NORTH DAKOTA LEGISLATIVE MANAGEMENT
ADMINISTRATIVE RULES COMMITTEE
June 14, 2018
Administrative Rules Making for
North Dakota Century Code 23-09.5 Cottage Food Production and Sales

Chairman Devlin and members of the Administrative Rules Committee, my name is Julie Wagendorf and I represent the Department of Health, Division of Food and Lodging. I am here to provide a status update related to draft rules developed by the department to implement North Dakota Century Code (N.D.C.C.) 23-09.5 Cottage Food Production and Sales which became effective August 1, 2017, and to seek guidance related to next steps. This law, also known as the Cottage Food Law, relates to direct producer to consumer sales of cottage food products.

The Department of Health (the Department), through the Health Council, has the statutory obligation in N.D.C.C. 23-01-03(3) to “establish standards, rules, and regulations which are found necessary for the maintenance of public health, including sanitation and disease control.” Under this general authority, the Department initiated the rule making process to define and clarify the terms “baked good, jams, jellies, and other food and drink products” which are stated in the Cottage Food Law but were not defined. Additionally, the Cottage Food Law directs the Department or local health unit to “conduct an investigation upon complaint of an illness or environmental health complaint.” The proposed rules outline procedures related to the investigation of a complaint of illness or environmental health complaint. These rules are not mandated by federal laws.

In July 2017, before initiating the rule making process, the Department organized a cottage food workgroup, extending invitations to local growers and cottage food operators, North Dakota Grocers Association, Northern Plains Sustainable Agriculture, Food Freedom, North Dakota Farmers Market Association, local health departments, academia, and the N.D. Department of Agriculture. In preparing for the rule making process, the Department met with the work group on July 10 (1 hour), July 19 (4 hours), July 26 (4 hours), and February 12 (3 hours). In August 2017, the Department posted an unofficial notice stating its intent to propose rules and issued an interim guidance document providing best practice recommendations for food safety. The interim guidance document and other website materials were reviewed by the workgroup and made available free for download from the Department’s website www.ndhealth.gov/FoodLodging/CottageFood.asp. The department drafted proposed rules, and received input from the workgroup prior to finalizing the rules for public comment.

While planning for the public comment period anticipated in March 2018, the Department attended local grower’s workshops and trainings to educate about production and sales of cottage food products and to inform interested parties about the Department’s intent to propose rules for the Cottage Food Law. These presentation venues included the N.D. Department of Agriculture’s Annual Local Growers meeting in Minot, the Department of Agriculture’s Pride of Dakota Board Meeting and Annual Meeting in Bismarck, attending Dakota College’s Farm and Cottage Food APPENDIX N
Safety Workshops dating from March 3 to May 26 in various city locations throughout the state, presenting at NDSU Extension’s Field-to-Fork webinar series, attending the State Association of City and County Officials quarterly meeting in Bismarck, attending the Department of Public Instruction’s Farm to School: Local Foods for Local Kids Workshop in Dickinson as well as several one-on-one telephone conversations with farmers market managers and event coordinators throughout the state asking for clarification about the law.

On February 15th, Legislative Counsel was provided official public notice for the proposed Administrative Rules Chapter 33-33-10 Preparation of Cottage Food Products for Sale as well as each official county newspaper for publication. In addition to the newspaper ads, on March 9, the Department issued a news release announcing the opening of the public comment and three public hearings scheduled on: March 22, 2018, at the North Dakota Department of Health in Bismarck; March 22, 2018, at Southwestern District Health Unit in Dickinson; and March 23, 2018, at Fargo Cass Public Health in Fargo; as well as instructions for receiving all written comments accepted through April 4, 2018.

The Department intended to submit the proposed rules, as well as comments and responses, to Legislative Counsel by May 1, 2018, and for presentation at the Interim Rules Committee hearing scheduled for June 14.

However, during the public comment period, it became apparent that interested groups questioned the legislative intent of the Cottage Food Law and the basis of the proposed rules. On March 11th, written comment was received from a law firm in Arlington Virginia, referencing N.D.C.C 23-09.5 as the ‘Food Freedom Act’ and claimed the proposed rules were unlawful because they significantly limit the statutory rights granted to homemade cottage food producers by the legislature. The law firm indicated their firm had successfully sued other states in similar cases and notified the Department of their intent to pursue litigation in the event the Department proceeded with implementation of the rules.

Shortly after receiving the letter from the law firm, various legislators requested a meeting with the State Health Officer to express their concerns about the proposed rules not aligning with legislative intent and requested the rules be rescinded. Based on the significant disagreement between the Department, the Food Freedom group, and various members of the legislature regarding the legislative intent of the Cottage Food Law, the Department suspended the administrative rules hearings.

As a result, the Department is requesting an extension from the Administrative Rules Committee to move forward with a modified portion of the rules related to the complaint investigation process. The Department has a statutory obligation to protect public health by offering as safe a food supply as realistically possible. Some modifications to the present law may be needed to allow the Department to fulfill this obligation, or at a minimum, ensure the citizens of North Dakota are fully informed of the risks of eating or drinking food products that may be unsafe.

I would be happy to answer any questions. Thank you.
Workgroup participants:
LeAnn Harner – Food Freedom
Bonnie Munsch – farmers markets, grower
Hero Barth – farmers markets, grower
Jonathon Moser - Northern Plains Sustainable Ag
Susan Long – Northern Plains Sustainable Ag
John Dyste – North Dakota Grocers Association
Arlene Billberg – North Dakota Grocers Association/Hugos
Holly Mawby – Dakota College, ND Farmers Market Association, grower
Julie Garden-Robinson – NDSU Extension
Cliff Hall – NDSU Extension
Shaundra Ziemann-Bolinske – NDSU Extension
Vanessa Hoines – NDSU Extension
Kelly Wald – Pride of Dakota, Dept. of Agriculture
Jamie Good – Marketing, Dept of Agriculture
Shawn Quissell – Livestock and Dairy Division, Dept. of Agriculture
Melanie Gaebe – Policy, Dept. of Agriculture
Andrea Grondahl – State meat Inspection Program, Dept. of Agriculture
David Slack – State meat Inspection Program, Dept. of Agriculture
Nathan Kroh - Livestock and Dairy Division, Dept. of Agriculture
Anton Sattler – Bismarck Burleigh Public Health
Javin Bedard – Grand Forks Public Health
Jayme Calavera – First District Health Department
Kim Moe – Fargo Cass Public Health
Marcie Bata – Central Valley District Health Unit
Darleen Bartz – NDDOH (invited)
Julie Wagendorf – NDDOH
Kalee Werner – NDDOH
Mike Lee – NDDOH
Tara Brandner – Office of Attorney General (invited)
Senator Jerry Klein (invited)

July 10, 2017: Monday 8:30 – 9:30
A conference call with NDSU, Dakota College, ND Farmers Market Association, Dept of Ag – Marketing and Pride of Dakota on Monday, July 10th at 8:30 am.

Objectives of the meeting include:
- Develop a workgroup for drafting proposed administrative rules; review list of attendees confirmed interested in volunteering for the workgroup, identify remaining individuals Julie W still need to make contact and ask;
- Discuss format of meetings, location, define scope and purpose of workgroup and timeline for completing objectives
- Schedule work group call #1 – inform work group of selected/proposed rules modeled by other state cottage food laws and food safety principles;
July 19, 2017: Cottage Food Workgroup Meeting/Call #1; Wednesday 8:00 – noon
Work Group Attendees present except for Jonathon Moser, Susan Long, Arlene Billberg, Vanessa Haines, Kelly Wald, Andrea Grondahl, Nathan Kroh, and David Slack.

Discussion points:

DOH has rule making authority over Title 23 of the Century Code. The following timeline and action items are underway to provide Interim Guidance until the public hearing and rules-making process is completed:

1) This new legislation will become effective on August 1st. Until August 1st, the current Farmers Market fact sheet guidance is the status quo.

2) proposed administrative rules are being drafted and reviewed by a work group selected of mixed disciplines including regulatory, industry, Dept. of Ag/Pride of Dakota, local producers, farmers market association representatives, and academia.

   o schedule work group call #2 – distribute draft of proposed rules and review; collaborate and discuss suggested changes

3) Shortly after August 1st the interim guidance document will be posted and made available online as a free download until the public hearing process begins and interim rules committee meets and approves rules into administrative code.

Introduction to NDDOH Food and Lodging Cottage Foods website materials: memo, fact sheet, pH meter map, training resources

Reviewed NDCC 23-09.5 line by line; took notes on questions regarding interpretation, questions, education needs, proposed rules process and timeline, and discussed definitions needed.

Questions and discussion on tax requirements and liability insurance – questions the industry might have and where to find these resources

July 26, 2017: Cottage Food Workgroup Meeting/Call #2; Wednesday 8:30 – noon
Work Group Attendees present except for Jon Moser, Susan Long, John Dyste, Arlene Billberg, Vanessa Haines, Kelly Wald, Andrea Grondahl, Nathan Kroh, and David Slack.

Discussion points:
DOH has rule making authority over Title 23 of the Century Code. The following timeline and action items are underway to provide Interim Guidance until the public hearing and rules-making process is completed:

1) This new legislation will become effective on August 1, 2017. Until August 1st, the current Farmers Market fact sheet guidance is the status quo.

2) Proposed administrative rules are being drafted and reviewed by a work group selected of mixed disciplines including regulatory, industry, Dept. of Ag/Pride of Dakota, local producers, farmers market association representatives, and academia.

3) Shortly after August 1st the interim guidance document will be posted and made available online as a free download until the public hearing process begins and interim rules committee meets and approves rules into administrative code.

Review state cottage food laws that may be used for modeling rules after

Continued - review NDCC 23-09.5 line by line; took notes on questions regarding interpretation, questions, education needs, proposed rules process and timeline, and discussed definitions needed.

February 12, 2018: Cottage Food Workgroup Meeting/Call #3; Monday, February 12, 2018 1:00 pm – 4:00pm

Work Group Attendees present except for Hero Barth, Jon Moser, Susan Long, John Dyste, Vanessa Hoines, Kelly Wald, Shawn Quissell, Andrea Grondahl, and Nathan Kroh.

Darleen Bartz, Health Resources Section Chief, and Tara Brandner, Office of the Attorney General, were present. Senator Klein was invited but not available to attend.

Discussion points:
Reviewed state statute, North Dakota Century Code 23-09.5, and rule making authority under North Dakota Century Code 23-01-03

Reviewed estimated timeline and open comment period:
- Three public hearings scheduled on March 22 – 23; Bismarck, Dickinson and Fargo (see public notice for times and locations)
- Public comment period will close April 4th
- The Interim Rules Committee meets in June 2018
- If approved, rules will be effective July 1, 2018

The discussion and review of drafted proposed rule and definitions, line by line, commenced:

[Detailed minutes of discussion and change requests are available – typing in progress]
CHAPTER 23-09.5
COTTAGE FOOD PRODUCTION AND SALES

23-09.5-01. Definitions.
As used in this chapter:
1. "Cottage food operator" means an individual who produces or packages cottage food products in a kitchen designed and intended for use by the residents of a private home.
2. "Cottage food product" means baked goods, jams, jellies, and other food and drink products produced by a cottage food operator.
3. "Delivery" means the transfer of a cottage food product resulting from a transaction between a cottage food operator and an informed end consumer.
4. "Farmers market" means a market or group of booths where farmers and other cottage food operators sell cottage food products directly to consumers.
5. "Home consumption" means food consumed within a private home or food from a private home consumed only by family members, employees, or nonpaying guests.
6. "Informed end consumer" means an individual who is the last individual to purchase a cottage food product and has been informed the cottage food product is not licensed, regulated, or inspected.
7. "Transaction" means the exchange of buying and selling.

23-09.5-02. Direct producer to consumer sales of cottage food products.
1. Notwithstanding any other provision of law, a state agency or political subdivision may not require licensure, permitting, certification, inspection, packaging, or labeling that pertains to the preparation or sale of cottage food products under this section. This section does not preclude an agency from providing assistance, consultation, or inspection, upon request, of a producer.
2. Transactions under this section must be directly between the cottage food operator and the informed end consumer and be only for home consumption. Transactions may occur at a farm, ranch, farmers market, farm stand, home-based kitchen, or any other venue not otherwise prohibited by law or through delivery.
3. Transactions under this section may not:
   a. Involve interstate commerce;
   b. Be conducted over the internet or phone, through the mail, or by consignment;
   c. Include the sale of uninspected products made from meat, except as provided under subdivision d; or
   d. Include the sale of uninspected products made from poultry, unless:
      (1) The cottage food operator slaughters no more than one thousand poultry raised by the cottage food operator during the calendar year;
      (2) The cottage food operator does not buy or sell poultry products, except products produced from poultry raised by the cottage food operator; and
      (3) The poultry product is not adulterated or misbranded.
4. Except for whole, unprocessed fruits and vegetables, food prepared by a cottage food operator may not be sold or used in any food establishment, food processing plant, or food store.
5. The cottage food operator shall inform the end consumer that any cottage food product or food sold under this section is not certified, labeled, licensed, packaged, regulated, or inspected.
6. This section does not change any requirement for brand inspection or animal health inspections.
7. A cottage food operator shall label all cottage food products that require refrigeration, such as baked goods containing cream, custard, meringue, cheesecake, pumpkin pie, and cream cheese, with safe handling instructions and a product disclosure statement indicating the product was transported and maintained frozen.
8. A cottage food operator shall display a consumer advisory sign at the point of sale or place a label on the cottage food product with the following statement:
"This product is made in a home kitchen that is not inspected by the state or local health department."

9. The state department of health or a local regulating authority may conduct an investigation upon complaint of an illness or environmental health complaint.
Chapter 33-33-10
Preparation of Cottage Food Products for Sale

The following Sections are created as follows:

33-33-10-01 Definitions
33-33-10-02 Cottage Food Products Approved for Sale
33-33-10-03 Standards of Home-Canned Products – Verification
33-33-10-04 Safe Handling Instructions and Product Disclosure
33-33-10-05 Illness or Environment Health Complaint Investigation
33-33-10-06 Infectious Disease

33-33-10-01. Definitions. For purposes of this chapter:

1. “Acid foods or acidified foods” means high-acid food to which acid or acid food is added to reduce the pH to 4.6 or below. Foods commonly called “pickles” or “pickled” are examples of acidified food. Foods that are low in acid (pH greater than 4.6) or stored, distributed, and retailed under refrigeration are not included in this definition.

2. "Adulterated" means the condition of a food or drink if it:
   a. bears or contains any poisonous or deleterious substance in a quantity which may render it injurious to health;
   b. bears or contains any added poisonous or deleterious substance for which no safe tolerance has been established by rule, or in excess of such tolerance if one has been established;
   c. consists in whole or in part of any filthy, putrid, or decomposed substance, or if it is otherwise unfit for human consumption;
   d. has been processed, prepared, packed, or held under unsanitary conditions, whereby it may have become contaminated with filth, stagnant or contaminated water, or whereby it may have been rendered injurious to health; or
   e. packaging container is composed in whole or in part of any poisonous or deleterious substance which may render the contents injurious to health.

3. "Cottage food production area" means the portion of a private home or home kitchen where the preparation, packaging, storage, or handling of cottage food products occurs.

4. "Department" means the state department of health.

5. “Environmental health hazard” means a chemical agent, physical object, a source of filth, cause of illness or injury, or condition that is a hazard to the public or to the environment.

6. “Farm” means an operation in one general physical location devoted to the growing of crops, the harvesting of crops, the packing and holding of raw agricultural commodities, the raising of animals or any combination of these activities.

7. “Fermented” means low-acid foods subjected to the action of certain microorganisms, which produce acid during their growth and reduce the pH of the food to 4.6 or below.
8. "Frozen" means maintaining frozen foods in a frozen state at O degrees Fahrenheit or less.

9. "Inspection" means any activity done by a representative of the department or local regulating authority at a cottage food production area, farmers market, or other venue serving as a point of sale or point of purchase of cottage food products.

10. "Investigation" means entering, inspecting, evaluating, photographing, and securing any samples, photographs or other evidence from any producer or cottage food production area or component thereof.

11. "Homemade" means home-canned product, home-processed, home-baked, and home-packaged cottage food products prepared in a cottage food operator's home kitchen.

12. "Home-baked good" means a food produced in North Dakota from dough or batter that is baked before consuming.

13. "Home-canned products" means fruits or vegetables processed in North Dakota using a boiling water canner where the product does not require temperature control for safety. Homemade canned products do not include products containing dairy, meat, wild game, poultry products, fish, or seafood.

14. "Home kitchen" means a kitchen in a private home intended for use by the cottage food operator in the production of cottage food products and may include equipment such as a refrigerator, freezer, grinder, ice maker, mixer, oven, scale, sink, slicer, stove, hood, table, countertop, temperature measuring device, pH meter, or dishwashing machine.

15. "Home-packaging or -packaged" means food placed into a container (bottled, boxed, cartoned, canned, securely bagged, or securely wrapped) that directly contacts the food by which the cottage food products are received by the consumer safe and protected. Packing of harvested, raw agricultural commodities such as whole, intact fruits and vegetables, is not included in this definition.

16. "Home-processing or -processed" means additional handling or preparation of foods, beverages, or ingredients such as sorting, repackaging, grinding, mixing, peeling, cutting, slicing, or chopping.

17. "Misbranded" means the presence of any written, printed, or graphic matter, upon or accompanying food or containers of food, including signs or placards displayed in relation to such products, which is false or misleading.

18. "Other food and drink products" means a food or beverage approved as a cottage food product.

19. "Point of Sale or Point of Purchase" means the place where a cottage food operator completes a direct sale or transaction face-to-face with an informed end-consumer.

20. "Potential for hydrogen or pH" means a measure of acidity or alkalinity of a solution alkalinity using a numerical scale between 1 and 14. A pH value of 1 is most acidic, a pH value of 7 is neutral and values above 7 are referred to as basic or alkaline.
21. “Poultry products” means:
   a. Whole, frozen raw poultry slaughtered by the producer on the farm located in North Dakota where the poultry is raised, or
   b. In-shell farm, flock eggs from poultry raised by the producer on the farm located in North Dakota.

22. “Private home or residence” means a single-family dwelling or an area within a rental unit where a single person or family actually resides; but does not include any group or communal residential setting within any type of structure; or outbuilding, shed, barn, or other similar structure.

23. “Producer” in the context of this chapter is a cottage food operator according to definition stated in North Dakota Century Code section 23-09.5-01.

24. “Product disclosure statement” means a statement indicating the product was transported and maintained frozen.

25. “Ready-to-eat” means food that is ready to eat for which further baking or cooking is not required for food safety.

26. “Safe handling instructions” means specific requirements included on a label for certain products that informs the ultimate end consumer proper handling instructions where it has been established with reasonable certainty illness from bacteria can be prevented.

27. “Standards” are processes, practices, or recipes used by a cottage food operator as practical for use under the conditions of cottage food production that adequately reduces the presence of microorganisms of public health significance and to eliminate spore-forming microorganisms that cause botulism.

28. “Subject matter expert” means a competent person or organization having expert knowledge of home-canning practices and who also has access to a testing facility for making such determinations.

29. “Temperature control for safety” means any perishable food which consists in whole or in part of milk or milk products, eggs, meat, poultry, fish, shellfish, or other ingredients capable of supporting rapid and progressive growth of infectious or toxigenic micro-organisms unless maintained at a safe holding temperature of forty-one degrees Fahrenheit [7.22 degrees Celsius] or below.

30. “Undesirable microorganisms” means yeasts, molds, bacteria, viruses, protozoa, and microscopic parasites and includes species having public health significance, that subject food to decomposition, that indicate that food is contaminated with filth, or that otherwise may cause food to be adulterated.

31. “Water activity” means a measure of the free moisture in a product and is the quotient of the water vapor pressure of the substance divided by the vapor pressure of pure water at the same temperature. At 0.85 or less, the level of moisture in food is low enough to prevent the growth of undesirable microorganisms.
32. “Venue” means any venue not otherwise prohibited by law of requiring a food license by the department. Examples include farmers markets, roadside stands, craft shows, county fairs and community-spirited fund raising events.

History:
General Authority: North Dakota Century Code 23-01-03
Law Implemented: North Dakota Century Code 23-09.5

33-33-10-02. Cottage Food Products Approved for Sale. Homemade cottage food products approved for sale in accordance with North Dakota Century Code section 23-09.5-02 are as follows:

1. Home-canned products, such as jams, jellies, or pickles, shall meet one or more of the following standards:
   a. A high acid food that has a natural pH of 4.6 or less;
   b. Naturally fermented or acidified foods which have acid or acid food added where the final pH of the food has been reduced to 4.6 or less; or
   c. Water activity is 0.85 or less.

2. Home-baked goods:
   a. Home-baked goods requiring temperature control for safety, such as kuchen, cheesecake, or pumpkin pie, shall be maintained frozen. Items shall be fully baked and not partially baked and are ready-to-eat once thawed;
   b. Dry mixes used as ingredients for baking baked goods;
   c. Raw home-baked goods, such as cookie dough or bread dough, requiring temperature control for safety, shall be maintained frozen.
   d. Ready-to-eat home-baked goods that do not require temperature control for safety, such as bread, cookies, or biscuits, shall be fully-baked.

3. Home-processed or home-packaged dry goods and other food and drink products produced in North Dakota that do not contain dairy, meat, wild game, poultry products, fish, seafood, or seed sprouts of any variety, and do not require temperature control for safety such as hulled or un-hulled seeds, grains, flour, candy, popcorn, and dry roasted coffee.

4. Dehydrated or dried foods, such as herbs, fruit, or fruit leather, produced in North Dakota where water activity has been reduced to 0.85 or less and do not contain dairy, meat, wild game, poultry products, fish, or seafood;

5. Honey produced in North Dakota by the cottage food operator’s own hives located on the farm, property, or at the private home where the cottage food operator resides;

6. Non-alcoholic beverages and other drink products, such as dry-mix lemonade, black coffee, or brewed tea, produced in North Dakota that do not require temperature-control for safety.

7. Poultry products in accordance with these rules and North Dakota Century Code section 23-09.5-02 part 3 subdivision d.

History:
General Authority: North Dakota Century Code 23-01-03
Law Implemented: North Dakota Century Code 23-09.5

33-33-10-03. Standards of Home-Canned Products – Verification. Home-canned product standards required in accordance with these rules shall be verified by one of the following methods:

1. Use of a standard recipe and process for approved, home-canned products from:
   a. Ball® Blue Book™ 37th edition;
b. United States Department of Agriculture Complete Guide to Home Canning
   published August 19, 2011, revised 2015;
   c. National Center for Home Food Preservation; or
   d. A university extension service.

2. Use of a custom recipe and process approved by a subject matter expert who also has
   access to a testing facility or where the final product from the custom recipe has been home-
   tested using a calibrated pH meter.

History:
General Authority: North Dakota Century Code 23-01-03
Law Implemented: North Dakota Century Code 23-09.5

1. Home-baked goods requiring refrigeration and temperature control for safety shall be
   labeled with safe handling instructions and a product disclosure statement in accordance
   with North Dakota Century Code section 23-09.5-02(7).
2. Safe handling instructions and a product disclosure statement shall appear:
   a. On the label prominently, conspicuously, and in a type size no smaller than one-
      sixteenth of one inch; and
   b. In a hairline box and the words “safe handing instructions” must appear in bold
      capital letters.

History:
General Authority: North Dakota Century Code 23-01-03
Law Implemented: North Dakota Century Code 23-09.5

33-33-10-05. Illness or Environment Health Complaint Investigation.
1. Authorized representatives of the department or local regulating authority may request
   access to a cottage food production area of a home kitchen under the authority of North
   Dakota Century Code section 23-09.5-02. The cottage food operator may request to see
   the representatives' credentials.
2. An investigation conducted by the department or local regulating authority in accordance
   with North Dakota Century Code section 23-09.5-02 may include inspection of the
   following:
   a. Cottage food product;
   b. Cottage food production area and any equipment used in the production or
      delivery of the cottage food product;
   c. Location or venue serving as the point of sale or point of purchase; and
   d. Cottage food product testing records, if applicable.
3. A cottage food operator shall provide the department or local regulating authority access
   to the items identified in subsection 2 of this section, which are required by the
   department or local regulatory authority as part of an investigation conducted in
   accordance with North Dakota Century Code section 23-09.5-02:
4. If the department or local regulatory authority determines, as part of an investigation
   conducted in accordance with North Dakota Century Code 23-09.5-02 the source of an
   environmental health hazard or an illness complaint is associated with preparation,
   processing, packaging, or point of sale of a cottage food product, or otherwise
   associated with the cottage food operation, and poses a threat to public health or safety,
   where all reasonable measures have not been taken to ensure a cottage food product is
   not adulterated, contaminated by undesirable microorganisms, or that cottage food
   product is misbranded or misrepresented to the informed end consumer, the cottage
food operator will be notified and provided guidance regarding a recall of implicated products.

5. The cottage food operator shall prepare and submit to the department a plan of correction in accordance with the minimum standards of these rules and North Dakota Century Code chapter 23-09.5. The plan shall contain adequate information to enable the department to determine whether the proposed corrective action measures will abate or prevent ongoing threat to public health.

History:
General Authority: North Dakota Century Code 23-01-03
Law Implemented: North Dakota Century Code 23-09.5

33-33-10-06. Infectious Disease. A cottage food operator afflicted with a contagious or infectious disease or skin condition shall not knowingly:
   1. Handle or prepare cottage food products, or
   2. Work in a cottage food production area.

History:
General Authority: North Dakota Century Code 23-01-03
Law Implemented: North Dakota Century Code 23-09.5
March 16, 2018

VIA EMAIL AND CERTIFIED MAIL
Mylynn K. Tufte
State Health Officer
North Dakota Department of Health
600 East Boulevard Avenue
Bismarck, ND 58505-0200

RE: Proposed Rules for the Food Freedom Act

Dear Ms. Tufte:

I am writing to you regarding the proposed rules for administering North Dakota’s Food Freedom Act, which were proposed on February 15. These proposed rules contradict the plain text of the Act and would thus be ultra vires. Accordingly, we strongly suggest that you withdraw the proposed rules from consideration.

I am a constitutional attorney at the Institute for Justice, a national nonprofit organization that fights against laws that irrationally burden people’s right to pursue their chosen livelihood. One of my areas of expertise is cottage food law. I was the attorney who successfully sued Minnesota (Astramecki v. Department of Agriculture) and Wisconsin (Kirvirist v. Department of Agriculture) concerning their unconstitutionally restrictive cottage food laws, and I am currently litigating against New Jersey regarding its total ban on the sale of cottage foods. In addition, I litigate against state agencies that enact ultra vires rules. See, e.g., Espinoza v. Mont. Dep't. of Rev., No. DV-15-1152(D) (Mont. Dist. Ct. Mar. 31, 2016).

My colleague Jennifer McDonald and I were recently alerted to the Department’s proposed rules by residents within your state. Upon investigation, we have concluded that these rules would, if promulgated, substantially curtail the rights granted to homemade food producers under the Food Freedom Act. While the statute allows the sale of all homemade foods and drinks besides certain meat and poultry products, the proposed rules would allow the sale of only a few, extremely restricted foods.

The statutory language of the Food Freedom Act is clear. Section 23-09.5-02(1) states that “a state agency or political subdivision may not” regulate “the preparation or sale of cottage food products.” “Cottage food product,” in turn, is defined as a “food and drink product[] produced by a cottage food operator,” and “cottage food operator” is defined as a person who makes food in a private home kitchen. § 23-09.5-01(1) & (2). The only homemade foods that the Act does not permit the sale of are certain “uninspected products made from meat” and certain “uninspected products made from poultry” (unless the poultry producer meets certain...
requirements). § 23-09.5-02(3). The Act thus covers all homemade “food and drink” that is not meat or poultry.

In contrast, the proposed rules would severely limit the homemade foods allowed to be sold to baked goods, certain home-canned goods, dry goods, and a few other limited items. The rules would also severely restrict the sale of even these items. For instance, the rules would require that home-baked goods that need refrigeration be frozen when sold. Not only would this prohibit the sale of many “fresh” baked goods, but it would also prevent the sale of baked goods to customers who want to eat them shortly after purchase. The rules would also require that home-canned goods have a pH level of 4.6 or lower, preventing many fruits and vegetables from being canned and sold by a home producer.

Rules that contradict the language of a statute are ultra vires and invalid. See, e.g., Shiek v. North Dakota Workers Compensation Bureau, 1998 ND 139, ¶16 (stating the courts “will defer to a reasonable interpretation of a statute by the agency enforcing it . . . . However, an interpretation that does contradict clear and unambiguous statutory language cannot be called reasonable.”); see also Guthmiller v. Dir., 2018 ND 9, ¶8 (“We defer to the interpretation of a statute by the agency administering the law unless that interpretation contradicts clear statutory language.”).

Finally, it bears noting that North Dakota’s Food Freedom Act is an important piece of legislation that has the potential to create thousands of jobs across the state. According to new research by the Institute for Justice, cottage foods provide an attractive avenue to entrepreneurship, as they allow people to start businesses with little capital. Cottage food producers are overwhelmingly female, live in rural areas, and have below-average income. By hamstringing the Food Freedom Act, the Department would deprive such vulnerable people, and others like them, from realizing the economic opportunity that the Act was intended to provide. The Department’s rules would also severely limit consumers from making their own choices when it comes to where their food comes from.

Therefore, we strongly encourage you to withdraw these rules. Cottage food producers should be allowed to sell all foods not explicitly excluded by statute. Thank you, and please contact me if you have any questions. My number is (703) 682-9320.

Sincerely,

[Signature]

Erica Smith
Attorney
INSTITUTE FOR JUSTICE
cc:
Governor Doug Burgum (via email and certified mail)
Lieutenant Governor Brent Sanford (via email and certified mail)
Jennifer McDonald, Institute for Justice research analyst (via email)
Darleen Bartz, Chief of Health Resources Section: (via email)
Julie Wagendorf, Director of Food & Lodging (via email)
LeAnn Harner, North Dakota Food Freedom organization (via email)