

Memorandum of Understanding

Between

The Virginia Department of Health

And

The Virginia Department of Agriculture and Consumer Services

Purpose

The purpose of this Agreement between the Virginia Department of Health (VDH) and the Virginia Department of Agriculture and Consumer Services (VDACS) (collectively, the Departments) is to clarify and establish permitting and inspection responsibilities for establishments offering food to the public. The Departments share authority to administer and enforce regulations to ensure the safe manufacture, sale, and consumption of food products; therefore, they seek to ensure uniform application of shared regulatory authority while reducing duplication of services by ensuring efficient use of state resources. Additionally, several types of food establishments are by statute (Code of Virginia § 35.1-25) exempt from VDH jurisdiction. This Agreement allows the Departments to provide and maintain the highest level of public health protection and ensure efficient use of state resources, while avoiding unduly burdensome and duplicative regulatory oversight. This Agreement abrogates neither agency's authority to inspect and/or permit any food establishment otherwise subject to regulation.

Statutory Authority

Section 3.2-5100 of the Code of Virginia (Code) delegates authority to VDACS to inspect all establishments that manufacture, sell, expose, or offer food and drink products for sale in the Commonwealth. Sections 35.1-1 and 35.1-5 of the Code of Virginia delegate authority to the Commissioner of Health, or the Commissioner's designee, to inspect food establishments, including any place where food is prepared for service, on or off premises, and any place where food is served.

General Agreement

The Departments agree when statutory inspection responsibilities overlap they shall be divided as follows:

Wholesale Distribution

Food establishments that wholesale food products are required to be under inspection by VDACS.

Convenience Stores

Section 35.1-25(6) of the Code, as amended, exempts from VDH's jurisdiction "Convenience stores or gas stations that are subject to the *Retail Food Establishment Regulations [2 VAC5-585 et seq.]* or any regulations subsequently adopted *and* that (i) have 15 or fewer seats at which food is served to the public on the premises of the convenience store or gas station *and* (ii) are not associated with a national or regional restaurant chain." (Emphasis added.)

Convenience stores or gas stations that have 15 seats or fewer, at which food is served to the public on the premises of the convenience store or gas station not associated with a national or regional restaurant chain, shall be subject to the authority of VDACS.

Convenience stores or gas stations at which food is served to the public on the premises of the convenience store or gas station that have 16 or more seats *or* are associated with a national or regional restaurant chain that is otherwise inspected by VDH, shall be subject to the authority of VDH.

The agency having the authority over a convenience store or gas station pursuant to this Agreement, at which food is served to the public on the premises of the convenience store or gas station shall have responsibility to inspect the entire convenience store or gas station.

Grocery Stores

Section 35.1-25(4) of the Code, *in part*, exempts grocery stores and places that manufacture or sell packaged or canned foods from VDH's jurisdiction. This also includes the delicatessen portion that is a part of a grocery store selling exclusively for off-premises consumption.

Restaurants/food service co-located on the premises of a grocery store, or restaurants/food service located within a grocery store, where operations of both establishments are under the same ownership shall be subject to inspection by VDACS. Food establishments co-located on the premises of a grocery store where the food establishment is under separate ownership (including when under a subsidiary) from the grocery store shall be inspected by VDH (with the exception of sushi operations, which will continue to be inspected by VDACS).

Bakery Operations

Bakeries where bakery products are regularly prepared, processed or manufactured, for sale only to the end consumer, where the primary business model is providing food service (e.g. onsite consumption) to the public *and* there is no wholesale distribution (e.g. coffee and baked goods cafes without wholesale), shall be subject to the authority of VDH. Mobile Food Unit and Temporary Food Establishment bakeries shall be the authority of VDH.

Bakeries where bakery products are regularly prepared, processed, or manufactured for wholesale distribution, *or* whose primary business model is the preparation and sale of conventional baked goods (i.e. cakes, cookies, donuts etc.) for offsite consumption, shall be subject to the authority of VDACS.

In certain exceptions when determined by the VDH Division Director of Food and General Environmental Services in consultation with the VDACS Food Safety Program Supervisor, where full service restaurants are wholesaling bakery products, both agencies will have jurisdiction.

Seafood Markets

Seafood markets where seafood products are offered for sale, where the primary business model is providing food service to the public (e.g. onsite consumption and prepared food take out) *and* there is no wholesale distribution, shall be subject to the authority of VDH.

Seafood markets where seafood products are offered for wholesale distribution, *or* whose primary business model is not food service to the public, shall be subject to the authority of VDACS.

In certain exceptions as determined by the VDH Division Director of Food and General Environmental Services in consultation with the VDACS Food Safety Program Supervisor, where full service restaurants are wholesaling seafood products, both agencies will have jurisdiction.

Regulation of shucking, repacking, or other shellfish activities governed under 12VAC5-150, 12VAC5-160, and 12VAC5-165 are not under the scope of this Agreement, and the VDH Division of Shellfish Safety will regulate those activities under that chapter.

Meal Preparation & Meal Subscription

Meal preparation and/or subscription services that provide food service to the public (in a traditional restaurant model) and are therefore under regulation by VDH, that provide “meal prep” services where meals are regularly prepared and packaged for sale *to the end consumer*, via retail on site, or direct to the consumer via shipping, shall be subject to the authority of VDH.

Any wholesale operations (i.e. sales not to the end consumer) at these establishments shall be subject to the authority of VDACS; in these cases, both agencies will have jurisdiction and presence at the establishment.

Meal preparation and /or subscription services at firms not otherwise permitted under the traditional scope of VDH that provide packaged meals or ingredient supply services shall be subject to the authority of VDACS.

Food Service Operation Inspections of Wineries (Including Cideries and Meaderies), Distilleries, and Breweries

The following section applies to the food preparation and service aspects of:

1. Winery establishments (including cideries and meaderies) with food service operations holding only a winery license or farm winery license, as defined by Code of Virginia § 4.1-207 (until January 1, 2022, then § 4.1-206.1)
2. Distillery establishments with food service operations holding licenses under Code of Virginia § 4.1-206 (until January 1, 2022, then § 4.1-206.1), and
3. Brewery establishments with food service operations holding licenses under Code of Virginia § 4.1-208 (until January 1, 2022, then § 4.1-206.1).

Wineries (including cideries and meaderies), distilleries, and breweries without food service will be inspected by VDACS.

Food service operations within, attached to, or contiguous to winery (including cideries and meaderies), brewery and distillery establishments, holding only retail off-premises licenses (gourmet licenses, convenience stores, grocery stores, etc) for beer or wine under 3VAC5-50-100 (definitions and qualifications for off premises type licenses), will be inspected by VDACS so long as the food service qualifies for inspection by VDACS under the criteria below.

Wineries (including cideries and meaderies), distilleries, and breweries expanding food service beyond that which qualifies for inspection by VDACS under the criteria outlined below are classified as food establishments and shall be subject to the authority of VDH.

Qualifying wineries (including cideries and meaderies), breweries and distilleries as described above will fall under the jurisdiction of VDACS, provided food preparation is limited to as described in the table below.

Classification	Description
<p>Inspection Under VDACS:</p> <p>e.g. Vegetable trays, single serving size packaged snacks, hot dogs not from raw links, sandwich assembly and sandwich grilling, commercially prepared soup, salads, pizzas with commercially pre-cooked crust and meat toppings</p>	<p>Establishments preparing for same day service only, and not handling raw animal protein or other products that cannot be served raw, including:</p> <ul style="list-style-type: none"> ● Serving or selling prepackaged food. ● Food Preparation with no cook step (Store-Prepare-Serve). ● Receive-store-hold commercially processed food in its original package and/or heat only commercially processed foods, for immediate service and/or hot holding (Store-Heat-Hold-Serve).
<p>Inspection Under VDH:</p> <p>e.g. Hamburgers, pizzas with raw dough, fried chicken, homemade chili, homemade barbecue, raw oysters or caviar/roe</p>	<ul style="list-style-type: none"> ● Handling of raw animal protein, including those that can be served raw (oysters, caviar/roe, etc.) or other products that cannot be served raw. ● Complex preparation involving cooking, cooling, and reheating involving TCS foods. ● Establishment conducts specialized processes (e.g. smoking and curing, reduced oxygen packaged for extended shelf life).

Farmers Markets

Vendors selling food items from approved sources that comply with applicable law, such as manufacturers inspected by VDACS, are under the authority of VDACS or the equivalent agency in another state. Vendors selling packaged food items exempt from VDACS inspection as outlined in Code of Virginia § 3.2-5130A(3-5) are under the scope of VDACS, and do not require VDACS inspection. The serving or sampling of food items in this group is not regulated by VDH.

Food establishments with a valid permit from VDH may offer their items for sale at the farmers market without obtaining an additional permit from VDH.

Vendors preparing food at the farmers market to include cooking, steaming, beverage service, etc., and/or vendors that do not fall into the two categories above, nor meet the exemption as outlined in Code of Virginia § 35.1-14 (selling their own farm produced product directly to consumers for personal use), are under the authority of VDH (and must obtain a temporary food establishment permit).

Temporary Food Establishments

Packaged food items from approved sources that comply with applicable law, such as vendors inspected by VDACS, are under the authority of VDACS or an equivalent agency in another state. Samples of these items may also be offered without obtaining an additional permit from VDH (following Farmers Market Guidance above).

All vendors at temporary type events not otherwise delineated above as under the sole authority of VDACS or an equivalent agency in another state, fall under the jurisdiction of VDH (and require a temporary food establishment permit).

Questions Regarding Inspection Responsibility and Transfers of Jurisdiction

When a question arises regarding jurisdictional oversight, the VDACS Regional Manager or designee and VDH District Environmental Health Manager, or designee, will discuss to determine jurisdiction. If no mutual agreement regarding the inspectional jurisdiction for the food establishment can be reached, a final determination will be made by the VDH Division Director of Food and General Environmental Services in consultation with the VDACS Food Safety Program Supervisor.

Once the agencies reach an agreement, if the establishment is already under regulation (i.e. is already in business), the current agency will contact the establishment's owner and conduct an inspection/investigation to document the deviations from the establishment application as originally permitted or established, and to note any retail food regulatory violations. At this time the inspecting agency shall provide due notice to the facility owner and follow all applicable provisions of Code of Virginia § 2.2-4000 *et seq.*

When transfer of jurisdiction is appropriate, it should occur after giving the operator sufficient time to make application to the new agency and prepare for any new regulatory requirements, or revert operations to remain within the current agency's jurisdiction. The amount of time may vary but operators should be provided at least six months in cases where physical modifications to the facility (e.g. sewage disposal system enhancements) are necessary to comply with regulatory requirements. If a permit/license expires during the transition period, the agency with current jurisdiction will retain regulatory responsibility for a period agreed upon by the VDACS Regional Manager and local health department district Environmental Health Manager.

Prior to final transfer of jurisdiction, the agency determined to be the appropriate regulatory

authority shall provide due notice to the facility owner and follow all applicable provisions of Code of Virginia § 2.2-4000 *et seq.*

Areas of Collaboration

Information Exchange

To keep both Departments apprised of the conditions in food establishments throughout the Commonwealth, VDH and VDACS will, upon request, exchange information pertaining to establishments where formal or informal hearings are held or where permit withdrawals or legal actions are instituted. In situations where both Departments are involved with the inspection of the same facility, each agency will notify the other with respect to enforcement actions taken.

Both VDH, through its local health departments, and VDACS shall maintain current listings of establishments under their respective inspection programs and make such listings available to the other upon request. In addition, the contact information of VDACS and VDH personnel at regional and local levels will be made available to each agency.

Water and Sewage System Evaluations

VDACS shall notify VDH when an evaluation of a sewage disposal system is necessary due to a new establishment, an expansion of the menu, addition of seating, etc. Private sector evaluations of the water and sewage disposal system for the intended use will be reviewed by VDH. Local Health Departments will provide timely written responses to evaluation requests from the firm owner and copy VDACS on responses.

Prior to approval of a food establishment application, VDACS shall consult with the appropriate regional VDH Office of Drinking Water to determine whether the water system is or should be classified as a public non-community water supply.

Prior to instituting enforcement action regarding a private well, sewage system, or waterworks used by a food establishment subject to VDACS inspection, VDH shall notify the appropriate VDACS Regional Manager or Program Supervisor.

This memorandum of understanding supersedes: the Memorandum of Understanding entered into on or about March 8, 1989, and incorporates any subsequent adopted/ratified/signed addendums; the Memorandum of Understanding entered into on or about June 25, 2015, for Food Service Operation Inspections of Wineries and Meaderies; the Memorandum of Understanding entered into on or about October 6, 2015, for Food Service Operation Inspections of Breweries and Distilleries; and the Memorandum of Understanding entered into on or about January 19, 2017, for Food Vendor Operations at Farmers Markets and Other Gatherings.

Agreement and Consent

The Departments do hereby agree this agreement shall be effective upon signature by the State Commissioner of the Agriculture and Consumer Services and the State Commissioner of Health, and shall delegate, to the extent legally possible, those responsibilities for carrying out the terms of this Agreement.

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M. Norman Oliver, MD
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M. Norman Oliver, MD, MA,
State Health Commissioner
Virginia Department of Health
1/13/2022 | 11:36:06 AM EST

Date

Brad Copenhaver,
Commissioner
Virginia Department of Agriculture and Consumer Services

1/13/2022
Date