Ian Goldberg	9/3/23 7:21 am
<a href="#">In favor</a>	Elise Jenkins, Cool Dogs Petsitting	9/2/23 10:06 pm
<a href="#">In Favor</a>	Reilly Park	9/2/23 7:24 pm
<a href="#">Vote in favor of this bill.</a>	Tonya Irizarry	9/2/23 5:38 pm
<a href="#">Regulation for transport of poultry.</a>	Eileen rodan	9/2/23 8:31 am
<a href="#">In Favor</a>	Andrea Williams	9/2/23 7:32 am
<a href="#">Minimum standard</a>	Sarah	9/1/23 12:17 pm
<a href="#">In favor</a>	Hogs & Kisses Farm Sanctuary	8/28/23 6:46 pm

**Trouble posting comments?** These pages have been tested with multiple versions of all the major browsers. If you have trouble: (1) try another computer if you have access to one, (2) try another browser if your computer has one installed (3) contact [Town Hall support staff](#) for assistance.



Agency

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Chapter

[\[2 VAC 5 - \]](#)

31 comments

**All comments for this forum****[Back to List of Comments](#)****Commenter:** Hogs & Kisses Farm Sanctuary

8/28/23 6:46 pm

**In favor**

In favor of compassionate care for all animals

CommentID: **219806****Commenter:** Sarah

9/1/23 12:17 pm

**Minimum standard**

These should be the absolute minimum standard of care for farmed animals. As we teach our children to "be kind" to all beings and our Mother Earth, the least we can do is set a good example for them.

CommentID: **220052****Commenter:** Andrea Williams

9/2/23 7:32 am

**In Favor**

Please instill standards for compassionate handling of farm animals.

CommentID: **220094****Commenter:** Eileen rodan

9/2/23 8:31 am

**Regulation for transport of poultry**

I strongly support passage of these regulations as I have been horrified at the conditions I have seen on the highway passing trucks full of chickens freezing, crowded, looking exhausted and sticking heads out for air. Please pass it

CommentID: **220095**

**Commenter:** Tonya Irizarry

9/2/23 5:38 pm

**Vote in favor of this bill.**

It's outrageous we even have to make basic standards of care into laws. Please vote in favor of this bill.

CommentID: **220102**

**Commenter:** Reilly Park

9/2/23 7:24 pm

**In Favor**

I am strongly in favor of the passage of these regulations to provide some relief to the horrific conditions these animals experience their entire lives. They are thinking, feeling individuals who deserve our compassion and care.

CommentID: **220103**

**Commenter:** Elise Jenkins, Cool Dogs Petsitting

9/2/23 10:06 pm

**In favor**

Please vote in favor of this bill, simply asking for some decent standards and less cruelty. There is no valid reason for chickens to be mishandled in such a manner. Thank you for your consideration.

CommentID: **220104**

**Commenter:** Ian Goldberg

9/3/23 7:21 am

**In Favor**

Please support bare minimum welfare standards for animals.

CommentID: **220106**

**Commenter:** Janette Reever

9/4/23 10:41 am

**In Favor**

As a VA resident, I am in support of this bill.

CommentID: **220128**

**Commenter:** Anonymous

9/4/23 10:41 am

**In favor**

They deserve compassion

CommentID: **220129**

**Commenter:** Cara Frye

9/4/23 10:46 am

**In favor**

Birds deserve to be treated with compassion.

CommentID: **220130**

**Commenter:** Anonymous

9/4/23 10:51 am

**In Favor**

In favor!

CommentID: **220131**

**Commenter:** Holly Nielsen

9/4/23 10:54 am

**Poultry laws**

In favor- more laws/regulations needed!

CommentID: **220132**

**Commenter:** Kayla Baker

9/4/23 1:43 pm

**In Favor**

It is my hope that the Virginia Town Hall will pass minimum standards to protect chickens in transport. Chickens are sentient beings who are forced endure horrific conditions and treatment, and it is our responsibility to mitigate these conditions.

CommentID: **220147**

**Commenter:** C Lane

9/4/23 4:20 pm

**In Favor**

Please pass this as all living creatures deserve at least minimum protection f

CommentID: **220150**

**Commenter:** Amy Bergmann

9/5/23 1:58 am

**Need more protections for poultry**

I am strongly in favor of more humane treatment of poultry. It is horrifying to see them stuffed into cages on trucks bound for slaughter. I have seen those trucks hauling birds in all sorts of weather, and have witnessed birds dead on the highway after having fallen out of the truck. It is atrocious treatment and I have seen videos that show it is just one more instance of cruelty to these poor creatures. For example, "bunchers" will grab multiple birds by their legs and literally throw them all at once into an open crate door, very like causing injuries and trauma. This is unacceptable and I hope we can at least work on improving their last day. Thank you.

CommentID: **220165****Commenter:** A. Ahern

9/5/23 1:30 pm

**In favor**

In favor of this petition and compassionate care for all animals

CommentID: **220166****Commenter:** Stacey Norris

9/6/23 7:26 pm

**Regarding improvements in care for Virginia poultry**

To whom it may concern: I wish to thank you for considering improvements to the handling of millions of birds sent to slaughter in Virginia each year.

These seem like very easy to implement, common sense regulations, and I'm shocked that they're not already in place. Thank you again.

CommentID: **220169****Commenter:** Stacie Woodward

9/7/23 6:54 am

**In Favor**

Animals pay the ultimate price for human survival, they pay with their life. They deserve more than "the bare minimum." We should be providing them w/ the Gold Standard of care for their sacrifice.

CommentID: **220170****Commenter:** M Kelley Moreland

9/8/23 7:05 am

**In favor**

Please vote yes on these simple rules to reduce the suffering of countless beings.

CommentID: **220176****Commenter:** Wendy Harper

9/8/23 7:54 pm

**In favor**

In favor

CommentID: **220185****Commenter:** Anonymous

9/8/23 11:11 pm

**Regulation for the Transportation of Poultry**

**Expressing Support**CommentID: **220186****Commenter:** M. Bruggeman

9/9/23 8:52 pm

**In favor of welfare improvements for poultry**

Please make the necessary changes to support these suggested welfare improvements for the handling of poultry.

CommentID: **220195****Commenter:** Kennedy

9/10/23 12:14 pm

**Less cruelty**

It wouldn't take much to provide less cruel treatment for the animals. I

highly recommend it as your time in business is shoe as the climate crisis people want all fake meat. You may

be out of business soon enough.

CommentID: **220196****Commenter:** Jackson

9/10/23 7:13 pm

**In favor of welfare improvements for poultry**

In favor of welfare improvements for poultry.

CommentID: **220198****Commenter:** Anonymous

9/11/23 3:43 pm

**In favor**

In favor

CommentID: **220207****Commenter:** Jami Cooper

9/11/23 3:45 pm

**I support this Bill.**

I support this Bill.

CommentID: **220208****Commenter:** Anonymous

9/13/23 1:58 pm

**In favor of welfare protections**

Birds are sentient beings that can feel pain and suffering. As a civilized society, we should have regulations providing at least minimum welfare protections for poultry in transport within the Commonwealth. It is only the lucky residents of our state who have never been stuck behind an overcrowded poultry truck full of birds experiencing intense confinement and extreme weather on their way to slaughter.

CommentID: **220314**

**Commenter:** Animal Equality

9/15/23 5:41 pm

## **Animal Equality Supports Animal Partisan's Petition**

Dear Virginia Board of Agriculture and Consumer Services,

On behalf of Animal Equality, we submit the following comment in support of the Petition for Rulemaking Pursuant to Virginia Code §2.2-4007(A): Minimum Welfare Standards for the Transport of Live Poultry for Slaughter submitted by Animal Partisan (hereinafter "Animal Partisan's Petition").

Animal Equality is a 501(c)(3) non-profit organization whose mission is to create a world where animals used in agriculture are respected and protected. Our organization works toward this mission by engaging with public officials, private companies, and members of the public through investigations, campaigns, and legal advocacy. Animal Equality has supporters throughout the United States, including Virginia, and regularly engages in litigation in jurisdictions across the country.

### **I.) Adopting the Regulations Laid Out in Animal Partisan's Petition Would Help Reduce Unnecessary Suffering of Poultry During All Stages of Transport Process**

We, as an organization, strongly support Animal Partisan's Petition, as it would create safeguards and regulations that would undoubtedly reduce the number of pre-slaughter deaths and the amount of intense suffering experienced by poultry throughout each stage of the transport process.

As noted in Animal Partisan's Petition, poultry are the most processed animals in the United States, yet they are the least protected. Poultry often endure unspeakable suffering during the handling process, prior to transport. Animal Partisan's Petition notes these birds can sustain serious injuries and endure immense stress from improper handling. This improper handling has also contributed to increased dead-on-arrival rates. Additionally, Animal Partisan outlines a 2022 investigation done by Animal Outlook, where birds were abused by workers during the handling process, with one worker even ripping the head off a bird. Unfortunately, this type of brutality during handling is all too common in the industry, and guidelines and safeguards are needed to ensure they are handled with the utmost care and respect. Animal Partisan's Proposed Rule, as laid out in its Petition, would bolster protections for poultry and reduce suffering on a vast scale during the handling stage.

While poultry are vulnerable to pain and suffering during the handling stage, they are even more at risk during the transport stage. As Animal Partisan's Petition notes, extreme temperatures play a key role in stress, injury, and death during the transport stage. In fact, it is estimated that more than 20 million chickens die every year while being transported in the United States, with researchers at Michigan State University noting that "these deaths are caused by a number of factors, including poor ventilation, long journeys and high temperatures . . ." Animal Partisan's Proposed Rule, as laid out in its Petition, would effectively reduce poultry suffering and mortality rates, as the Rule would ensure that the temperature is appropriately regulated through proper ventilation, strict temperature monitoring, and sufficient space for each bird. These Regulations are absolutely necessary to ensure that birds are not left to suffer and die from extreme temperatures during transport.



After the birds are transported to the slaughterhouse, they are often left, sometimes for many hours, to suffer and die from extreme temperatures in the lairage stage. Animal Partisan's Proposed Rule would effectively reduce, if not eliminate, poultry deaths in the lairage period by implementing safeguards, including proper ventilation, temperature control, and strict limits on lairage time. Again, this Proposed Rule is absolutely critical to ensure the safety and well-being of poultry.

## II.) Adopting the Regulations Laid Out in Animal Partisan's Petition Adds Additional Safeguards to Protect Virginia Consumers from Unsafe Food Products

Not only does Animal Partisan's Proposed Rule create safeguards for birds, but it also protects Virginia consumers from potentially dangerous food products. As Animal Partisan notes in its Petition, physiological responses to stress in animals, as well as physical impacts that cause bruising, can completely alter meat products in unsafe ways. Current poultry transport practices significantly increase the likelihood of stress and physical impact in birds, thus putting consumers at risk of consuming unsafe meat products. Stronger regulations, like the ones suggested by Animal Partisan, could greatly reduce stress and physical impact during the transport process, thus reducing the risk of unsafe meat products reaching Virginia consumers. For their safety, Animal Partisan's Proposed Rule should be adopted.

## III.) Conclusion

To conclude, Animal Equality strongly supports Animal Partisan's Petition and asks that the Board adopt the regulations set forth in the Petition. These regulations are critical to ensure that poultry are protected from unnecessary suffering and that Virginia's consumers are safeguarded from potentially dangerous food products. We thank you for your time and consideration.

Best Regards,

**Animal Equality**

CommentID: 220345

**Commenter:** People for the Ethical Treatment of Animals

9/18/23 9:36 am

## Public Comment on Petition 397: "Regulation for the Transportation of Poultry"

PETA supports Animal Partisan's petition that the Board of Agriculture and Consumer Services promulgate regulations setting minimum standards of care for the transportation, handling and lairage of birds prior to slaughter within the Commonwealth.

In the United States, more than 9 billion birds are slaughtered for their flesh each year—more than all other land animals combined—yet not a single federal law protects them from abuse, neglect, suffering and distress in transport and at slaughterhouses.

These animals are effectively denied such protection under the Commonwealth's laws, as well. Va. Code § 3.2-6570 (D) exempts "farming activities" (including transportation of birds in ways consistent with the poultry industry's practices) from prosecution. Meanwhile, local law enforcement agencies often mistakenly believe that federal regulation of slaughterhouses preempts criminal liability under state law for cruelty that occurs there.

As a result, these animals routinely suffer and die—in clearly illegal ways—on the Commonwealth's roadways and in its slaughterhouses, with no legal ramifications for the culpable parties. For example:

- In December 2022, a winter storm brought freezing rain and temperatures of 33 degrees to the Dayton area. Despite this, turkeys were transported in a trailer with no protection from the elements to the Cargill Meat Solutions slaughterhouse in Dayton. At the slaughterhouse, a federal inspector found that 24 dead turkeys on the trailer were "diffusely soaked wet and cold to the

touch,” “consistent with death due to hypothermia.”

- In November 2022, a federal inspector discovered a container of live chickens which had fallen off a trailer at Shenandoah Valley Organic’s Harrisonburg slaughterhouse onto the pavement below, with the birds “piled on top of one another, at least three or four deep.” The inspector counted “67 chickens [who] were dead or dying ... due to trauma and/or suffocation ....”
- In July 2022, a man hauling chickens to that Harrisonburg slaughterhouse ran off a straight stretch of road, struck two utility poles, crossed the oncoming lane of traffic, ran off the left side of the road, crossed back, overturned in the right lane, and struck a third pole. The crash killed many chickens who were crushed or ejected from crates on the overturned trailer, and left many other maimed birds to suffer for several hours along the roadside.
- In May 2020, workers at George’s, LLC left thousands of chickens overnight on two trailers—as the temperature dropped to 37 degrees—at its slaughterhouse near Edinburg. Up to 2,525 of the animals died as a result.
- Circle S Ranch, Inc. trucks carrying turkeys to the Cargill Meat Solutions slaughterhouse in Dayton crashed on at least five occasions between 2012 and August 2023 in Henry and Pittsylvania counties alone. Eyewitnesses reported that turkeys with broken bones and other serious injuries were not relieved of their suffering on site. Workers allegedly tossed them against coops, causing their heads and wings to strike the metal frames. After this August’s crash, State Police struggled for two hours to even reach Circle S, and another three hours passed before turkey industry representatives arrived to start recovering survivors. After the 2012 crash, approximately 540 turkeys—piled on top of one another in transport cages and denied shade—slowly suffered and died from apparent heat-related stress on the side of the road.

Avian species handled, transported and held for slaughter in the Commonwealth are as capable of suffering as are the exotic and native birds (and other companion animals) the Board has wisely regulated the transport of in Virginia Administrative Code, Chapter 150.

Given this—and the abject suffering of poultry in Virginia currently unaddressed by law enforcement and regulatory agencies—PETA urges the Board to regulate the transportation, handling and lairage of such birds prior to their slaughter within the Commonwealth. Some of the worst abuses of these animals would be mitigated to the extent the poultry industry complied with the proposed rule.

CommentID: **220349**

**Commenter:** Farm Sanctuary

9/18/23 9:51 pm

### **Minimum Welfare Standards for the Transport of Live Poultry to Slaughter: Farm Sanctuary Comment**

VIA TOWNHALL.VIRGINIA.GOV

September 15, 2023

Kevin E. Schmidt  
 Director, Office of Policy, Planning and Research  
 Virginia Department of Agriculture and Consumer Services  
 kevin.schmidt@vdacs.virginia.gov  
 (807) 786-1346

### **Re: Comments on Petition for Rulemaking Pursuant to Virginia Code § 2.2-4007(A): Minimum Welfare Standards for the Transport of Live Poultry to Slaughter**

#### **Introduction**

We submit the following comment on behalf of our 1.8 million members and followers across the country in support of food systems that work better for animals, people, and the planet.

As a national animal protection organization that pioneered the Sanctuary movement, Farm Sanctuary possesses firsthand experience with the dire consequences of inadequately regulated poultry transport. Over the past 35 years, we have cared for numerous birds subjected to inhumane transport conditions, uniquely positioning us to advocate for the nearly 300 million chickens and turkeys transported, processed, and sold in Virginia each year.<sup>1</sup>

In the following sections, we explore why and how the Virginia Board of Agriculture and Consumer Services should set specific minimum welfare standards for the transport of live poultry to slaughter.

## I. Handling

In early 2022, a poultry truck driver took a wide turn at an intersection, causing over a dozen unsecured crates filled with hundreds of small chickens to crash on a busy street. With little incentive to return and collect the birds, the driver continued on. Luckily, Farm Sanctuary was contacted.<sup>2</sup>

One of the chicks, named Lemondrop, suffered a broken wing. While one might assume her wing broke from the fall's impact, we cannot be sure Lemondrop wasn't harmed from routine, rough handling.<sup>3</sup> Numerous documented cases reveal instances of poultry abuse by workers,<sup>4</sup> including multiple investigations against Tyson Foods that exposed handlers beating, throwing, kicking, and suffocating live birds.<sup>5</sup> As cited in Animal Partisan's petition, the catching, handling, and loading of birds for transport to slaughter can cause a host of injuries, including bone fractures, dislocations, ruptured organs, bruising, and head trauma.<sup>6</sup>

Minimizing stress, bruising, and injury from handling not only benefits the birds but also the humans who consume them. Increased stress from physical and psychological harm elevates the risk that Salmonella bacteria in the birds' intestines will infiltrate the muscle—consumed by humans—via the bloodstream.<sup>7</sup> Bruising also poses a concern, as Salmonella bacteria thrive and spread much more easily in bruises than in healthy tissues, thus heightening the risk of consumers falling ill from roughly handled poultry.<sup>8</sup>

We support the Virginia Cooperative Extension's recommendations regarding best practices for the humane catching and handling of poultry and call upon the Virginia Board of Agriculture and Consumer Services to adopt the Extension's standards:

Noisy and aggressive catching can cause panic and injury. Approach the birds quietly and calmly, possibly under dim lighting. For larger bird types, always have two points of contact when catching a bird, for instance, by holding the legs and the body. Never catch birds by their neck, head, or tail. Avoid catching by their legs or wings alone. Do not hold birds upside down, [as] they get stressed, fearful, and may even die because of inverted restraint.<sup>9</sup>

## 2. Transit Conditions

### *Temperature*

As discussed in Animal Partisan's petition, extreme temperatures constitute the primary cause of stress and injury for poultry during transit to slaughter.<sup>10</sup> According to publicly available records, thousands of birds have perished due to heat exhaustion and sub-zero conditions. In cases of severe heat and cold stress, surviving birds are more likely to contract Salmonella infections, thereby increasing the risk of Salmonella-related illnesses in human consumers.<sup>11</sup>

Minnesota's Butterfield Foods repeated state cruelty law violations showcase the peril posed by extreme temperatures for poultry in transit.<sup>12</sup> On June 9, 2021, over 2,500 birds died after being left in a trailer overnight without proper ventilation when local temperatures exceeded 90 degrees. The preceding year, Butterfield evaded accountability when, in two separate incidents, more than 18,500 birds suffered and died from heat exposure and freezing temperatures.<sup>13</sup> Without proper regulation, companies like Butterfield will continue jeopardizing human and animal lives.

To protect poultry from exposure to extreme temperatures and safeguard Virginia's consumers from Salmonella contamination, the Virginia Board of Agriculture and Consumer Services should

adopt the following standards for transit temperature regulation:<sup>14</sup>

- Ensure the maximum temperature reached in all transport-related facilities does not exceed 84°F. Humidity assessments should be conducted using species-specific temperature-humidity indices.
- Ensure the minimum temperature reached in all transport-related facilities does not drop below 41°F. If maintaining temperatures within this range is impossible, transport should be delayed until safe temperatures can be achieved.
- If a heating and/or ventilation system is installed to control temperatures, it must be capable of operating for a minimum of four hours independently of the vehicle engine.
- Each vehicle must be equipped with functional temperature sensors positioned in areas of the vehicle most susceptible to extreme climatic conditions.

### *Stocking Density*

In May 2015, locals notified Farm Sanctuary that 60 chickens had fallen off a transport truck headed to Brooklyn.<sup>15</sup> The year prior, Farm Sanctuary rescued 87 birds that survived a similar fall from a truck on the Staten Island Expressway.<sup>16</sup> We have witnessed how frequently unsecured straps result in dozens, if not hundreds, of birds toppling off moving vehicles. But even more prevalent are the overcrowded transport conditions birds must endure on their way to slaughter.

Birds in transport trucks are tightly packed into several tiers of plastic crates, with feces and debris raining down on those stuck below. All 87 survivors of the 2014 crash required treatment for respiratory infections, likely stemming from the congested, stressful, and unsanitary conditions that overcrowding creates.<sup>17</sup>

According to the Virginia Cooperative Extension, each chicken must be allotted one-half and one square foot of space, while ducks, geese, and turkeys require two to three square feet.<sup>18</sup> The Virginia Board of Agriculture and Consumer Services must ensure that birds in transit have adequate space by enshrining the Virginia Cooperative Extension's recommendations into law.

### **III. Length of Journey and Lairage**

The primary statute governing the treatment of poultry during transport to slaughter is Virginia Code § 3.2-6508, which prohibits the confinement of animals for transport longer than twenty-four hours without exercise, rest, feed, and water.<sup>19</sup> Virginia's twenty-four hour law is insufficient to protect the welfare of birds. Leaving any living being, regardless of species, in cramped, unsanitary, and perilous conditions for up to twenty-four hours is both inhumane and unsafe.

Lairage, the period between the arrival of poultry at the slaughterhouse and slaughter itself, is another poorly regulated aspect of the transport process that often results in birds being left for hours or days, even during extreme weather events.<sup>20</sup> Similar to transit, heat and cold stress are common in lairage, leading to unnecessary suffering, death, and risk of Salmonella contamination.<sup>21</sup>

In establishing humane standards of care for poultry during transport, the Virginia Board of Agriculture and Consumer Services should enact the following rules:

Transit:<sup>22</sup>

- Limit transit confinement, commencing when the first bird is loaded and ending when the last bird is unloaded, to a maximum of eight hours.
- If the transit journey must exceed eight hours, ensure the birds have access to sufficient, clean, species-appropriate food and water onboard the vehicle. The food and water containers must be designed to prevent freezing or tipping over.
- After unloading, all birds must be fed, watered, and provided adequate space to rest for at least 24 hours before reloading takes place.

**Lairage:**<sup>23</sup>

- Birds must not be kept in lairage for more than four hours.

**Conclusion**

Farm Sanctuary calls on the Virginia Board of Agriculture and Consumer Services to pass rules enacting minimal welfare standards for poultry in transport. The recommendations set forth in this comment, while significant, do not encompass the full spectrum of considerations pertaining to poultry transport to slaughter. We strongly urge the Virginia Board of Agriculture and Consumer Services to conduct further research on all aspects of poultry transport to slaughter, including handling techniques, maximum transport times, exposure to weather, loading densities, vehicle design, feed and water deprivation, and licensing and training.

We know firsthand how meager government oversight negatively affects the wellbeing of chickens, ducks, geese, and turkeys. Regular reviews of USDA enforcement records reveal that every year, tens of thousands of birds suffer excruciating deaths before they even make it to the slaughter line.<sup>24</sup> In August 2020, we filed a lawsuit against the USDA in collaboration with the Animal Welfare Institute and Harvard Law School's Animal Law & Policy Clinic. Our objective was to prompt the resolution of systematic poultry mistreatment during slaughter.<sup>25</sup> Unfortunately, we are still awaiting the development of poultry handling regulations that meaningfully address concerns related to food safety and bird welfare. This lawsuit is just the beginning, as we are well aware of the numerous regulatory gaps resulting from lack of federal oversight that must be filled.

In light of the absence of federal laws, and adequate state laws, regulating the welfare of poultry during transport to slaughter,<sup>26</sup> the state of Virginia must take immediate action to protect Virginia's birds and communities.

**Sources**

1. Nat'l Agric. Stat. Serv., U.S. Dep't of Agric., AC-17 AC-17-A-46, 2017 Census of Agriculture (2019).
2. Farm Sanctuary, Lemondrop, Cottonball, and Friends: 41 Chickens Rescued from Two NYC Crises, <https://www.farmsanctuary.org/news-stories/lemondrop-cottonball-41-chickens-rescued-two-nyc-crises/> (Mar. 15, 2022).
3. Id.
4. See, for example, Natasha Lennard, Dangerous Pathogens and Cruelty Law Violations at Perdue Subsidiary, Animal Rights Report Alleges, The Intercept, <https://theintercept.com/2023/06/13/perdue-chicken-slaughterhouse-animal-cruelty-dxe/> (June 13, 2023, 11:46 am).
5. Osita Nwanevu, Undercover Video Shows Tyson Food Employees Abusing Chickens, Slate, <https://slate.com/news-and-politics/2016/08/an-undercover-video-shows-tyson-food-employees-beating-throwing-and-standing-on-chickens.html> (Aug. 11, 2016, 5:55 pm); Animal Outlook, Investigation of Tyson Grower Reveals Mass, Systemic Cruelty, <https://animaloutlook.org/investigations/investigation-of-tyson-grower-reveals-mass-systemic-cruelty/>
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7. Animal Welfare Institute, AWI Proposes Slaughter Reforms to Help Protect Poultry and Public Health, <https://awionline.org/awi-quarterly/spring-2023/awi-proposes-slaughter-reforms-help-protect-poultry-and-public-health> (Spring 2023).

8. Id.
9. Philip J. Clauer, VA. Coop. Extension, *Transporting Poultry in a Humane Manner* 1 (2018).
10. M.A. Mitchell & P.J. Kettlewell, *Welfare of Poultry During Transport: A Review* 91 (2009).
11. Animal Welfare Institute, *supra* note 7.
12. Virginia Code § 3.2-6508 (2023).
13. Animal Welfare Institute, *Minnesota Law Enforcement Urged to Investigate Butterfield, Jennie-O for Animal Cruelty*, <https://awionline.org/press-releases/minnesota-law-enforcement-urged-investigate-butterfield-jennie-o-animal-cruelty> (Oct. 14, 2021).
14. Mercy for Animals, *Updating Canada's Farmed Animal Transportation Regulations*, [https://wpit.cachefly.net/edudev/sites/12/2017/01/Updating-Canadas-Transportation-Regulations.pdf?\\_ga=2.179445092.1799525159.1694550998-307941344.1685039716](https://wpit.cachefly.net/edudev/sites/12/2017/01/Updating-Canadas-Transportation-Regulations.pdf?_ga=2.179445092.1799525159.1694550998-307941344.1685039716) (2017).
15. Farm Sanctuary, *60 Chickens Fall Off Transport Truck*, <https://www.farmsanctuary.org/news-stories/60-chickens-fall-off-transport-truck/> (May 22, 2015).
16. Farm Sanctuary, *Jane and Friends: Chickens Survive Fall on Staten Island Expressway*, <https://www.farmsanctuary.org/news-stories/jane-and-friends-chickens-survive-fall-onto-staten-island-expressway/> (Oct. 16, 2014).
17. Id.
18. See CLAUER, *supra* note 9, at 3.
19. See *supra* note 12.
20. Animal Welfare Institute, *supra* note 7.
21. Id., *Animal Welfare Institute, USDA Fails to Protect Birds Who Are Neglected, Abandoned During Transport and At Slaughterhouse*, <https://awionline.org/press-releases/report-usda-fails-protect-birds-who-are-neglected-abandoned-during-transport> (Aug. 9, 2018).
22. Mercy for Animals, *supra* note 14.
23. See K.S. Schwartzkopf-Genswein et al., *Road Transport of Cattle, Swine and Poultry in North America and Its Impact on Animal Welfare, Carcass and Meat Quality: A Review*, 92 *Meat Sci.* 227, 238 (2012).
24. Animal Welfare Institute, *USDA Sued to Compel Humane Handling of Birds at Slaughter*, <https://awionline.org/press-releases/usda-sued-compel-humane-handling-birds-slaughter> (Aug. 13, 2020).
25. Farm Sanctuary, *Judge Rules Humane Handling Laws Against USDA Must Move Forward*, <https://www.farmsanctuary.org/news-stories/judge-rules-humane-handling-lawsuit-against-usda-must-move-forward/> (Oct. 14, 2021).
26. In interpreting the Twenty-Eight Hour Law, the USDA has determined it does not apply to poultry. U.S. Dep't of Agric., *Twenty-Eight Hour Law*, Nat'l Agric. Libr., <https://www.nal.usda.gov/animal-health0and-welfare/twenty-eight-hour-law> (last visited June 8, 2023).

CommentID: **220352**



September 14, 2023



Dr. Carolynn Bissett, Program Manager  
Office of Veterinary Services  
Department of Agriculture and Consumer Services  
Oliver Hill Building  
102 Governor Street  
Richmond, VA 23219

Dear Dr. Bissett:

I am writing on behalf of Virginia Farm Bureau Federation (VFBF) to request that the Virginia Board of Agriculture and Consumer Services deny Animal Partisan's petition for the promulgation of regulations setting minimum standards of care for the transportation, handling, and lairage of poultry prior to slaughter within the Virginia.

VFBF is a statewide farm membership organization representing farmers in all aspects of agriculture production in the Commonwealth. Our membership includes hundreds of farm families that raise and market chickens, turkey, and chicken eggs independently or under contract with a poultry processor or egg company.

Animal welfare is a top priority and necessary for the production, transport, and processing of poultry. Sound animal welfare fulfills an ethical obligation, satisfies consumer expectations, and makes good economic sense. A flock that is healthy and well cared for throughout its life is essential for delivering the best poultry products to consumers and in turn the economic well-being of farmers and processors. Poultry is Virginia's largest agricultural sector; there is no greater incentive for poultry welfare for those whose livelihoods depend upon it.

To this end, the poultry industry has adopted and continually seeks improvement in science-based poultry health and welfare standards. Comprehensive animal welfare standards adopted by the National Chicken Council, the National Turkey Federation, and the United Egg Producers set expectations for proper management of poultry during transport. In fact, many of the concerns and objectives stated by the petitioner are implemented through these audited standards, which apply to poultry throughout Virginia.

State regulations should only be implemented when necessary to address a demonstrated problem. Regulations are not necessary in response to this petition because the industry has adopted adequate standards and auditing, certified by the Professional Animal Auditor Certification Organization (PAACO), a leading authority on animal welfare auditing which provides high quality training and certification credentials for auditors and audits. Furthermore, industry organizations and universities provide outreach to poultry processors and transporters to present the latest scientific research and information so that poultry transporters are always implementing best practices for continuous improvement.

Please let me know if you have any questions. Thank you for your consideration of our comments.

Sincerely,

A handwritten signature in cursive script that reads "Tony Banks".

Tony Banks, Senior Assistant Director  
Agriculture, Development, and Innovation





*Educate. Advocate. Innovate.*

September 17, 2023

Dr. Carolyn Bissett  
Program Manager  
Office of Veterinary Services  
Department of Agriculture and Consumer Services  
Oliver Hill Building  
102 Governor Street  
Richmond, VA 23219

Dear Dr. Bissett,

The Delmarva Chicken Association (DCA) is the 1,600-member trade association representing the meat-chicken growers, companies, and allied businesses on the Eastern Shore of Maryland, the Eastern Shore of Virginia, and Delaware. We respectfully request that the Virginia Board of Agriculture and Consumer Services deny the petition brought forth by Animal Partisan to promulgate regulations setting minimum standards of care for transportation, handling, and lairage of poultry prior to slaughter.

Animal welfare is a top priority for our chicken industry, both for profitability and for meeting the standards of care our consumers have come to expect. For the entire lifespan of the bird, hatcheries, growers, transportation personnel, and processing plant employees work to ensure minimum mortality prior to slaughter. Our companies also have an ethical obligation to both the animal and our consumers to provide care which our culture deems appropriate, and which provides maximum comfort for the animal. Without meeting such standards, the economic well-being of farmers and companies is undermined.

As such, the chicken community has well-established standards of care rooted in science and technology, and in the interest of keeping as many birds alive and as healthy as possible. Most of our companies follow the extensive guidelines set out by the National Chicken Council for catching and transportation of live birds. Those that do not have their own guidelines which meet or exceed NCC standards. Perhaps unbeknownst to Animal Partisan, the NCC standards are used by USDA to evaluate chicken company activities under the Poultry Care Verified Program. These audits specifically address crowding, minimizing bird stress, and catching techniques which minimize bird injury. We encourage Animal Partisan to review these audited standards, which largely address their concerns and objectives.

Although the petition cites specific failures of certain live haulers to meet NCC standards, they do not demonstrate a systemic failure which would warrant promulgation of regulations. As stated, there is already an auditing process conducted by the USDA which provides penalties if standards of proper care are not met. Promulgating further regulations on a state level would require significant time and resources, and in this



*Educate. Advocate. Innovate.*

case is completely unnecessary. Furthermore, we take exception to any regulations affecting our industry which do not have broad stakeholder input.

Again, we respectfully request that the Virginia Board of Agriculture and Consumer Services deny the petition brought forth by Animal Partisan. Please let me know if you have any questions or would like further information on this subject. Thank you for your thoughtful consideration.

Sincerely,

Holly Porter  
Executive Director



P.O. Box 2277, Harrisonburg, VA 22801, 540-433-2451

September 17, 2023

Dr.Carolynn Bissett  
Program Manager  
Office of Veterinary Services  
Department of Agriculture and Consumer Services  
Oliver Hill Building  
102 Governor Street  
Richmond, VA 23219

Dear Dr. Bissett:

I am writing on behalf of Virginia Poultry Federation (VPF) to request that the Virginia Board of Agriculture and Consumer Services deny the petition of Animal Partisan to promulgate regulations setting minimum standards of care for the transportation, handling, and lairage of poultry prior to slaughter within the Commonwealth.

VPF is a statewide trade association, founded in 1925, representing all segments of the poultry industry throughout Virginia. Poultry is Virginia's largest agricultural sector, supporting the livelihood of more than a thousand farm families and thousands of jobs in the Commonwealth. In addition to poultry growers, VPF members include poultry processors operating in Virginia.

Animal welfare is a top priority and integral to the production, transport, and processing of poultry in Virginia and throughout the United States. Ensuring the best possible welfare not only fulfills an ethical obligation and satisfies consumer expectations but also makes good business sense. From hatch onward, the goal in each phase of production, transport, and processing is a healthy, well cared for flock; anything less hurts the economic well-being of farmers and processors. No greater incentive for poultry welfare exists than that of those whose livelihoods depend upon it.

As such, the poultry industry has marshalled science, technology, and knowledge for continuous improvement in poultry health and welfare. This is reflected in the scientifically based, comprehensive animal welfare standards adopted by the chicken, turkey, and egg industries in the United States. Standards adopted by the National Chicken Council<sup>i</sup>, the National Turkey Federation<sup>ii</sup>, and the United Egg Producers<sup>iii</sup> set expectations for proper management of poultry during transport. In fact, many of the concerns and objectives stated by the petitioners are implemented through these audited standards, which apply to poultry throughout Virginia.

VPF believes that state regulations should be implemented only when necessary to address a demonstrated problem for the public benefit. In this instance, regulations are

not necessary because the industry has adopted adequate standards and auditing, certified by the Professional Animal Auditor Certification Organization (PAACO), a leading authority on animal welfare auditing which provides high quality training and certification credentials for auditors and audits. In addition to robust, audited standards, industry organizations and universities conduct seminars and workshops to discuss the latest scientific research so that poultry transporters are always on the cutting edge of implementing best practices for continuous improvement.

Please let me know if you have any questions or would like additional information. Thank you for your consideration of our comments.

Sincerely,



Hobey Bauhan  
President

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<sup>i</sup> National Chicken Council Animal Welfare Guidelines, <https://www.nationalchickencouncil.org/policy/animal-welfare/>

<sup>ii</sup> National Turkey Federation Animal Care Guidelines, <https://www.eatturkey.org/animal-welfare/standards/>

<sup>iii</sup> United Egg Producers, <https://uepcertified.com/resources/>



September 18, 2023

Dr. Carolyn Bissett  
Program Manager  
Office of Veterinary Services  
Virginia Department of Agriculture and Consumer Services  
Richmond, Virginia 23219

Dear Dr. Bissett,

I am writing on behalf of Virginia Agribusiness Council to request that the Virginia Board of Agriculture and Consumer Services deny the petition of Animal Partisan to promulgate regulations setting minimum standards of care for the transportation, handling, and lairage of poultry prior to slaughter within the Commonwealth.

The Council represents over 40,000 farmers and agribusinesses and the entire agriculture and forestry industry supply chain, which is responsible for a \$105 billion total economic impact to the Commonwealth annually.

Animal welfare is a top priority and integral to the production, transport, and processing of poultry in Virginia and throughout the United States. Ensuring the best possible welfare not only fulfills an ethical obligation and satisfies consumer expectations but also makes good business sense. From hatch onward, the goal in each phase of production, transport, and processing is a healthy, well cared for flock; anything less hurts the economic well-being of farmers and processors. No greater incentive for poultry welfare exists than that of those whose livelihoods depend upon it.

And animal welfare and care are important priority issues for the Council. The Council's Agriculture Animal Care Standards Policies are as follows:

- The Council supports responsible use of agriculture animals for human purposes, such as food, fiber, recreation, work, education, exhibition, and research conducted for the benefit of both humans and animals.
- The Council supports proper handling, nutrition, management, and animal health practices appropriate to the care and use of agricultural animals.
- The Council supports animal care decisions founded in scientific knowledge and professional judgment.
- The Council supports the advancement of animal care through scientific research and education.
- The Council opposes state and local actions which are burdensome, unreasonable, and not based on scientific research and that adversely impact animal agriculture producers.

The poultry industry in particular has marshalled science, technology, and knowledge for continuous improvement in poultry health and welfare. This is reflected in the scientifically based, comprehensive

animal welfare standards adopted by the chicken, turkey, and egg industries in the United States. In fact, many of the concerns and objectives stated by the petitioners are implemented through these audited standards, which apply to poultry throughout Virginia.

Like our partners at the Virginia Poultry Federation, the Virginia Agribusiness Council believes that state regulations should be implemented only when necessary to address a demonstrated problem for the public benefit. In this instance, regulations are not necessary because the industry has adopted adequate standards and auditing, certified by the Professional Animal Auditor Certification Organization (PAACO), a leading authority on animal welfare auditing which provides high quality training and certification credentials for auditors and audits. In addition to robust, audited standards, industry organizations and universities conduct seminars and workshops to discuss the latest scientific research so that poultry transporters are always on the cutting edge of implementing best practices for continuous improvement.

Please let me know if you have any questions or would like additional information. Thank you for your consideration of our comments.

Sincerely,

A handwritten signature in cursive script that reads "Cliff Williamson". The signature is written in dark ink and is positioned above the typed name.

Cliff Williamson  
Executive Director  
Virginia Agribusiness Council



September 18, 2023

Dr.Carolynn Bissett  
Program Manager  
Office of Veterinary Services  
Department of Agriculture and Consumer Services  
Oliver Hill Building  
102 Governor Street  
Richmond, VA 23219

Dear Dr. Bissett:

Tyson Foods, Inc. (Tyson Foods) is one of the world's largest food companies and a recognized leader in protein. We currently operate two harvest facilities in the state of Virginia. As a global leader in protein production, it is a priority to ensure that high standards for animal health and welfare, which conform to all applicable laws and industry best practices, are informed by sound science and good management practices, as well as implemented, enforced and verified across our supply chain. In support of this endeavor, our animal welfare policies and procedures reflect the most current science and we continually evaluate emerging technologies to drive continuous improvement.

We request that the Virginia Board of Agriculture and Consumer Services deny the petition of Animal Partisan to promulgate regulations setting minimum standards of care for the transportation, handling, and lairage of poultry prior to slaughter within the Commonwealth. Animal welfare is a top priority and integral to the production, transport, and processing of poultry in Virginia and throughout the United States.

This is reflected in the scientifically based, comprehensive animal welfare standards adopted by the chicken, turkey, and egg industries in the United States. Standards adopted by the National Chicken Council, the National Turkey Federation and the United Egg Producers set expectations for proper management of poultry during transport. In fact, many of the concerns and objectives stated by the petitioners are implemented through these audited standards, which apply to poultry throughout Virginia.

We believe regulations are not necessary because the industry has adopted adequate standards and auditing, certified by the Professional Animal Auditor Certification Organization (PAACO), a leading authority on animal welfare auditing which provides high quality training and certification credentials for auditors and audits.

We are supportive of the comments submitted by the Virginia Poultry Federation on the petition. We thank you for your consideration of these comments.

Respectfully submitted,

/s/ Barbara Masters

Barbara Masters, DVM  
VP, Regulatory Policy, Food and Agriculture





September 18, 2023

Dr.Carolynn Bissett  
Program Manager  
Office of Veterinary Services  
Department of Agriculture and Consumer Services  
Oliver Hill Building  
102 Governor Street  
Richmond, VA 23219

Dear Dr. Bissett:

Cargill is a major processor of turkeys in the United States, with 600 independent family farms supplying turkeys to our processing plants located in Arkansas, Missouri and Virginia. Cargill is a dedicated global leader in animal welfare. In addition to being ethical and accountable, we care for animals in a manner that embraces proven animal science, husbandry and standards. Our global animal welfare approach includes initiatives that promote continuous engagement and the development of a positive animal welfare culture, as well as accountability for animal wellbeing throughout an animal's life.

We respectfully request that the Virginia Board of Agriculture and Consumer Services deny the petition of Animal Partisan to promulgate regulations setting minimum standards of care for the transportation, handling, and lairage of poultry prior to slaughter within the Commonwealth.

Cargill follows the scientifically based, comprehensive animal welfare standards adopted by the chicken, turkey, and egg industries in the U.S. Standards adopted by the National Turkey Federation set expectations for proper management of poultry during transport. In fact, many of the concerns and objectives stated by the petitioners are implemented through these audited standards. Cargill is aligned with the concerns raised by the Virginia Poultry Federation comments.

Cargill is continuously reviewing and improving our animal welfare programs and working to ensure our suppliers meet our animal welfare standards. We also

continue to pioneer strategies and tools which improve animal welfare, and we leverage innovation to ensure our progress. In addition, we hold ourselves and our suppliers accountable for the humane treatment of animals.

Thank you for your consideration. Please let us know if Cargill can be a resource to the Department on this important issue.

Sincerely,

Nick Wolfenden  
Global Director of Animal Welfare



# COMMONWEALTH of VIRGINIA

## Department of Agriculture and Consumer Services

PO Box 1163, Richmond, Virginia 23218

[www.vdacs.virginia.gov](http://www.vdacs.virginia.gov)

Joseph W. Guthrie  
Commissioner

October 15, 2023

Members of the Board of Agriculture and Consumer Services:

### I. PURPOSE

To report on the activities, educational programs, and grants administered through the Pesticide Control Fund (Fund), as required in item 105<sup>1</sup> of the 2022 Appropriation Act.

### II. THE PESTICIDE CONTROL FUND

The Virginia Pesticide Control Act (Act) (Va. Code § 3.2-3900 et seq.) grants certain powers to the Board of Agriculture and Consumer Services (Board), including the authority to regulate pesticides in Virginia. Section 3.2-3906 of the Act authorizes the Board to adopt regulations, in part, to establish a fee structure for the licensure, registration, and certification of pesticide businesses and applicators. Section 3.2-3912 of the Act (i) establishes the Fund, which is a special non-reverting account established on the books of the Comptroller into which all moneys levied and collected under the Act are deposited, (ii) provides that moneys in the Fund shall be used by the Department of Agriculture and Consumer Services solely for carrying out the purposes of the Act, and (iii) specifies that "expenditures and disbursements from the Fund shall be made by the State Treasurer on warrants issued by the Comptroller upon written request signed by the Commissioner."

### III. PESTICIDE FEES

All pesticide fees that are collected pursuant to the Act are deposited into the Fund. The type, amount, frequency, and due date of the various fees are prescribed in 2 VAC 5-675, *Regulations Governing Pesticide Fees Charged by the Department of Agriculture and Consumer Services*.

The schedule of pesticide fees for fiscal year 2023 is below:

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<sup>1</sup> 2022 SPECIAL SESSION I - BUDGET BILL - Acts of Assembly, Ch. 2, Item 105

*The Office of Pesticide Services shall publish a report on the activities, educational programs, research, and grants administered through the Pesticide Control Act Fund to the Board of Agriculture and Consumer Services by October 15 of each year.*

Pesticide Business License (Initial)	\$150	Payable at time of application
Pesticide Business License (Renewal)	\$150	Annual (Due March 31)
Late Fee for Business License Renewal	\$30	Payable upon late renewal
Commercial Applicator Certification (Initial)	\$100	Payable at time of application
Commercial Applicator Reciprocal Certification	\$100	Payable at time of application
Commercial Applicator Certification (Renewal)	\$0	
Commercial Applicator - Additional certification category	\$35	Payable at time of application
Registered Technician Applicator Certification (Initial)	\$50	Payable at time of application
Registered Technician Applicator Certification (Renewal)	\$0	
Product Registration (Initial)	\$225	Payable at time of application
Product Registration (Renewal)	\$225	Annual (Due December 31)
Late Fee for Product Registration Renewal	\$45	Payable upon late renewal

On May 18, 2023, the Board approved the creation of a regulatory advisory panel to assist the Board in evaluating fees established in 2 VAC 5-675, *Regulations Governing the Pesticide Fees Charged by the Department of Agriculture and Consumer Services*. Recommendations from the regulatory advisory panel will be presented to the Board at its meeting on December 7, 2023.

#### IV. GRANT FUNDING

The Pesticide Control Fund received \$459,448.00 in grant funding from the U.S. Environmental Protection Agency (EPA). The Virginia Department of Agriculture and Consumer Services (VDACS) used the EPA grant funds to offset salary and fringe expenses related to certification and enforcement. The agency also used the grant funds for pesticide-related projects such as training workshops and pollinator protection.

#### V. ADMINISTRATION OF THE PESTICIDE CONTROL FUND DURING FISCAL YEAR 2023

The Fund carried a cash balance of \$3,310,412.18 from fiscal year (FY) 2022. During FY 2023, the Office of Pesticide Services reported Fund sources of \$4,286,043.38 and Fund uses of \$3,258,788.09. The Fund cash balance at the end of FY 2023 was \$4,337,667.47. (Please see Appendix 1.) Expense detail for 2018-2023 can be found in Appendix 2.

##### **A. Operation of Office of Pesticide Services (OPS)**

OPS certifies pesticide applicators, registers pesticide products, issues pesticide business licenses, and educates pesticide users and the public about the benefits and risks of these products. Staff conducts routine inspections and investigates complaints to determine if pesticides have been misused. Staff also carries out public interest programs such as recycling of pesticide containers and disposal of pesticides. Through these activities, OPS protects consumers and the environment while permitting the safe and effective control of pests that adversely affect crops, structures, health, and domestic animals.

During FY 2023, OPS certified 4,845 private applicators, 9,357 commercial applicators, and 8,411 registered technicians to apply pesticides in the Commonwealth. OPS also licensed 2,337 pesticide businesses and registered 7,781 pesticide products. Due to ongoing technological issues with implementation of the online product registration system and staff vacancies, the processing time of new and renewing pesticide product registrations was delayed. Payments for these registrations were received and posted to the Fund. OPS has continued to process the registrations received in 2023. As a result, the overall number of pesticide products registered

by June 30, 2023, is lower than in previous years. As a result of the processing time for product registrations, no marketplace inspections were conducted during the fiscal year. Field staff conducted 1,541 routine inspections and related activities and initiated 94 investigations, including complaints, incidents, accidents, and related activities, at 1,407 individual sites throughout Virginia. The registration status of pesticides, as part of use inspection and investigation activities, was verified. Please see Appendix 3 for an organizational chart and staffing as of July 1, 2023. Appendix 3 indicates the positions that were vacant at year-end closing. Appendix 3 also includes an organizational chart reflecting changes made after July 1, 2023.

**B. Continuation of Education and Outreach Programs**

OPS continues to work with its Virginia Cooperative Extension (VCE) partners to provide pesticide applicators with up-to-date training materials and exams. Specific documents undergoing review and revision include four exams based upon the *Virginia Core* manual.

Costs related to applicator training, manuals, exams, and certification as well as continuing education and outreach programs were as follows:

<u>Virginia Cooperative Extension</u>	
Applicator Training, Manuals/Exams and Certification	\$ 385,081.30.

Pesticide applicators can take the certification exams through the use of SecuriTest, which is offered at more than 70 Department of Motor Vehicles (DMV) customer service centers throughout the Commonwealth, at VCE offices, online using the newly implemented remote testing option, or by appointment with OPS staff. During FY 2023, DMV administered 3,258 exams through SecuriTest and 131 prospective applicators utilized the remote testing option. A total of 5,097 exams were given at all sites, resulting in the issuance of 4,883 new certifications across all pesticide applicator categories. Testing sites included DMV offices, VDACS offices, online remote testing, and other proctored testing venues.

During the reporting period, VDACS issued and awarded the one-year pesticide safety education agreement, with four one-year renewal options, to Telamon to provide worker and handler training to growers throughout the state. This training is provided free of charge to agricultural employers and is available in English, Spanish, and Haitian Creole. During FY 2023, Telamon did not conduct training and no expenses were submitted for reimbursement.

**C. Environmental Stewardship Programs**

Since its inception, the Pesticide Collection Program has collected approximately 1.8 million pounds of unwanted, expired, or discontinued pesticides. The program provides an environmentally conscientious option for agricultural producers, pesticide dealers, pest control firms, homeowners, and golf course operators to dispose of unwanted pesticides at no cost to them. For FY 2023, the Pesticide Collection Program collected 59,580 pounds of unwanted pesticides.

Since its inception in 1993, the Plastic Pesticide Container Recycling Program has collected more than 2.4 million pounds of containers. The program is available to any pesticide applicator or dealer in Virginia and is part of a nationwide effort by chemical manufacturers to reduce the waste generated by the disposal of plastic pesticide containers. For FY 2023, the Pesticide Plastic Container Recycling Program collected 96,254 pounds of pesticide containers statewide.

Costs related to environmental stewardship programs were as follows:

Pesticide Disposal	\$	75,465.01
Container Recycling	\$	14,177.29
<b>Total</b>	<b>\$</b>	<b>89,642.30</b>

**D. Projected Fund Cash Balance**

Obligations paid from the Fund during FY 2023 include (i) OPS operating expenses, (ii) education and outreach programs, and (iii) the Pesticide Collection and the Plastic Pesticide Container Recycling programs.

The Fund's year-end cash balance for the past five years:

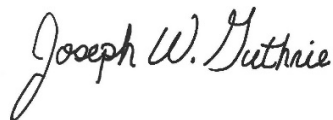
Fiscal Year	Ending Balance
2019	\$953,555
2020	\$1,916,139
2021	\$2,868,696
2022	\$3,310,412
2023	\$4,337,667

It is anticipated that (i) continued information technology costs for the online application system and (ii) equipment purchases will impact the ending balance for FY 2024. The year-end balance for FY 2024 is estimated to be \$ 4.4 million.

**VI. CONCLUSION**

The agency is committed to the fair and sensible regulation of pesticides in Virginia as well as activities that are consistent with the provisions of the Pesticide Control Act. I trust that our commitment is evidenced by the breadth and scope of the activities listed in this report. Please let me know if you have any questions or need additional information. As always, your input is most welcome and appreciated.

Sincerely,



Joseph W. Guthrie  
Commissioner

cc: The Honorable Matthew Lohr, Secretary of Agriculture and Forestry  
Travis Rickman, Deputy Secretary of Agriculture and Forestry  
Beth Green, Deputy Secretary of Agriculture and Forestry

Appendix 1

<b>Pesticide Control Fund – FY 2023</b>	
<b>Fund Balance – June 30, 2022</b>	\$ 3,310,412.18
<b>SOURCES</b>	
Pesticide product registrations	\$ 3,387,570.00
Commercial applicator certification	\$ 151,675.00
Pesticide business licenses	\$ 418,868.00
Registered technician certification	\$ 210,535.00
Late fees, interest, misc.	\$ 103,695.38
Civil penalties	\$ 13,700.00
<b>Total Sources</b>	<b>\$ 4,286,043.38</b>
<b>USES</b>	
Personal services	\$ 1,600,066.52
Contractual services	\$ 555,590.61
Supplies and materials	\$ 39,068.17
Transfer payments (includes grant payments)	\$ 399,258.59
Continuous charges	\$ 106,050.54
Equipment	\$ 12,193.66
Agency administrative expenses	\$ 546,560.00
<b>Total Uses</b>	<b>\$ 3,258,788.09</b>
<b>Fund Balance – June 30, 2023</b>	<b>\$ 4,337,667.47</b>

Appendix 2

Pesticide Control Fund  
FY 2018-2023

Expenditure Category	2018	2019	2020	2021	2022	2023
Projects*	\$435,836	\$488,481	\$427,182	\$401,628	\$360,606.56	\$474,723.60
Salaries	\$969,458	\$935,717	\$997,666	\$1,103,706	\$1,112,168.11	\$1,142,280.43
Fringe Benefits	\$447,899	\$444,642	\$460,338	\$505,811	\$491,372.50	\$457,786.09
Administrative Overhead	\$366,899	\$422,301	\$525,747	\$591,002	\$581,552.00	\$546,560.00
Information Technology	\$252,447	\$275,019	\$332,985	\$585,538	\$1,178,310.93	184,932.67
Laboratory Services	\$162,632	\$169,211	\$178,647	\$87,844	\$140,185.21	\$152,237.67
Rent	\$90,939	\$90,320	\$91,626	\$91,127	\$91,071.76	\$89,518.68
Equipment	\$1,694	\$10,789	\$1,830	\$110,186	\$24,603.25	\$12,193.66
Supplies	\$27,764	\$28,694	\$32,724	\$30,651	\$35,336.65	\$39,068.17
Travel	\$16,639	\$10,867	\$8,921	\$1,791	\$2,515.14	\$9,079.34
Testing Services (DMV)	\$23,050	\$17,215	\$17,870	\$6,020	\$19,662.00	\$18,660.00
Other**	\$130,845	\$160,287	\$378,343	\$ 141,949	\$109,465.00	\$131,747.78
<b>Revenue</b>	\$3,067,108	\$3,076,81500	\$4,416,465	\$4,609,809	\$4,588,565.73	\$4,286,043.38
<b>June 30 Cash Balance</b>	\$930,283	\$953,555	\$1,916,139	\$2,868,695	3,310,412.18	\$4,337,667.47

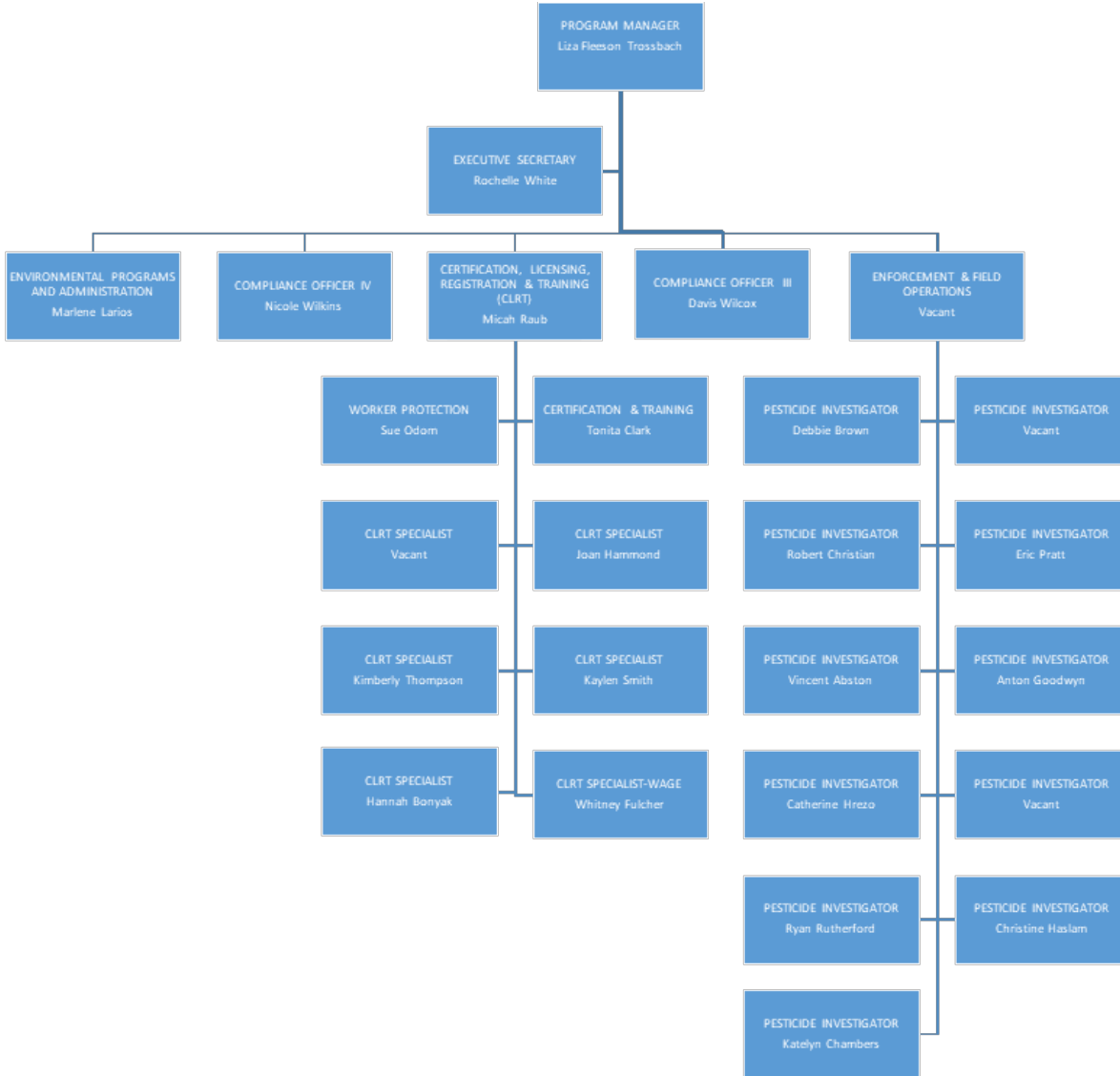
**\*Projects** includes expenditures for Applicator Training, Manuals/Exams and Certification (VCE); Pesticide Safety Education (Telamon) and pesticide disposal and container recycling. There were no expenses submitted by Telamon for reimbursement for services rendered in FY 2023.

\*\* "Other" includes expenditures for postage, printing, telecommunications, public information, legal and media services, vehicle repair, temporary employee wages, workers compensation, unemployment compensation, liability and tort insurance, employee training, and various operating expenses.

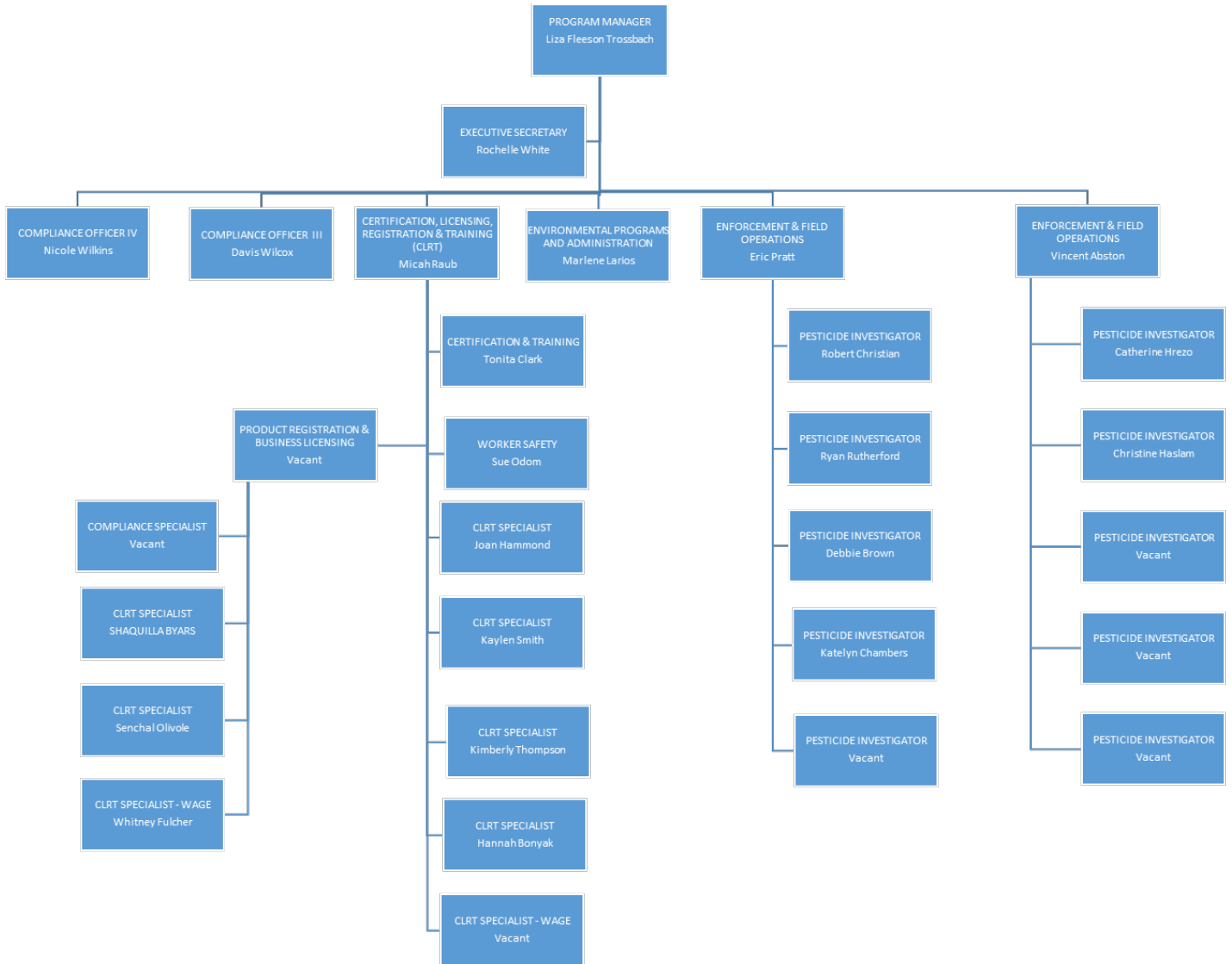


Appendix 3

**VDACS - Division of Consumer Protection  
Office of Pesticide Services (FY 2023)**



**VDACS - Division of Consumer Protection  
Office of Pesticide Services (Effective FY  
2024)**



**BOARD OF AGRICULTURE AND CONSUMER SERVICES  
Future Meeting Dates**

**MARK YOUR CALENDARS**

**Thursday, March 21, 2024**

Patrick Henry Building  
East Reading Room  
1111 East Broad Street  
Richmond, VA 23219

**Thursday, May 23, 2024**

TBD  
Richmond, VA

**Thursday, December 12, 2024**

TBD  
Richmond, VA