

**Department of State Health Services  
Council Agenda Memo for State Health Services Council  
November 20-21, 2013**

**Agenda Item Title:** New rules concerning the regulation of food at farmers' markets

**Agenda Number:** 4.h

**Recommended Council Action:**

For Discussion Only

For Discussion and Action by the Council

**Background:**

The Public Sanitation and Retail Foods Safety Group in the Regulatory Services Division regulates approximately 12,000 retail food establishments, youth camps, and school cafeterias, and conducts nuisance complaint investigations in areas that are not inspected by local health districts. The Group also provides accreditation for food handler education or training programs and trains local inspectors. The Group is funded from dedicated fees charged for licenses it issues to retail food establishments and youth camps and from fees charged for inspecting school cafeterias.

**Summary:**

The purpose of the new rules is to implement Senate Bill (S.B.) 81, 82nd Legislature, Regular Session, 2011, and House Bill (H.B.) 1382, 83rd Legislature, Regular Session, 2013.

S.B. 81 amended Health and Safety Code, Chapter 437, regarding food safety at farmers' markets. S.B. 81 authorized DSHS to issue a temporary food establishment permit to a person who sells food at a farmers' market. The bill also authorized DSHS to adopt temperature requirements for food sold at, prepared on-site at, or transported to or from a farmers' market, when the farmers' market is located in a county that has a population of 50,000 or more, and over which no local health department has jurisdiction. S.B. 81 did not authorize DSHS to mandate a specific method for complying with temperature requirements.

H.B. 1382 amended Health and Safety Code, Chapter 437, regarding the regulation of food that is stored, distributed, or sold at farms and farmers' markets and limiting the applicability of a fee. H.B. 1382 prohibits DSHS from adopting a rule regulating the provision of samples of food or the sale of food to consumers at a farm or farmers' market. H.B. 1382 also prohibits DSHS from adopting a rule regulating cooking demonstrations at a farmers' market.

The new rules:

- state the purpose and applicability of the new subchapter;
- define terms;
- specify who must obtain a temporary food establishment permit; and
- set temperature requirements for food.

The proposed rules will set temperature requirements for potentially hazardous foods and require temporary food establishment permits. Potentially hazardous food means a food that requires time and temperature control for safety to limit pathogen growth or toxin production.

**Key Health Measures:**

The expected outcome includes increased food safety through temperature requirements and permitting for potentially hazardous foods and a decrease in foodborne illnesses. The group will collect and analyze data about the number of complaints received and process data from stakeholders related to farmers' markets. Also, since the rules allow for the issuance of a temporary food establishment permit, we expect the number of permits to increase and the group will track the number of permits issued.

**Summary of Input from Stakeholder Groups:**

A workgroup was formed in August 2013 to develop proposed rules on farmers' markets. The workgroup had face-to-face meetings, telephone conferences, and e-mail distributions of proposed language. These rules were drafted based on the work of this workgroup and the requirements of the legislation.

The following stakeholders were solicited during the rules development process:

- Texas Department of Agriculture;
- Texas Restaurant Association;
- representatives of city, county, and public health districts;
- representatives of farmers' markets;
- representatives of Texas farmers and producers of agricultural products; and
- representatives of consumer groups.

The proposed rules were posted to the DSHS website for comment. There have been no comments and no changes made to the rules.

**Proposed Motion:**

Motion to recommend HHSC approval for publication of rules contained in agenda item #4.h.

**Approved by Assistant Commissioner/Director:** Kathryn C. Perkins, R.N., M.B.A. **Date:** 11/4/2013

**Presenter:** Christopher Sparks **Program:** Public Sanitation and Retail Food Safety **Phone No.:** 512-834-6770 x2303

**Approved by CCEA:** Carolyn Bivens **Date:** 11/4/13

Title 25. Health Services  
Part 1. Department of State Health Services  
Chapter 229. Food and Drug  
Subchapter FF. Farmers' Markets  
New §§229.701 - 229.704

### Proposed Preamble

The Executive Commissioner of the Health and Human Services Commission, on behalf of the Department of State Health Services (department), proposes new §229.701 - §229.704, concerning the regulation of food at farmers' markets.

### BACKGROUND AND PURPOSE

The purpose of the new rules is to implement Senate Bill (SB) 81 of the 82nd Legislature, Regular Session, 2011, and House Bill (HB) 1382 of the 83rd Legislature, Regular Session, 2013, that amends Health and Safety Code, Chapter 437, relating to requirements for farmers' markets. SB 81 and HB 1382 direct the department to adopt rules under Health and Safety Code, §437.020 and §437.0202, as they relate to food temperature requirements and permits at farmers' markets that sell to consumers.

### SECTION-BY-SECTION SUMMARY

New §229.701 sets forth the purpose and applicability of this subchapter.

New §229.702 defines and clarifies the intended meaning of words and terms used in the subchapter.

New §229.703 sets forth permit requirements for a person who sells potentially hazardous food at a farmers' market.

New §229.704 sets forth temperature and cook time controls for the safety of food at farmers' markets, along with the maintenance of proper storage of food.

### FISCAL NOTE

Jon Huss, Section Director, Environmental and Consumer Safety Section, has determined that for each year of the first five years that the sections will be in effect, there will be no fiscal implications to state or local governments as a result of enforcing and administering the sections as proposed.

### SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Mr. Huss has also determined that there will be no effect on small businesses or micro-businesses required to comply with the sections as proposed. This was determined by

interpretation of the rules that small businesses and micro-businesses will not be required to alter their business practices in order to comply with the sections.

#### ECONOMIC COSTS TO PERSONS AND IMPACT ON LOCAL EMPLOYMENT

There are no anticipated economic costs to persons who are required to comply with the sections as proposed. There is no anticipated negative impact on local employment.

#### PUBLIC BENEFIT

In addition, Mr. Huss has also determined that for each year of the first five years the sections are in effect, the public will benefit from adoption of the sections. The public benefit anticipated as the result of administering these sections is the assurance of food safety at farmers markets.

#### REGULATORY ANALYSIS

The department has determined that this proposal is not a "major environmental rule" as defined by Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state.

#### TAKINGS IMPACT ASSESSMENT

The department has determined that the proposed new rules do not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, do not constitute a taking under Government Code, §2007.043.

#### PUBLIC COMMENT

Comments on the proposed new rules may be submitted to Christopher Sparks, Public Sanitation and Retail Food Safety, Policy, Standards and Quality Assurance Unit, Division of Regulatory Services, Environmental and Consumer Safety Section, Department of State Health Services, Mail Code 1987, P. O. Box 149347, Austin, Texas 78714-9347, (512) 834-6770, extension 2303, or by email to Christopher.Sparks@dshs.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

#### PUBLIC HEARING

A public hearing to receive comments on the proposal will be scheduled after publication in the *Texas Register* and will be held at the Department of State Health Services, Exchange Building, 8407 Wall Street, Austin, Texas 78754. The meeting date will be posted on the Food Establishments Group website at [www.dshs.state.tx.us/foodestablishments](http://www.dshs.state.tx.us/foodestablishments). Please contact Christopher Sparks at (512) 834-6770, extension 2303, or Christopher.Sparks@dshs.state.tx.us if you have questions.

## LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the proposed rules have been reviewed by legal counsel and found to be within the state agencies' authority to adopt.

## STATUTORY AUTHORITY

The new rules are authorized under the Health and Safety Code, Chapter 437, which provides the Executive Commissioner of the Health and Human Services Commission with authority to adopt rules and guidelines under §437.020, §437.0201 and §437.0202; and Government Code, §531.0055(e), and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

The new rules affect Health and Safety Code, Chapters 437 and 1001; and Government Code, Chapter 531.

Legend: Proposed New Rules  
Regular Print: Proposed new language

Subchapter FF. Farmers' Markets.

§229.701. Purpose and Applicability.

(a) The purpose of this subchapter is to implement rules under the Health and Safety Code, Chapter 437, as they relate to food temperature requirements and permits at farmers' markets.

(b) This subchapter does not apply to a farmers' market in a county:

- (1) that has a population of less than 50,000; and
- (2) over which no local health department has jurisdiction.

(c) A person who sells or provides samples of meat or poultry or food containing meat or poultry shall comply with Health and Safety Code, Chapter 433.

(d) This section does not authorize the sale of or provision of samples of raw milk or raw milk products at a farmers' market.

§229.702. Definitions. The following words and terms, when used in this subchapter, have the following meanings, unless the context clearly indicates otherwise.

(1) Department--The Department of State Health Services.

(2) Farmers' market--A designated location used primarily for the distribution and sale directly to consumers of food by farmers and other producers.

(3) Fish--As defined in §229.162 of this title (relating to Definitions).

(4) Food--An agricultural, apicultural, horticultural, silvicultural, viticultural, or vegetable product for human consumption, in either its natural or processed state, that has been produced or processed or otherwise has had value added to the product in this state. The term includes:

- (A) fish or other aquatic species;
- (B) livestock, a livestock product, or livestock by-product;
- (C) planting seed;
- (D) poultry, a poultry product, or a poultry by-product;
- (E) wildlife processed for food or by-products;

(F) a product made from a product described in this paragraph by a farmer or other producer who grew or processed the product; or

(G) produce.

(5) Potable water--Drinking water.

(6) Poultry--A live or dead domesticated bird.

(7) Produce--Fresh fruits or vegetables.

(8) Producer--A person or entity that produces agricultural products by practice of the agricultural arts upon land that the person or entity controls.

(9) Sample--A bite-sized portion of food or foods offered free of charge to demonstrate its characteristics and does not include a whole meal, an individual portion, or a whole sandwich.

(10) Potentially hazardous food (time/temperature control for safety food)--As defined in §229.162 of this title.

§229.703. Permits. A person who sells potentially hazardous food (time/temperature control for safety food) at a farmers' market shall obtain a temporary food establishment permit.

§229.704. Temperature Requirements.

(a) Potentially hazardous food (time/temperature control for safety food) sold, distributed, or prepared on-site at a farmers' market, and potentially hazardous food (time/temperature control for safety food) transported to or from a farmers' market shall meet the requirements of this section.

(b) Frozen food. Stored frozen foods shall be maintained frozen.

(c) Hot and cold holding. All potentially hazardous food sold at, prepared on site at, or transported to or from a farm or farmers' market at all times shall be maintained at:

(1) 5 degrees Celsius (41 degrees Fahrenheit) or below; or

(2) 54 degrees Celsius (135 degrees Fahrenheit) or above.

(d) Cooking of raw animal foods. Raw animal foods shall be cooked to heat all parts of the food to the following temperatures:

(1) poultry, ground poultry, stuffing with poultry, meat and fish to 74 degrees Celsius (165 degrees Fahrenheit) for 15 seconds;

(2) ground meat, ground pork, ground fish, and injected meats to 68 degrees Celsius (155 degree Fahrenheit) for 15 seconds;

(3) beef, pork, meat, fish, and raw shell eggs for immediate service to 63 degrees Celsius (145 degrees Fahrenheit) for 15 seconds;

(4) prepackaged, potentially hazardous food (time/temperature control for safety food), that has been commercially processed, to 57 degrees Celsius (135 degrees Fahrenheit);

(5) a raw or undercooked whole-muscle, intact beef steak may be served if:

(A) the steak is labeled to indicate that it meets the definition of "whole-muscle, intact beef" as defined in §229.162(115) of this title (relating to Definitions); or

(B) the steak is cooked on both the top and bottom to a surface temperature of 63 degrees Celsius (145 degrees Fahrenheit) or above and a cooked color change is achieved on all external surfaces; and

(6) raw animal foods cooked in a microwave oven shall be:

(A) rotated or stirred throughout or midway during cooking to compensate for uneven distribution of heat;

(B) covered to retain surface moisture;

(C) heated to a temperature of at least 74 degrees Celsius (165 degrees Fahrenheit) in all parts of the food; and

(D) allowed to stand covered for 2 minutes after cooking to obtain temperature equilibrium.

(e) Cooking fruits and vegetables. Fruits and vegetables that are cooked shall be heated to a temperature of 57 degrees Celsius (135 degrees Fahrenheit).

(f) Eggs. A farmer or egg producer that sells eggs directly to the consumer at a farm or farmers' market shall maintain the eggs at an ambient air temperature of 7 degrees Celsius (45 degrees Fahrenheit) as specified in §229.164(c)(1)(C) of this title (relating to Food).