

APPENDIX II-G

COVER SHEET FOR FINAL PROPOSAL

Notice Number 2022-65 Rule Number He-P 2300 various

<p>1. Agency Name & Address: Dept. of Health & Human Services Division of Public Health Services Food Protection Services 29 Hazen Drive Concord, NH 03301</p>	<p>2. RSA Authority: RSA 143:6, II(a) and (e); RSA 143-A:9; and RSA 143-A:28</p> <p>3. Federal Authority: _____</p> <p>4. Type of Action: <input checked="" type="checkbox"/> Adopt <input type="checkbox"/> Amendment (only if Initial Proposal was filed before 9/27/20.) <input type="checkbox"/> Repeal <input type="checkbox"/> Readoption <input checked="" type="checkbox"/> Readoption w/amendment</p>
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5. Short Title: **Sanitary Production and Distribution of Food**

6. Contact person for copies and questions:
 Name: **Allyson Zinno** Title: **Administrator-Administrative Rules Unit**
 Address: **Dept. of Health & Human Services** Phone #: **(603) 271-9604**
Administrative Rules Unit
129 Pleasant Street, Brown Bldg.
Concord, NH 03301

7. The rulemaking notice appeared in the Rulemaking Register on **April 28, 2022**.

**SEE THE INSTRUCTIONS--PLEASE SUBMIT ONE COPY OF THIS COVER SHEET
 AND ONE COPY OF THE FOLLOWING:
 (optional to number correspondingly)**

8. The "Final Proposal-Fixed Text," including the cross-reference table required by RSA 541-A:3-a, II as an appendix.
9. Yes N/A Incorporation by Reference Statement(s) because this rule incorporates a document or Internet content by reference for which an Incorporation by Reference Statement is required pursuant to RSA 541-A:12, III.
10. Yes N/A The "Final Proposal-Annotated Text," indicating how the proposed rule was changed because the text of the rule changed from the Initial Proposal pursuant to RSA 541-A:12, II(d).
11. Yes N/A The amended fiscal impact statement because the change to the text of the Initial Proposal affects the original fiscal impact statement (FIS) pursuant to RSA 541-A:5, VI.

Notice Number 2022-65

Rule Number He-P 2300 various

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5. Short Title: **Sanitary Production and Distribution of Food**

6. (a) Summary of what the rule says and of any proposed amendments:

He-P 2300 sets forth the licensing requirements for food establishments. He-P 2300 also contains the fees that are charged for annual applications, inspections, and enforcement provisions for non-compliance with the rule.

The Department of Health and Human Services (Department) is proposing to adopt new section He-P 2303.03 on requirements for food allergy awareness and readopt with amendment various sections of He-P 2300, specifically He-P 2301.01 on definitions, He-P 2303.02 on the requirements for food protection manager certification, He-P 2304.01 on initial license application requirements, He-P 2304.04 on license class, and He-P 2306.02 on administrative fines. Amendments to the various sections of He-P 2300 include:

- **Updating He-P 2301.01 on definitions by adding the definitions for “distributor”, “farm store”, “harvester”, “identifier”, “mushroom”, “tier 1 mushroom”, “tier 2 mushroom”, and “unattended market”;**
- **Updating He-P 2303.02 on the requirements for food protection manager certification by updating the category exemptions to include unattended markets and farm stores and allowing food establishments that have:**
 - **At least one certified food protection manager on staff to not be required to have the certified food protection manager present during hours of operation when food preparation is limited to reheating commercially prepared food or ready to eat foods; and**
 - **Five employees or less to be required to have only one certified food protection manager on staff who is available during all hours of operation;**
- **Adding new section He-P 2303.03 on requirements for food allergy awareness which requires a food service establishment that offers unpackaged foods intended for immediate consumption by the consumer to post a notice to customers of the customer’s obligation to inform the server of his or her food allergies;**
- **Updating He-P 2304.01 on initial license application requirements to add the requirement that the proposed menu or list of food and beverages to be offered at the food establishment be submitted with a new food application;**

- **Updating He-P 2304.04 on license classes to add unattended market to category F-5 and add new category F-7, farm store; and**
- **Updating He-P 2306.02 on administrative fines by:**
 - **Reducing the fine for failure to cease operations after a license has expired. The fine is being reduced from \$1000 to \$250 and each day that a license holder fails to cease operation shall be considered a separate offense and subject to an additional \$50 fine; and**
 - **Adding additional fines for failure to label wild mushrooms or retain records in accordance with RSA 143-A:23, for failure to maintain files for a least 90 days on the receipt of purchase of wild mushrooms in accordance with RSA 143-A:24, and for identifying, harvesting, or distributing wild mushrooms without having a license in accordance with RSA 143-A:23.**

Additionally, the Department is proposing to adopt part He-P 2314 on requirements for wild mushroom identifiers, harvesters, and distributors of wild mushrooms to food establishments or private individuals as food which contains He-P 2314.01 on initial and renewal application requirements, He-P 2314.02 on education requirements for wild mushroom harvesters, identifiers, and distributors, He-P 2314.03 on list of tier 1 wild harvested mushrooms, and He-P 2314.04 on list of tier 2 wild harvested mushrooms.

6. (b) Brief description of the groups affected:

These rules affect all food service establishments or retail food stores licensed under RSA 143-A; all in-state residential, non-commercial kitchen licensed under RSA 143-A:12; and all out-of-state food producers in residential, non-commercial kitchens who sell their products in New Hampshire. These rules will also affect all individuals who wish to identify, harvest, and distribute wild mushrooms.

6. (c) Specific section or sections of state statute or federal statute or regulation which the rule is intended to implement:

Rule	Specific State Statute which the Rule Implements
He-P 2301.01	RSA 143-A; RSA 143-A:3; RSA 143-A:12, RSA 143-A:13; and RSA 145
He-P 2301.01(o) & (ae)	RSA 143-A:12, 13
He-P 2303.02	RSA 143-A:9, V
He-P 2303.03	RSA 143-9, V
He-P 2304.01	RSA 143-A:6, I and V
He-P 2304.01(a)	RSA 143-A:6, I and V
He-P 2304.01(a)(1)	RSA 143-A:6, I
He-P 2304.04	RSA 143-A:9, I; RSA 143-A:12, II
He-P 2306.02	RSA 143:7-a; RSA 143-A:10-a
He-P 2314.01.01	RSA 143-A:28 VI.
He-P 2314.02	RSA 143-A:28 I:III
He-P 2314.03	RSA 143-A:28 IV
He-P 2314.04	RSA 143-A:28 V.

7. Contact person for copies and questions including requests to accommodate persons with disabilities:

Name: **Allyson Zinno** Title: **Administrator- Administrative Rules Unit**
Address: **Dept. of Health and Human Services** Phone #: **(603) 271-9604**
Administrative Rules Unit Fax#: **(603) 271-5590**
129 Pleasant Street, 2nd Floor E-mail: Allyson.E.Zinno@dhhs.nh.gov
Concord, NH 03301

TTY/TDD Access: Relay NH 1-800-735-2964
or dial 711 (in NH)

The proposed rules may be viewed and downloaded at:
<http://www.dhhs.nh.gov/oos/aru/comment.htm>

8. Deadline for submission of materials in writing or, if practicable for the agency, in the electronic format specified: **Thursday, May 26, 2022**

Fax E-mail Other format (specify):

9. Public hearing scheduled for:

Date and Time: **Thursday, May 19, 2022 at 11:30am**

Place: [**DHHS Brown Bldg., Auditorium, 129 Pleasant St., Concord, NH**](#)

10. Fiscal Impact Statement (Prepared by Legislative Budget Assistant)

FIS # 22-050, dated April 14, 2022

1. Comparison of the costs of the proposed rule(s) to the existing rule(s):

Not applicable with respect to He-P 2303.03, as this is a new rule. The remaining rules may benefit the state general fund by an indeterminable amount and have an indeterminable impact on independently-owned businesses.

2. Cite the Federal mandate. Identify the impact on state funds:

No federal mandate, no impact on state funds.

3. Cost and benefits of the proposed rule(s):

A. To State general or State special funds:

There is a potential increase in state general fund revenue due to the addition of a \$75 license fee and \$30 renewal fee for wild mushroom identifiers, harvesters, and/or distributors.

B. To State citizens and political subdivisions:

None.

C. To independently owned businesses:

There is a potential benefit to businesses with five employees or fewer and those who engage in limited food preparation, as under the proposed rule these businesses will

need only one certified food protection manager on staff. Potential costs include the licensing and renewal fees mentioned in (A) above, as well as the proposed rule He-P 2303.03 establishing the need to post signage advising patrons with food allergies to disclose this information to a server.

11. Statement Relative to Part I, Article 28-a of the N.H. Constitution:

The proposed rules modify an existing program or responsibility, but do not mandate any fees, duties or expenditures on the political subdivisions of the state, and therefore do not violate Part I, Article 28-a of the N.H. Constitution.

CHAPTER He-P 2300 SANITARY PRODUCTION AND DISTRIBUTION OF FOOD

PART He-P 2301 DEFINITIONS

Readopt with amendment He-P 2301.01, effective 8-20-19 (Document #12852), to read as follows:

He-P 2301.01 Definitions.

(a) “Acid foods” means “acid foods” as defined by 21 CFR 114.3(a), namely, “foods that have a natural pH of 4.6 or below.”

(b) “Acidified foods” means “acidified foods” as defined by 21 CFR 114.3(b), namely, “low-acid foods to which acid(s) or acid food(s) are added; these foods include, but are not limited to, beans, cucumbers, cabbage, artichokes, cauliflower, puddings, peppers, tropical fruits, and fish, singly or in any combination. They have a water activity (aw) greater than 0.85 and have a finished equilibrium pH of 4.6 or below. These foods may be called, or may purport to be, ‘pickles’ or ‘pickled’. Carbonated beverages, jams, jellies, preserves, acid foods (including such foods as standardized and non-standardized food dressings and condiment sauces) that contain small amounts of low-acid food(s) and have a resultant finished equilibrium pH that does not significantly differ from that of the predominant acid or acid food, and foods that are stored, distributed, and retailed under refrigeration are excluded from the coverage of this part.”

(c) “Applicant” means the owner of a food establishment or an officer of the legal ownership who applies for a license under these rules.

(d) “Bed and breakfast” means a type of food service establishment that is a transient lodging facility, which is the owner’s or innkeeper’s personal residence, is occupied by the owner or innkeeper at the time of rental to an in-house guest, and in which breakfast is the only meal served.

(e) “Beverage” means “beverage” as defined in RSA 143:9.

(f) “Caterer” means a person or entity which provides meals or food at private functions at off-site locations.

(g) “Certified food protection manager” means the person in charge who has shown proficiency of required information through passing a test that is part of an accredited program or as stated in 2-102.12(A) of the Food Code.

(h) “Change of ownership” means any time a controlling interest in a sole proprietorship, joint venture, partnership, corporation, limited liability company, or any other kind of entity is transferred to another sole proprietor, joint venture, partnership, corporation, limited liability company, or any other kind of entity.

(i) “Commissioner” means the commissioner of the New Hampshire department of health and human services, or his or her designee.

(j) “Continental breakfast” means a light breakfast that includes items such as coffee, tea, juices, toasts, breakfast cereals, assorted pastries, and uncut fruit.

(k) “Corrective action plan (CAP)” means a plan developed and written by the licensee, which specifies the actions that will be taken to correct identified deficiencies.

(l) “Critical control point” means a point or procedure in a specific food system where loss of control might result in an unacceptable health risk.

Unclear: By defining distributor in such a narrow context, the term is limited in the rest of the chapter. For example: He-P 2301.01 (ae) [Non-exempt homestead food operation] and He-P 2309.04 [Labeling of All Packaged Food] both use the term distributor. By narrowly defining distributor to only people who purchase mushrooms, these two sections exclude distributors who do not purchase and sell mushrooms. Could clarify by changing to it "Distributor of mushrooms" or "Mushroom distributor".

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

(n) "Department" means the New Hampshire department of health and human services.

(o) "Distributor" means a person who purchases wild mushrooms from a harvester and sells to food establishments or direct to the public. Distributor does not include food establishments.

(p) "Exempt homestead food operation" means a homestead food operation whose maximum annual gross sales is less than \$20,000 and whose homestead food products are only for sale directly to the consumer from the homestead residence, the owner's farm stand, at farmers' markets, or at a retail food store.

(q) "Farm store" means a retail food store with no food preparation areas and no running water that offers locally grown or produced foods only.

(r) "Food" means "food" as defined in RSA 143-A:3, III.

(s) "Food Code" means the U.S. Department of Health and Human Services, Public Health Services, Food and Drug Administration, Food Code, 2017 edition.

(t) "Food establishment" means "food service establishment" as defined in RSA 143-A:3, IV, or "retail food store" as defined in RSA 143-A:3, VII.

Edit: commas

(u) "Food processing plant" means a type of food service establishment that is a commercial operation that processes food for human consumption, and provides processed food for sale and distribution to other business entities such as other food establishments or direct to consumer at another location. This term includes "cold storage" or "refrigerating warehouse" as defined in RSA 145:1, II. The term does not include an operation that processes food under the oversight of the New Hampshire department of agriculture in accordance with RSA 426, RSA 427, RSA 428, RSA 429 and RSA 434.

Edit: This chapter was repealed.

(v) "Food service establishment" means "food service establishment" as defined in RSA 143-A:3, IV.

(w) "Foodborne disease outbreak" means the occurrence of 2 or more cases of a similar illness resulting from the ingestion of a common food.

Edit: "Forages"

(x) "Harvester" means a person who forges for and harvests wild mushrooms for sale to a distributor, food establishment, or to the public.

(y) "Homestead food operation" means "homestead food operation" as defined in RSA 143-A:12, I(a).

(z) "Homestead food products" means foods which are not potentially hazardous food and are limited to the following:

- (1) Baked items, including, breads, rolls, muffins, cookies, brownies, and cakes;
- (2) Double-crust fruit pies;
- (3) Candy and fudge;
- (4) Packaged dry products, which include spices and herbs;
- (5) Acid foods, including, vinegars and mustards; and
- (6) Jams and jellies.

Unclear: There are many foods that are not hazardous, but are not homestead food products. Please expand on the definition.

(aa) “Identifier” means a person who identifies wild mushrooms collected by a harvester on behalf of a distributor or a food establishment.

(ab) “Immediately endangers public health or safety” means that a condition exists that is an imminent health hazard.

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

(ad) “License” means the document issued by the department or other regulatory agency, which authorizes a license holder to operate a food establishment.

(ae) “License holder” means the entity legally responsible for the operation of a licensed food establishment, including, the owner, the owner’s agent, or other person.

(af) “Low-acid foods” means “low-acid foods” as defined by 21 CFR 114.3(d), namely, “any foods, other than alcoholic beverages, with a finished equilibrium pH greater than 4.6 and a water activity (aw) greater than 0.85. Tomatoes and tomato products having a finished equilibrium pH less than 4.7 are not classed as low-acid foods.”

(ag) “Major food allergen” means milk, egg, fish, such as bass, flounder, cod, and including crustacean shellfish such as crab, lobster, or shrimp, tree nuts, such as almonds, pecans, or walnuts, wheat, peanuts, and soybeans, or a food ingredient that contains protein derived from the aforementioned foods.

(ah) “Mobile food unit” means a food service establishment mounted on wheels or otherwise designed to be immediately moveable. This term does not include a food service establishment which is required to meet the wastewater requirements in He-P 2304.07.

(ai) “Mushroom” means the fleshy, spore-bearing, fruiting body of a fungus.

(aj) “Non-exempt homestead food operation” means a homestead food operation whose annual gross sales exceeds \$20,000 or who wishes to sell homestead food products, as defined in (w) above, to restaurants, over the Internet, by mail order, or to wholesalers, brokers or other food distributors for resale. A non-exempt homestead food operation is a type of food service establishment.

(ak) “Package” means a quantity or an amount of food that is bottled, canned, cartoned, securely bagged, or securely wrapped.

(al) “Person in charge” means the individual present at a food establishment who is responsible for the operation of the establishment at the time of inspection, including the duties described in section 2-103.11 of the Food Code, and who can demonstrate the knowledge required by section 2-102.11 of the Food Code which are pertinent to the risks inherent to that specific food establishment.

(am) “Potentially hazardous food” means “potentially hazardous food” as defined in RSA 143-A:12, I(b), namely, “foods requiring temperature control for safety because they are capable of supporting the rapid growth of pathogenic or toxigenic microorganisms and the growth of toxin production of clostridium botulinum. Potentially hazardous foods also include processed acidified and low acid canned foods.” This term includes “time/temperature control for safety (TCS) food.”

(an) “Poultry” means “poultry” as defined in RSA 143-A:14, III.

(ao) “Poultry producer” means “poultry producer” as defined in RSA 143-A:14, IV.

Unclear: This only lists examples instead of defining the term

Edit: Comma

(ap) "Priority item" means a provision of the Food Code, marked with a superscript P,P, whose application contributes directly to the elimination, prevention, or reduction to an acceptable level, hazards associated with foodborne illness or injury and there is no other provision that more directly controls the hazard.

(aq) "Public water system" means "public water system" as defined in RSA 485:1-a, XV.

(ar) "Pushcart" means a type of food service establishment that is a non-self propelled vehicle limited to serving non-time/temperature control for safety foods, packaged time/temperature control for safety foods maintained at proper temperatures, or limited to the preparation and serving of frankfurters.

(as) "Rabbit" means "rabbit" as defined in RSA 143-A:14, VI.

(at) "Rabbit producer" means "rabbit producer" as defined in RSA 143-A:14, VII.

(au) "Regulatory authority" means the local, state, or federal enforcement body having jurisdiction over the food establishment.

(av) "Remodeled" means having undertaken construction, which includes, but is not limited to, adding new seats, a food preparation area, or any construction affecting the kitchen or any other part of a food establishment that requires a plumbing modification.

(aw) "Retail food store" means "retail food store" as defined in RSA 143-A:3, VII.

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

Note to Agency: Is this a common term that the regulated community would know? If not, then this is unclear

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

(az) "Sewage" means "sewage" as defined in RSA 485-A:2, X, namely, "the water-carried waste products from buildings, public or private, together with such groundwater infiltration and surface water as may be present."

(ba) "Soup kitchen" means a food service establishment operated by a charitable organization including religious societies and fraternal organizations organized pursuant to RSA 292, RSA 306, and RSA 418, that prepares and serves meals to the public without charge.

(bb) "Tier 1 mushroom" means a wild mushroom which is easily identified, that has no toxic look-alikes, and which is unlikely to cause illness in humans.

(bc) "Tier 2 mushroom" means a wild mushroom which is difficult to identify, may have toxic look-alikes, or may cause illness in some humans.

(bd) "Time/temperature control for safety (TCS) food" means a food that requires time/temperature control for safety to limit pathogenic microorganism growth or toxin formation. This term includes "potentially hazardous food."

(be) "Unattended market" means an operation that provides packaged foods or whole fruit using an automated payment system, and has controlled entry not accessible by the general public.

(bf) "Uninspected bison" means "uninspected bison" as defined in 143-A:18.

Edit: change to comma or remove all together

Unclear: could misinterpret, are you changing the area? Adding a new area? Need to clarify. Ex. if only want to say adding a food prep area include "or" and remove the comma

PART He-P 2303 INCORPORATION OF THE 2017 FOOD CODE

Readopt with amendment He-P 2303.02, effective 8-20-19 (Document #12852), to read as follows:

He-P 2303.02 Requirements for Food Protection Manager Certification.

(a) The following categories as listed in He-P 2304.04 shall be exempt from the requirement for a certified food protection manager as defined in He-P 2301.01(g):

- (1) Category A-1, food processing plants which commercially process 100,000 packages of food or more, per year;
- (2) Category C-5, food processing plants which commercially process less than 100,000 packages of TCS food per year;
- (3) Category C-6, cold storage or refrigerating warehouse;
- (4) Category D-4, retail food stores that allow self-service of food, including coffee, hot dogs, or soft drinks;
- (5) Category D-6, servicing areas;
- (6) Category E-1, bed and breakfasts;
- (7) Category E-3, lodging facilities serving continental breakfasts;
- (8) Category F-1, home delivery services of packaged frozen food;
- (9) Category F-2, pushcarts and other mobile food units, including, those serving packaged food and non-TCS unwrapped foods only;
- (10) Category F-3, retail food stores with no food preparation areas;
- (11) Category F-4, wholesalers/distributors of TCS food;
- (12) Category F-5, on-site vending machines or unattended markets, which serve TCS food;
- (13) Category F-6, bakeries which do not serve TCS food and have no seats;
- (14) Category F-7, farm store;
- (15) Category G-1, bars/lounges without a food preparation area;
- (16) Category G-2, arena/theater concessions serving non-TCS food;
- (17) Category G-3, retail food stores serving pre-packaged ice cream;
- (18) Category G-7, sellers of pre-packaged frozen meat or poultry that is processed in a USDA-inspected plant; or
- (19) Category G-8, food processing plants that manufacturer or package non-TCS food;

(b) A food establishment that is in process of initial licensing shall have a certified food protection manager within first 45 days of the initial licensing inspection.

(c) If a food establishment’s certified food protection manager ceases his/her employment and renders the food establishment out of compliance with food manager certification requirements, the establishment shall have 90 days to come into compliance.

(d) Food establishments that have at least one certified food protection manager on staff shall not be required to have the certified food protection manager present during hours of operation when no food preparation is taking place.

(e) Food establishments having at least one certified food protection manager on staff shall not be required to have the certified food protection manager present when food preparation is limited to reheating commercially prepared food or ready to eat food.

(f) Food establishments having 5 food employees or less on duty are required to have only one certified food protection manager on staff who is available, although not required to be present, during all hours of operation.

(g) A food establishment shall have available the exam certificate of each certified food protection manager for review by inspection staff.

Adopt He-P 2303.03 to read as follows:



Unclear: This section is to incorporate the food code, but not clear where in the code it states this should be the practice. Reference the specific section of the food code this is incorporating

He-P 2303.03 Requirements for Food Allergy Awareness.

(a) A food service establishment that offers unpackaged foods intended for immediate consumption by the consumer shall post a notice to customers of the customer’s obligation to inform the server of his or her food allergies.

(b) This notice shall be displayed by brochures, deli case or menu advisories, label statements, table tents, place cards, or other effective written means and state “Before placing your order, please inform your server if a person in your party has a food allergy”.

PART He-P 2304 APPLICATION AND LICENSING PROCEDURE

Readopt with amendment He-P 2304.01, effective 8-20-19 (Document #12852), to read as follows:

He-P 2304.01 Initial License Application Requirements.

(a) Each applicant for a license shall complete and submit to the department an application form entitled “Application for New Annual Food Service License” (FSAPP June 2022), “Application for Annual Food Processing Plant License” (FPAPP July 2019), “Application for Annual Homestead License” (HAPP July 2019), or “Application for Annual Mobile Food Unit License” (MFAPP July 2019), as applicable, signed and dated by the applicant or the person who represents the applicant certifying the following:

Unclear: These forms have not been filed with OLS. Therefore, it cannot be determined if they are consistent with the rules.

“I certify that all information provided in or attached to this application is complete, accurate and up-to-date as of the date specified below. I further certify that there are no willful misrepresentations of the answers to questions herein, and that I have made no omissions with respect to any of my answers to the questions presented. I understand that it is my responsibility to immediately notify the Food Protection Section with regard to any changes, corrections, or updates to the information provided.”

(b) In addition to submitting the completed application, in (a) above, an applicant shall also submit the following:

Unclear: check that this link works. When OLS staff checked the cite it was not working.

(1) A check, money order, or on-line payment by credit card at <https://www.dhhs.nh.gov/dphs/fp/apply-change.htm> for the applicable fee submitted with the application in (1) above, in accordance with He-P 2304.05(a) and (c);

(2) Water system documentation, in accordance with He-P 2304.06, except that food establishments applying to be licensed as a farm store, home delivery services, pushcart and other mobile units, on-site vending machines, retail food stores serving pre-packaged ice cream, and sellers of pre-packaged frozen meat or poultry that is processed in a United States Department of Agriculture (USDA) plant shall not be required to submit such documentation;

(3) Wastewater system documentation, in accordance with He-P 2304.07, except that food establishments applying to be licensed as a bed and breakfast or a homestead shall not be required to submit such documentation;

Unclear: See comment to (a) above.

(4) A completed "Floor Plan Review Application" (PRAPP 07-01-15) signed and dated by the applicant, or the person who represents the applicant, if required by He-P 2304.12(a) and if not already submitted to the department for review, and which meets the requirements of the Food Code, unless the applicant is exempt from this requirement as set forth in He-P 2304.12(d);

(5) If the application is for a mobile food unit which uses a servicing area, one of the following:

- a. A copy of the food establishment license, from the appropriate regulatory authority, of the facility being used as a servicing area; or
- b. A separate license application for the facility to be used as a servicing area;

(6) A hazard analysis and critical control point (HACCP) plan if required by He-P 2304.13; and

(7) A proposed menu or list of food and beverages to be offered.

Unclear: Will the applicant have to re-submit if they change any of the menu items?

(c) The applicant shall apply online at <https://www.dhhs.nh.gov/programs-services/environmental-health-and-you/food-protection> by mail, or hand deliver the fee and all documents to:

Edit: Comma

Department of Health and Human Services
Bureau of Finance/Receipts Unit. Food Protection
Food Protection Section
129 Pleasant Street
Concord, NH 03301
(603) 271-4589

(d) Applicants seeking a change in license class, a new license, or a new license due to a change of ownership, shall contact the department's food protection section to arrange for an inspection of the establishment no later than 30 days from the date of mailing or delivering the fee and application.

Readopt with amendment He-P 2304.04, effective 8-20-19 (Document #12852), to read as follows:

He-P 2304.04 License Classes.

(a) For the purpose of licensure, food establishments shall be divided into the following classes:

(1) Class A which shall include:

- a. Category A-1, food processing plants which commercially process 100,000 packages of food or more, per year;

- b. Category A-2, food service establishments with 200 or more indoor seats; or
- c. Category A-3, retail food stores with 4 or more food preparation areas;

(2) Class B which shall include:

- a. Category B-1, retail food stores with 2 to 3 food preparation areas; or
- b. Category B-2, food service establishments with 100 to 199 indoor seats;

(3) Class C which shall include:

- a. Category C-1, retail food stores with one food preparation area, including, an area for cutting cheese or fudge;
- b. Category C-2, caterers serving food off-site;
- c. Category C-3, food service establishments with 25 to 99 indoor seats;
- d. Category C-4, bars or lounges with a food preparation area, excluding areas used for preparing garnish such as limes and lemons;
- e. Category C-5, food processing plants which commercially process less than 100,000 packages of TCS food per year; or
- f. Category C-6, cold storage or refrigerating warehouse;

(4) Class D, which shall include:

- a. Category D-1, food service establishments with 0 to 24 indoor seats;
- b. Category D-2, fraternities and sororities, except those where the members prepare all their own food;
- c. Category D-3, mobile food units which cook or prepare food;
- d. Category D-4, retail food stores that allow self-service of food, including coffee, hot dogs, or soft drinks;
- e. Category D-6, servicing areas; or
- f. Category D-7, arena or theater concessions serving TCS food;

(5) Class E which shall include:

- a. Category E-1, bed and breakfasts; or
- b. Category E-3, lodging facilities serving continental breakfasts;

(6) Class F which shall include:

- a. Category F-1, home delivery services of packaged frozen food;
- b. Category F-2, pushcarts and other mobile food units, including, those serving packaged food and non-TCS unwrapped foods only;
- c. Category F-3, retail food stores with no food preparation areas;

- d. Category F-4, wholesalers or distributors of TCS food;
- e. Category F-5, on-site vending machines or unattended markets, which serve TCS food;
- f. Category F-6, bakeries which do not serve TCS food and have no seats; or
- g. Category F-7, farm store. ← Edit: semicolon

(7) Class G shall include:

- a. Category G-1, bars or lounges without a food preparation area;
- b. Category G-2, arena or theater concessions serving non-TCS food;
- c. Category G-3, retail food stores serving pre-packaged ice cream;
- d. Category G-4, institutions including state, county, and municipal institutions;
- e. Category G-5, schools, private schools, and schools whose food service is operated by a caterer;
- f. Category G-6, senior meal sites;
- g. Category G-7, sellers of pre-packaged frozen meat or poultry that is processed in a USDA-inspected plant; or
- h. Category G-8, food processing plants that manufacturer or package non-TCS food;

(8) Class H, Category H-1, shall include non-exempt homestead food operations; and

(9) Class O, Category O-1, shall include municipality-run school cafeterias.

(b) When a food establishment operates more than one type of business, the higher class shall determine the class of license, with Class A being the highest.

(c) When a food establishment has an additional food processing business, each shall be licensed separately, requiring separate applications and separate fees.

(d) When a hospital or school offers food to the general public in addition to its population, then the license class shall be determined by the number of seats the food service establishment has.

PART He-P 2306 ENFORCEMENT ACTIONS

Readopt with amendment He-P 2306.02, effective 8-19-20 (Document #12852), to read as follows:

He-P 2306.02 Administrative Fines.

(a) The department shall impose fines as follows:

- (1) For providing false or misleading information on or with an application, in violation of He-P 2304.01(a), He-P 2311.01(a), or He-P 2304.12(a), the fine shall be \$1,000;
- (2) For failure to operate a food establishment only in the manner in which licensed to do so, in violation of He-P 2304.02(j), the fine shall be \$500;

- (3) For failure to cooperate during an inspection of a food establishment, including but not limited to failing to allow department representatives or inspectors to inspect food establishment premises, vehicles, and records at all times, in violation of He-P 2305.01, the fine shall be \$2,000;
- (4) For failure to notify the department by telephone within 24 hours of any fire or other disaster that jeopardizes the safety or sanitation of food provided in food establishments, in violation of He-P 2306.06(a), the fine shall be \$250;
- (5) For failure to notify the department pursuant to He-P 2304.08(a) at least 30 days prior to a food establishment ownership change, the fine shall be \$500;
- (6) For failure to notify the department pursuant to He-P 2304.10(a) at least 30 days prior to the change of location of a food establishment, the fine shall be \$500;
- (7) For failure to submit a plan for review as required in He-P 2304.12(a) and (b), the fine shall be \$300;
- (8) For failure to discard food as required by Food Code 3-701.11, and in the manner instructed to do so by the department, the fine shall be \$500;
- (9) For failure to cease operation upon notification by the department to do so, the fine shall be \$1,000. Each day that a license holder fails to cease operation shall be considered a separate offense subject to an additional \$500 fine;
- (10) For failure to cease operation when an application has been denied, or when a license has been revoked, the fine shall be \$1,000. Each day that a license holder fails to cease operation shall be considered a separate offense subject to an additional \$500 fine;
- (11) For a violation of the same priority item on more than 2 consecutive inspections, the fine shall be \$500;
- (12) For failure to pay an administrative fine within 30 days of its imposition, or within 30 days of the decision to uphold the imposition of a fine that was appealed, the fine shall be \$500. Each day until the expiration of the current license, that a license holder fails to pay such a fine shall be considered a separate offense subject to an additional \$500 fine;
- (13) For a failure to comply with any CAP that has been accepted by the department, the fine shall be \$500;
- (14) For operation of a food service establishment without obtaining a food service license, as required by RSA 143-A:4, the fine shall be \$1,000. Each day that a food establishment operates without a license shall be considered a separate offense subject to an additional \$500 fine;
- (15) For failure to submit a HACCP plan for review if required by the department in accordance with He-P 2304.13, the fine shall be \$500;
- (16) For failure to display a valid license, in accordance with He-P 2304.02(1), the fine shall be \$200;
- (17) For failure of an applicant, owner, or person in charge to be present at the time of inspection and demonstrate the knowledge required by section 2-102.11 of the Food Code which are pertinent to the risks inherent to the specific food establishment, in violation of He-P 2305.01(e), the fine shall be \$250;
- (18) For violating a variance approved in accordance with He-P 2304.14, the fine shall be \$500;

Unclear/Legis intent: If this is elsewhere in the rules, include a cite. If not elsewhere, this allows requirements to be set outside rulemaking in violation of RSA 541-A:3 and RSA 541-A:22, I.

- (19) For failure to submit a timely renewal application, in violation of He-P 2304.03(b), the fine shall be \$75;
 - (20) For failure of an exempt or non-exempt homestead food operation to label products in accordance with He-P 2310.01(d) or He-P 2311.04, the fine shall be \$250 per product line;
 - (21) For failure of a poultry producer or a rabbit producer to comply with training requirements of He-P 2313.02, the fine shall be \$500;
 - (22) For failure to cooperate during an outbreak investigation in violation of He-P 2313.01, the fine shall be \$500;
 - (23) For failure to maintain files, for at least 90 days, on the receipt of purchase of uninspected poultry or uninspected rabbits in accordance with RSA 143-A:15, II, the fine shall be \$500;
 - (24) For failure to correctly label a menu relative to the sale of uninspected, poultry or uninspected rabbits in accordance with He-P 2314.01, the fine shall be \$500; and
 - (25) For failure to comply with the requirements for a certified food protection manager in accordance with He-P 2303.02, the fine shall be \$250;
 - (26) For failure to cease operations after a license has expired, the fine shall be \$250. Each day that a license holder fails to cease operation shall be considered a separate offense subject to an additional \$50 fine;
 - (27) For failure to label wild mushrooms or retain records in accordance with RSA 143-A:23, the fine shall be \$500;
 - (28) For failure to maintain files, for at least 90 days, on the receipt of purchase of wild mushrooms, in accordance with RSA 143-A:24, the fine shall be \$500; and
 - (29) For identifying, harvesting, or distributing wild mushrooms without having a license in accordance with RSA 143-A:23, the fine shall be \$1000.
- (b) Except for violations of (a)(19) above, each day that an individual or licensee continues to be in violation of the provisions of RSA 143, RSA 143-A, or He-P 2300 shall constitute a separate violation and shall be fined in accordance with this section.
- (c) Payment of any imposed fine to the department shall meet the following requirements:
- (1) Payment shall be made in the form of check, money order, or on-line payment made payable to the "Treasurer, State of New Hampshire" in the exact amount due;
 - (2) Money order, or certified check shall be required when an applicant or licensee has issued payment to the department by check, and such check was returned for insufficient funds; and
 - (3) Any payment made to the department by check which is returned for insufficient funds, and which an individual, applicant, or licensee has not made good by submitting money order or certified check within 2 business days of notification by the department, including any penalty assessment allowed by RSA 6:11-a, shall be grounds for revocation of the license.

Adopt He-P 2314 to read as follows:

PART He-P 2314 REQUIREMENTS FOR WILD MUSHROOM IDENTIFIERS, HARVESTERS AND DISTRIBUTORS OF WILD MUSHROOMS TO FOOD ESTABLISHMENTS OR PRIVATE INDIVIDUALS AS FOOD

He-P 2314.01 Initial and Renewal Application Requirements.

(a) A person applying for a license to harvest, identify, and/or distribute tier 1 mushrooms or tier 2 mushrooms shall complete and submit to the department a "WMH APPLICATION FORM" (XXXX 2022) and the following:

Unclear: Type out the name of the form so that it matches what is on the form [Application for License for Wild Mushroom Harvesters, Identifiers, and Distributors]

(1) Proof of successful completion of an education course meeting the requirements of He-P 2314.02 and

Edit: semicolon

(2) A \$75 licensing fee by check, money order, or online payment by credit card at www.dhhs.nh.gov.

(b) If the applicant is applying for a tier 1 mushroom license, the applicant shall pass an exam on the tier 1 mushroom list outlined in He-P 2314.03.

(c) If the applicant is applying for a tier 2 mushroom license, the applicant shall pass an exam on the tier 2 mushroom list outlined in He-P 2314.04.

(d) Upon receipt of a completed application, the department shall issue a tier specific license.

(e) A licensee shall only identify, harvest, and/or distribute mushrooms from the tier list corresponding to the tier license they hold, except a tier 2 licensee who may also identify, harvest, and/or distribute mushrooms from the tier 1 list.

(f) A license shall be valid for 5 years from the date of issuance.

(g) A licensee shall renew their license by submitting to the department at least 30 days prior to their current license expiration:

(1) A completed renewal application;

Note to JLCAR: Within 5 years, the Department will need to develop and adopt a renewal form.

(2) Proof of completion of an on-line renewal course; and

(3) A \$30 renewal fee.

Unclear: What is this and what is required?

He-P 2314.02 Education Requirements for Wild Mushroom Harvester, Identifiers, Distributors.

(a) The education course to satisfy the application requirement set forth in He-P 2314.01(b) for a tier 1 wild harvested mushroom license shall include the following:

- (1) Identification of mushrooms;
- (2) Appropriate locations from which to harvest mushrooms;
- (3) The safe handling and storage of mushrooms;
- (4) Record keeping requirements and ethics of harvesting;

Note to JLCAR: Within 5 years, the Department will need to develop and adopt a renewal form.

Unclear: What is this and what is required?

(5) No less than 12 hours of in-person instruction with a mandatory online preparation module and any other specific requirements for wild mushroom harvesters, identifiers, or distributors set forth in RSA 143-A:21-28 or at least 4 hours with documentation from the course provider for abbreviated course, if the applicant can demonstrate to the instructor that they are able to identify all tier 1 mushrooms and have sufficient experience harvesting; and

(6) A certificate issued to a student indicating successful completion of the course.

(b) The education course to satisfy the application requirement set forth in He-P 2314.01(c) for a tier 2 wild harvested mushroom license shall include the following:

(1) Identification of mushrooms;

(2) Appropriate locations from which to harvest mushrooms;

(3) The safe handling and storage of mushrooms;

(4) Record keeping requirements and ethics of harvesting;

(5) No less than 4 hours of in-person instruction with a mandatory online preparation module and any other specific requirements for wild mushroom harvesters, identifiers, or distributors set forth in RSA 143-A:21-28; and

(6) A certificate issued to a student indicating successful completion of the course.

(c) An applicant shall provide proof of successful completion of the required training to the department with license application. Successful completion includes passing a standardized test on course material with a score of at least 70 percent.

(d) Course instructors shall hold a bachelor's degree in mycology or provide proof of one year of documented instruction of course material with at least two references, one character and one professional.

He-P 2314. 03 List of Tier 1 Wild Harvested Mushrooms. Tier 1 mushrooms shall include:

(a) Morel –*Morchella* spp. - *M. americana* Clowez & Matherly, *M. angusticeps* Pk., *M. elata* Fr., *M. punctipes* Pk;

(b) Chanterelle –*Cantharellus* spp. - *Cantharellus cinnabarinus* (Schwein.) Schwein. *C. flavus* Foltz & Volk, *C. lateritius* (Berk.) Singer, *C. minor* Pk., *C. roseocanus* (Redhead, Norvell & Danell) Redhead, Norvell & Moncalvo;

(c) Black Trumpet –*Craterellus cornucopioides* (L.) Pers., *C. fallax* A.H. Smith;

(d) Lion's Mane (Bears Head or Coral Tooth) –*Hericium* spp. - *H. americanum* Ginns, *H. coralloides* (Scop.) Pers., *H. erinaceus* (Bull.) Pers.;

(e) Oyster Mushroom –*Pleurotus* spp. - *Pleurotus ostreatus* (Jacq.) Kumm., *P. populinus* O. Hilber & O.K. Miller, *P. pulmonarius* (Fr.) Quel.;

Edit: When pairing Latin scientific terms with their English equivalent, put the English equivalent in parentheses and italicize or underline the Latin name. See *Drafting and Procedure Manual* Page 111 Chapter 4 Section 3.9. All Latin terms need to be italicized or underlined. See *Drafting and Procedural Manual* Page 126 Chapter 4 Section 4.2

Unclear: The requirements for a tier 2 are the same as for a tier 1 except less instruction. Yet, tier 2 mushrooms are potentially dangerous.

Unclear: What is this and what is required?

Unclear: From the Department?

Unclear: To whom is this presented?

Edit: "2" instead of "two"

Edit: See comment at end of page

(f) King Bolete (Porcini, Cep, Steinpilz) –*Boletus edulis* group (*B. edulis* Bull., *B. atkinsonii* Pk., *B. chippewaensis* A.H. Smith & Thiers, *B. nobilis* Pk., *B. sepeperans* Pk., *B. subcaerulescens* (E.A. Dick & Snell) Both, Bessette & A.R. Bessette, *B. variipes* Pk.);

(g) Matsutake –*Tricholoma magnivelare* (Pk.) Redhead;

(h) Hen-of-the-Woods –*Grifola frondosa* (Dickson) Gray;

(i) Wine Cap –*Stropharia rugosoannulata* Farl. ex Murrill;

(j) Cauliflower Mushroom –*Sparassis* spp. –*S. spathulata* (Schwein.) Fr., *S. americana* R.H. Petersen;

and

(k) Lobster Mushroom - *Hypomyces lactifluorum* (Schwein.) Tulasne & C. Tulasne.

He-P 2314. 04 List of Tier 2 Wild Harvested Mushrooms. Tier 2 mushrooms shall include:

(a) Caesar's Amanita - *Amanita jacksonii* Pomerleau;

(b) Pear-shaped Puffball - *Lycoperdon pyriforme* Schaeff;

(c) Crown-tipped Coral - *Artomyces pyxidatus* (Pers.) Julich;

(d) Russell's Bolete - *Aureoboletus russellii* (Frost) G.Wu & Zhu L. Yang;

(e) Jelly Ear - *Auricularia americana* Parmasto & I.Parmasto;

(f) Pallid Bolete - *Boletus pallidus* Frost;

(g) Butter Bolete - *Butyriboletus brunneus* (Pk.) D. Arora & J. L. Frank;

(h) Frost's Bolete - *Butyriboletus frostii* (J.L.Russell) G.Wu, Kuan Zhao & Zhu L. Yang;

(i) Pheasant's Back or Dryad's Saddle –*Polyporus (Cerioporus) squamosus* (Huds.) Fr.;

(j) Blewit - *Lepista nuda* (Bull.) Cooke;

(k) Shaggy Mane - *Coprinus comatus* (O.F. Muller) Pers;

(l) Trumpet Chanterelle - *Craterellus* spp. Pers. (*Craterellus caeruleofuscus* A.H. Smith, *Craterellus foetidus* A.H. Smith, *Craterellus ignicolor* (R.H. Petersen, Dahlman, Danell & Spatafora, *Craterellus tubaeformis* (Fr.) Quel.);

(m) Aborted Entoloma - *Entoloma abortivum* (Berk. & M.A. Curtis) Donk;

(n) Beefsteak Polypore - *Fistulina hepatica* (Schaeff.) Wither;

- (o) Enoki or Winter Mushroom - *Flammulina velutipes* (Curt.) Sing;
- (p) Chestnut Bolete - *Gyroporus castaneus* (Bull.) Quel.;
- (q) Bluing Bolete - *Gyroporus cyanescens* (Bull.) Quel.;
- (r) Chrome-footed Bolete - *Harrya chromapes* (Frost) Halling, Nuhn, Osmundson, & M. Binder;
- (s) Yellow Scaber-stalk - *Hemileccinum subglabripes* (Pk.) Halling;
- (t) White Hedgehog - *Hydnum albidum* Pk. group (subgenus *Alba*);
- (u) Sweet Tooth - *Hydnum repandum* L. group (subgenus *Hydnum*);
- (v) Depressed Hedgehog - *Hydnum umbilicatum* Pk. group (subgenus *Rufescentia*);
- (w) Conifer Tuft - *Hypholoma capnoides* (Fr.) P. Kumm.;
- (x) Brick Cap - *Hypholoma lateritium* (Schaeff.) P. Kumm.;
- (y) Elm Oyster - *Hypsizygus ulmarius* (Bull.) Redhead;
- (z) Elm Oyster- *Hypsizygus tessellatus* (Bull.) Sing.;
- (aa) Bay Bolete - *Imleria badia* (Fr.) Vizzini;
- (ab) Purple-gilled Laccaria - *Laccaria ochropurpurea* (Berk.) Pk.;
- (ac) Maple Milkcap or Burnt-sugar Milky - *Lactarius aquifluus* Pk. (= *L. helvus* (Fr.) Fr.);
- (ad) Corrugated-cap Milky - *Lactarius corrugis* (Pk.);
- (ae) False saffron Milkcap or Orange-latex Milky - *Lactarius deterrimus* (Groger);
- (af) Orange Milky - *Lactarius hygrophoroides* Berk. & M.A. Curtis;
- (ag) Tawny or Voluminous Milky - *Lactarius volemus* (Fr.) Fr.;
- (ah) Chicken-of-the-Woods or Sulphur Shelf - *Laetiporus cincinnatus* (Morgan) Birds., Banik & T.J.Volk, *Laetiporus sulphureus* (Bull.) Murrill;
- (ai) Gem-studded Puffball - *Lycoperdon perlatum* Pers.;
- (aj) Platterful Mushroom - *Megacollybia rodmanii* Petersen, Hughes, & Lickey;
- (ak) Black-staining Polypore - *Meripilus sumstinei* (Murrill) M.J. Larsen & Lombard;

Edit: See comment at bottom of page 13 for all highlighted sections below.

(al) Olive Oysterling –*Sarcomyxa serotina* (Pers.) V. Papp (= *Panellus serotinus* (Pers.) P. Kumm.);

(am) Old Man of the Woods - *Strobilomyces* Berk. spp.;

(an) Dotted-stalk Suillus - *Suillus weaverae* (A.H. Smith & Shaffer) Kretzer & T.D. Bruns (= *granulatus* (L.) Rouss.); and

(ao) Spotted Bolete - *Xanthoconium affine* var. *affine* Pk. and var. *maculosus* (Pk.) Sing.

Note to Agency: In the final proposal make sure you include an incorporation by Reference Information Appendix for the FDA Food Code. See *Drafting and Procedure Manual* Page 112 Chapter 4 Section 3.12

APPENDIX B

Rule	Specific State Statute which the Rule Implements
He-P 2301.01	RSA 143-A; RSA 143-A:3; RSA 143-A:12, RSA 143-A:13; and RSA 145 ← Note to Agency: Chapter repealed
He-P 2301.01(o) & (ae)	RSA 143-A:12, 13 ← Note to Agency: Update. sections have changed
He-P 2303.02	RSA 143-A:9, V
He-P 2303.03	RSA 143-9, V ← Edit: "143-A:9, V"
He-P 2304.01	RSA 143-A:6, I and V
He-P 2304.01(a)	RSA 143-A:6, I and V
He-P 2304.01(a)(1)	RSA 143-A:6, I
He-P 2304.04	RSA 143-A:9, I; RSA 143-A:12, II
He-P 2306.02	RSA 143:7-a; RSA 143-A:10-a
He-P 2314.01.01 ← Edit: mistype?	RSA 143-A:28 VI.
He-P 2314.02	RSA 143-A:28 I:III
He-P 2314.03	RSA 143-A:28 IV
He-P 2314.04	RSA 143-A:28 V.