

RULES AND REGULATIONS

Title 7—AGRICULTURE

DEPARTMENT OF AGRICULTURE

[7 PA. CODE CH. 59]

Milk Sanitation

The Department of Agriculture (Department) amends Chapter 59 (relating to milk sanitation). The revisions: (1) reformat and add several new defined terms to § 59.1 (relating to definitions); and (2) revise § 59.22 (relating to milk dating) to extend the current 14-day maximum “sell-by” period for pasteurized milk to 17 days, clarify the exceptions to that sell-by date requirement and describe the milk quality sampling and testing that will be performed by the Department.

Statutory Authority

The act of July 2, 1935 (P. L. 589, No. 210) (31 P. S. §§ 645—660g) (act) provides the legal authority for this final-form rulemaking. In particular, section 21 of the act (31 P. S. § 660e) makes the Department generally responsible for the safety and wholesomeness of the milk supply and allows the Department to exclude milk from commerce if it fails to meet the requirements of the act, and section 19 of the act (31 P. S. § 660c) authorizes the Department to regulate for the proper enforcement of the act.

Need for the Final-Form Rulemaking

The primary purpose of the final-form rulemaking is to amend § 59.22 to extend the maximum sell-by date for pasteurized milk by 3 days. The current maximum sell-by date is 14 days beginning after midnight of the date of pasteurization. Modern processing and refrigeration allow for the production of pasteurized milk that can remain on-the-shelf for longer periods of time without bacterial growth exceeding acceptable limits. The final-form rulemaking follows the trend among states to extend sell-by dates for pasteurized milk, whether by designating a maximum sell-by period (as the final-form rulemaking does) or allowing individual producers to demonstrate their pasteurization and refrigeration processes result in dairy products that remain within acceptable bacterial limits for the period in which they are marketed to consumers.

The final-form rulemaking also reformats § 59.1. The section was divided into two subsections, one containing “general definitions” and the other containing definitions related to “milk and milk products.” The final-form rulemaking deletes these subsection designations and combines the two sets of terms and definitions into a single, more readable set.

The final-form rulemaking also revises § 59.1 by adding definitions of “aseptically processed dairy products” and “higher heat shorter time pasteurization,” two terms describing relatively recent advances in the processing of dairy products. These processes result in milk with a longer shelf life than milk processed through typical pasteurization processes. Section 59.22(d) exempts milk processed through either of these methods (and several other methods) from the sell-by date requirements described in that section.

Section 59.22 describes the process by which the Department will sample and analyze pasteurized milk to ensure it does not exceed bacterial limits prescribed by regulation.

In summary, the Department is satisfied there is a need for the revisions accomplished by this final-form rulemaking.

Comments

Notice of proposed rulemaking was published at 32 Pa.B. 4717 (September 28, 2002), and provided for a 30-day public comment period. Comments were received from the Pennsylvania Association of Milk Dealers (Dealers) and the Independent Regulatory Review Commission (IRRC).

Comment: The Dealers represent the substantial majority of companies which process beverage milk sold in this Commonwealth, and offered its strong support for the increase in the maximum milk sell-by date to 17 days from date of pasteurization. The commentator believes the change will “. . . help the industry adapt to the changing marketplace and grow stronger.”

Response: The Department accepts the comment without further response.

Comment: IRRC noted that proposed § 59.22(e) made reference to the Department “periodically” sampling containers of pasteurized milk, and suggested the final-form regulation include a specific time frame for this “periodic” sampling.

Response: The Department accepts this suggestion, and has implemented it in § 59.22(e)(1) of the final-form regulation by specifying this “periodic” sampling shall be at least one product from each processor or distributor each year. As a result of this comment and the other comments offered by IRRC, the Department divided § 59.22(e) into four paragraphs dealing with: (1) sampling requirements; (2) testing requirements; (3) the imposition of maximum sell-by dates of less than 17 days; and (4) resumption of 17-day maximum sell-by periods. This reformatting adds clarity to the section.

Comment: Proposed § 59.22(e) provided that the Department might require a milk processor to use a maximum sell-by date of something less than 17 days if two or more samples demonstrated the processor could not produce pasteurized milk that remained consistently within acceptable bacterial limits during a 17-day sell-by period. IRRC recommended the final-form rulemaking describe the procedure by which a milk processor could reestablish a 17-day sell-by date for its pasteurized milk.

Response: The Department accepts IRRC’s recommendation and has implemented it in § 59.22(e)(2) and (3). The new language also clarifies that the analysis of samples is to be conducted by a “Pennsylvania approved dairy laboratory”—a term defined in § 59.1.

Comment: On a subject closely related to the previous comment, IRRC requested the final-form rulemaking specify how the Department will establish a specific maximum sell-by date for a milk processor that cannot produce pasteurized milk that merits a 17-day maximum sell-by date.

Response: The Department has revised the final-form regulation to implement this request, in § 59.22(e)(3) and

(4), to reflect that predicted bacterial growth shall determine the appropriate sell-by date.

Fiscal Impact

The final-form rulemaking does not impose any costs and has no fiscal impact upon the Commonwealth, political subdivisions or the general public.

The final-form rulemaking has no adverse fiscal impact upon the private sector. The extension of the maximum sell-by date for pasteurized milk is expected to have a favorable economic impact upon milk processors and milk retailers. These economic impacts cannot be readily quantified.

Paperwork Requirements

The final-form rulemaking does not appreciably increase the paperwork burden of the Department, local government units, milk producers, milk distributors or other affected entities.

Contact Person

Further information is available by contacting the Department of Agriculture, Bureau of Food Safety and Laboratory Services, 2301 North Cameron Street, Harrisburg, PA 17110-9408, Attention: James Dell, (717) 787-4316.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a), on September 18, 2002, the Department submitted a copy of the notice of proposed rulemaking published at 32 Pa.B. 4717 to IRRC and to the Chairpersons of the House and Senate Standing Committees on Agriculture and Rural Affairs for review and comment.

In compliance with section 5(c) of the Regulatory Review Act, the Department also provided IRRC and the Committees with copies of all comments received, as well as other documentation. In preparing this final-form rulemaking, the Department has considered all comments received from IRRC, the Committees and the public.

Under section 5.1(j.2) of the Regulatory Review Act (71 P. S. § 745.5a(j.2)), on July 23, 2003, the House and Senate Committees deemed approved the final-form rulemaking. Under section 5.1(e) of the Regulatory Review Act, IRRC met on August 14, 2003, and approved the final-form rulemaking.

Findings

The Department finds that:

(1) Public notice of its intention to adopt the regulations encompassed by this order has been given under sections 201 and 202 of the act of July 31, 1968 (P. L. 769, No. 240) (45 P. S. §§ 1201 and 1202) and the regulations thereunder, 1 Pa. Code §§ 7.1 and 7.2.

(2) A public comment period was provided as required by law and all comments received were considered.

(3) The modifications that were made to this final-form rulemaking in response to comments received do not enlarge the purpose of the proposed rulemaking published at 32 Pa.B. 4717.

(4) The adoption of the regulations in the manner provided in this order is necessary and appropriate for the administration of the authorizing statute.

Order

The Department, acting under authority of the authorizing statute, orders that:

(a) The regulations of the Department, 7 Pa. Code Chapter 59, are amended by amending § 59.1 to read as set forth at 32 Pa.B. 4717 and by amending § 59.22 to read as set forth in Annex A.

(b) The Secretary of Agriculture shall submit this order, 32 Pa.B. 4717 and Annex A to the Office of General Counsel and to the Office of Attorney General for approval as required by law.

(c) The Secretary of Agriculture shall certify this order, 32 Pa.B. 4717 and Annex A and deposit them with the Legislative Reference Bureau as required by law.

(d) This order shall take effect upon publication in the *Pennsylvania Bulletin*.

DENNIS C. WOLFF,
Secretary

(Editor's Note: For the text of the order of the Independent Regulatory Review Commission, relating to this document, see 33 Pa.B. 4372 (August 30, 2003).)

Fiscal Note: Fiscal Note 2-141 remains valid for the final adoption of the subject regulations.

Annex A

TITLE 7. AGRICULTURE

PART III. BUREAU OF FOOD SAFETY AND LABORATORY SERVICES

Subpart B. LIQUID FOODS

CHAPTER 59. MILK SANITATION

Subchapter A. PRELIMINARY PROVISIONS

LABELING

§ 59.22. Milk dating.

(a) *Label requirement.* The cap or nonglass container of pasteurized milk held in retail food stores, restaurants, schools or similar food establishments for resale shall be conspicuously and legibly marked in a contrasting color with the designation of the "sell-by" date—the month and day of the month after which the product may not be sold or offered for sale. The designation may be numerical—such as "8-15"—or with the use of an abbreviation for the month, such as "AUG 15 or AU 15." The words "Sell by" or "Not to be sold after" shall precede the designation of the date, or the statement "Not to be sold after the date stamped above" shall appear legibly on the container. This designation of the date may not exceed 17 days beginning after midnight on the day on which the milk was pasteurized.

(b) *Prominence of sell-by date on label.* The sell-by date shall be separate and distinct from any other number, letter or intervening material on the cap or nonglass container.

(c) *Prohibition.* Pasteurized milk may not be sold or offered for sale if either of the following occurs:

(1) The milk is sold or offered for sale after the sell-by date designated on the container.

(2) Without regard to the sell-by date designated on the container, the milk exceeds the bacterial limits for pasteurized milk described in § 59.52 (relating to table).

(d) *Exemption.* The following pasteurized dairy products are exempt from the requirements of this section:

- (1) Ultra-pasteurized dairy products.
- (2) Cultured dairy products.
- (3) Aseptically processed dairy products.

(4) Dairy products that have undergone higher heat shorter time pasteurization.

(5) Milk sold or offered for retail sale on the same premises at which it was processed.

(e) *Monitoring by the Department.*

(1) The Department will periodically sample containers of pasteurized milk in the possession of the processor or distributor. This sampling may occur at any time before the pasteurized milk is delivered to the store or the customer. The Department will sample at least one milk product from each processor each calendar year.

(2) The samples described in paragraph (1) shall be analyzed by a Pennsylvania-approved dairy laboratory, applying a methodology set forth in the most current edition of Dairy Practices Council Guideline No. 10, entitled "Guidelines for Maintaining and Testing Fluid Milk Shelf Life," to determine whether the bacterial test results exceed the bacterial limits for pasteurized milk described in § 59.52 prior to the expiration of the sell-by date designated on the retail container.

(3) When two or more samples demonstrate a processor cannot produce pasteurized milk that remains consistently within the bacterial limits referenced in paragraph (2) during a 17-day sell-by period, the Department will require a processor to use a sell-by date of something less than the 17-day period described in subsection (a). The Department will calculate this revised sell-by date so that bacterial growth in the milk will not exceed the referenced bacterial limits within that sell-by period if the milk is maintained in accordance with the temperature standards for pasteurized milk in § 59.52.

(4) A processor may submit samples to the Department for analysis to obtain approval to resume a 17-day sell-by period for the product sampled. The Department will approve resumption of a 17-day sell-by period when analysis of a sample demonstrates that bacterial growth in the milk will not exceed the referenced bacterial limits within that sell-by period if the milk is maintained in accordance with the temperature standards for pasteurized milk in § 59.52.

[Pa.B. Doc. No. 03-1742. Filed for public inspection September 5, 2003, 9:00 a.m.]

Title 58—RECREATION

FISH AND BOAT COMMISSION [58 PA. CODE CHS. 63, 71 AND 73] Injurious Nonnative Species

The Fish and Boat Commission (Commission) amends Chapters 63, 71 and 73 (relating to general fishing regulations; propagation and introduction of fish into Commonwealth waters; and transportation of live fish into this Commonwealth). The Commission is publishing this final-form rulemaking under the authority of 30 Pa.C.S. (relating to the Fish and Boat Code) (code). This final-form rulemaking relates to injurious, nonnative species.

A. *Effective Date*

This final-form rulemaking will go into effect upon publication of this order in the *Pennsylvania Bulletin*.

B. *Contact Person*

For further information on this final-form rulemaking, contact Laurie E. Shepler, Assistant Counsel, P. O. Box 67000, Harrisburg, PA 17106-7000, (717) 705-7815. This final-form rulemaking is available electronically through the Commission's website (<http://www.fish.state.pa.us>).

C. *Statutory Authority*

This final-form rulemaking is published under the statutory authority of section 2102 of the code (relating to rules and regulations).

D. *Purpose and Background*

This final-form rulemaking is designed to update, modify and improve the Commission's regulations pertaining to fishing. The specific purpose of this rulemaking is described in more detail under the summary of changes.

E. *Summary of Changes*

Black carp (*Mylopharyngodon piceus*), bighead carp (*Hypophthalmichthys nobilis*) and silver carp (*Hypophthalmichthys molitrix*) are native to Asia. They are not native to this Commonwealth. These species were originally imported by fish farmers into waters of several states in the lower Mississippi River Valley. Black carp are mollusk eaters imported to control snails in culture ponds. Silver and bighead carp are plankton feeders, which have been cultured for sale as food fish in specialty food markets. Because black carp consume mollusks, there is concern that if released they would prey on native mussel populations. In July 2002, the United States Fish and Wildlife Service issued a notice of proposed rulemaking to list the black carp as an injurious fish species. Silver and bighead carp are capable of attaining weights of 60 and 90 pounds, respectively. Because they forage on phytoplankton and zooplankton, there is concern that food sources for forage fishes will be reduced and aquatic food chains upset. Bighead carp have escaped to the wild and have made their way towards the Great Lakes from the Upper Mississippi River system. Last year, a bighead carp was found in Lake Erie and several were found in other Great Lakes. It has recently been determined that this species can thrive and reproduce in a wider range of water temperatures and habitats than previously believed.

Several years ago, the Commission's Bureaus of Fisheries and Law Enforcement became aware that a fish dealer from Arkansas was transporting Asian carp through this Commonwealth to live fish markets in New York. The investigation revealed that the trucks were stopping at a stream in southcentral Pennsylvania to discharge tank water and add fresh water from the stream. The fish dealer and the hauler were notified that these activities were not lawful. This example emphasizes how easily injurious nonnative species could be released into Commonwealth waters.

The zebra mussel (*Dreissena polymorpha*) and the quagga mussel (*Dreissena bugensis*) are well known nonnative species introduced to the Great Lakes and Lake Erie from ballast water discharges in the late 1980s. The zebra mussel also has infiltrated this Commonwealth by means of the Ohio River in southwest Pennsylvania. Recently, it was found in several tributaries to the upper Allegheny River. Transfer of this species to inland waters is usually unintentional and likely the result of attachment to recreational boats. However, there is evidence that some persons may have intentionally transported zebra mussels into flooded quarries where SCUBA diving

occurs to aid in clearing up the water. In addition to a quarry in southeastern Pennsylvania, there is a well-documented zebra mussel population in a dive quarry in Virginia. These species out compete and smother native mussels, foul water intakes and dramatically alter the water quality of areas they invade.

The round goby (*Neogobius melanostomus*) is a more recent invader to Lake Erie and the other Great Lakes. Population densities of this species have dramatically increased in Lake Erie reaching densities in some areas of over 3,000 gobies/acre. Currently, there is no evidence to suggest that round gobies are present in any inland Commonwealth waters. However, they have caused considerable changes to the predator-prey relationships in Lake Erie. This species has demonstrated that it can out compete and displace native darters and sculpins. They can adapt to a variety of habitats and have the ability to spawn up to six times per year. This species represents a serious threat to native fish populations in inland waters. Additionally, another goby species, the tubenose goby (*Proterorhinus marmoratus*), has recently appeared in Lake Erie.

The Mississippi Interstate Cooperative Resource Association, of which the Commonwealth is a member, has publicly stated its opposition to the use or release of Asian carp, particularly the black carp. At its March 2003 meeting, members of the Lake Erie Committee of the Great Lakes Fishery Commission agreed that member states should move forward with regulations that specifically prohibit the possession, transport and introduction of the aforementioned Asian carp species. On February 7, 2003, member state Michigan enacted new regulations that prohibit the possession and transportation of the aforementioned species plus several additional species.

Although it already is illegal under Commonwealth laws and regulations for anyone to release live black carp, silver carp, bighead carp, zebra mussels, quagga mussels or round gobies into Commonwealth waters, it currently is not illegal to possess, transport, offer for sale or purchase these species. Accordingly, the Commission proposed to amend these sections to address this issue and to further emphasize that it is unlawful to possess, introduce, import and transport these species in this Commonwealth.

On final-form rulemaking, the Commission adopted the amendments to §§ 63.46, 71.6 and 73.1 to read as set forth in Annex A and added the European rudd (*Scardinius erythrophthalmus*) to the list of species contained in these sections. The European rudd, a member of the minnow family, is native to the waters of western Europe and Asia. They have been reported to occur in at least 20 states. Documented sightings in this Commonwealth previously have been limited to a report of a single rudd captured in Lake Winola, Wyoming County, in 1991. However, several rudd were captured on May 22, 2003, in the waters of Presque Isle Bay off of Lake Erie by a team of biologists from the Department of Environmental Protection and the Erie County Department of Health. A Commission biologist verified the identification. This find confirms that this species does indeed inhabit Commonwealth waters of Lake Erie.

Rudd are identified by the deep red coloration of their fins. In addition, the iris around the pupil of their eyes is red. Large, golden-colored scales cover their body. Rudd have reportedly reached lengths of up to 17 inches, but the average rudd is unlikely to exceed 12–14 inches. Rudd are similar in appearance to the commonly occurring golden shiner (*Notemigonus chrysoleucas*), which is

found throughout this Commonwealth and is a staple of bait shops. Golden shiners, however, are native to this Commonwealth. The golden shiner can reach lengths similar to the rudd and has lighter golden colored scales. However, golden shiners lack the rudd's red iris, red fins and scales on the keel or belly area between the pelvic fins and anus.

Research has shown that rudd can hybridize with golden shiners. It is unknown what impact, if any, the hybridizations may have on native populations. Rudd and golden shiners are both known to consume aquatic invertebrates. Thus, rudd may also compete with native species for food resources. Without specific research to rely on, it is difficult to speculate on the impacts that rudd may have on native species in this Commonwealth. It is believed that most introductions of rudd in the United States resulted from unused or released bait.

F. Paperwork

This final-form rulemaking will not increase paperwork and will create no new paperwork requirements.

G. Fiscal Impact

This final-form rulemaking will have no adverse fiscal impact on the Commonwealth or its political subdivisions. This final-form rulemaking will impose no new costs on the private sector or the general public.

H. Public Involvement

A notice of proposed rulemaking was published at 33 Pa.B. 2762 (June 14, 2003). The Commission received three public comments. One commentator supported the proposed amendments but also urged the Commission to include flathead catfish to the list of species set forth in §§ 63.46, 71.6 and 73.1. The Commission considered this suggestion and believed that it would not be appropriate to include on these lists a species that has persisted for years (in the native range) and is well established in much of the southern Susquehanna and Delaware River drainages. A second commentator asked the Commission to reconsider the proposed amendments because there may be responsible owners of exotic species who wish to keep them in a private environment for their personal enjoyment. A third commentator supported the proposal but had concerns regarding practical issues that could arise.

Findings

The Commission finds that:

(1) Public notice of intention to adopt the amendments adopted by this order has been given under sections 201 and 202 of the act of July 31, 1968 (P. L. 769, No. 240) (45 P. S. §§ 1201 and 1202) and the regulations promulgated thereunder, 1 Pa. Code §§ 7.1 and 7.2.

(2) A public comment period was provided, and the comments received were considered.

(3) The adoption of the amendments of the Commission in the manner provided in this order is necessary and appropriate for administration and enforcement of the authorizing statutes.

Order

The Commission, acting under the authorizing statutes, orders that:

(a) The regulations of the Commission, 58 Pa. Code Chapters 63, 71 and 73, are amended by amending §§ 63.46, 71.6 and 73.1 to read as set forth in Annex A.

(b) The Deputy Executive Director will submit this order and Annex A to the Office of Attorney General for approval as to legality as required by law.

(c) The Deputy Executive Director shall certify this order and Annex A and deposit them with the Legislative Reference Bureau as required by law.

(d) This order shall take effect immediately upon publication in the *Pennsylvania Bulletin*.

DENNIS T. GUISE,
Deputy Executive Director

Fiscal Note: Fiscal Note 48A-143 remains valid for the final adoption of the subject regulations.

Annex A

TITLE 58. RECREATION

PART II. FISH AND BOAT COMMISSION

Subpart B. FISHING

CHAPTER 63. GENERAL FISHING REGULATIONS

§ 63.46. Sale, purchase or barter of injurious, non-native species.

It is unlawful for a person to sell, purchase, offer for sale or barter the following live species in this Commonwealth:

- (1) Snakehead (all species).
- (2) Black carp (*Mylopharyngodon piceus*).
- (3) Bighead carp (*Hypophthalmichthys nobilis*).
- (4) Silver carp (*Hypophthalmichthys molitrix*).
- (5) Zebra mussel (*Dreissena polymorpha*).
- (6) Quagga mussel (*Dreissena bugensis*).
- (7) Round goby (*Neogobius melanostomus*).
- (8) Tubenose goby (*Proterorhinus marmoratus*).
- (9) European rudd (*Scardinius erythrophthalmus*).

CHAPTER 71. PROPAGATION AND INTRODUCTION OF FISH INTO COMMONWEALTH WATERS

§ 71.6. Prohibited acts.

(a) Except as otherwise provided in § 71.7 (relating to triploid grass carp), it is unlawful to introduce or import grass carp (white amur) into this Commonwealth. Except as otherwise provided in § 71.7, it is unlawful to possess grass carp (white amur) in this Commonwealth.

(b) It is unlawful to introduce tilapia, including blue tilapia and tilapia hybrids, into the waters of this Commonwealth.

(c) As an exception to subsection (a), §§ 1.1 and 73.1 (relating to general; and transportation), the Executive Director may authorize the Research Division of the Bureau of Fisheries to possess grass carp (white amur) and introduce them into waters within the confines of the Commonwealth hatchery system as part of a carefully controlled research effort, subject to conditions as the Executive Director may prescribe.

(d) It is unlawful to possess the following live species in this Commonwealth. It is unlawful to introduce or

import the following live species into the waters of this Commonwealth:

- (1) Snakehead (all species).
- (2) Black carp (*Mylopharyngodon piceus*).
- (3) Bighead carp (*Hypophthalmichthys nobilis*).
- (4) Silver carp (*Hypophthalmichthys molitrix*).
- (5) Zebra mussel (*Dreissena polymorpha*).
- (6) Quagga mussel (*Dreissena bugensis*).
- (7) Round goby (*Neogobius melanostomus*).
- (8) Tubenose goby (*Proterorhinus marmoratus*).
- (9) European rudd (*Scardinius erythrophthalmus*).

CHAPTER 73. TRANSPORTATION OF LIVE FISH INTO THIS COMMONWEALTH

§ 73.1. Transportation.

(a) Species of fish may not be transported into this Commonwealth from another state, province or country and liberated in a watershed of this Commonwealth without previous written permission from the Commission, nor may a species of fish be transferred from waters in this Commonwealth into another drainage of this Commonwealth where this particular species is not always present without prior written consent from the Commission. Inspection for species composition or presence of disease, or both, will be required at the discretion of the Commission on all lots of fish transported into this Commonwealth.

(b) Permission is not required for the importation of tropical fish unless the Commission considers them to be potentially dangerous to native fish species or to man. Permission is not required for the stocking of farm ponds or licensed fee fishing ponds which receive fish stocks from Commonwealth commercial fish hatcheries except for the following kinds of fish: goldfish, golden orfe or fish species not native to this Commonwealth.

(c) Except as provided in § 71.7 (relating to triploid grass carp), transportation of the grass carp (white amur) in this Commonwealth is prohibited.

(d) Transportation of the following live species in or through this Commonwealth is prohibited.

- (1) Snakehead (all species).
- (2) Black carp (*Mylopharyngodon piceus*).
- (3) Bighead carp (*Hypophthalmichthys nobilis*).
- (4) Silver carp (*Hypophthalmichthys molitrix*).
- (5) Zebra mussel (*Dreissena polymorpha*).
- (6) Quagga mussel (*Dreissena bugensis*).
- (7) Round goby (*Neogobius melanostomus*).
- (8) Tubenose goby (*Proterorhinus marmoratus*).
- (9) European rudd (*Scardinius erythrophthalmus*).

[Pa.B. Doc. No. 03-1743. Filed for public inspection September 5, 2003, 9:00 a.m.]