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The Honorable Neal M. Kurk, Chairman  
Fiscal Committee of the General Court  
State House  
Concord, NH 03301

**INFORMATIONAL ITEM - Quarterly Report on Food Protection progress regarding Legislative Budget Assistant 2015 Performance Audit**

**Information**

The Department of Health and Human Services (DHHS), Division of Public Health Services (DPHS), Food Protection Section (FPS) submits the third quarterly progress report which provides details of follow-up actions the program has taken in response to observations and recommendations from the Legislative Budget Assistant 2015 Performance Audit.

**Explanation**

The report provides a summary of the completed corrective actions as well as planned steps that are in progress. The legislative subcommittee's review of RSAs as they relate to the audit and guidance for revisions that will address inconsistencies within law, rule and program practice has been completed. A report from the subcommittee is available as of May of 2016 and will be the basis for DHHS initiating legislative changes as well as revisions to rule and program scope and practices.

Actions Taken to Address Audit Observations and Recommendations  
April 2016-June 2016

In accordance with Executive Order 2014-03, the following is a report describing the progress that the Food Protection Section (FPS) has made in responding to the observations and recommendations noted in the Legislative Budget Assistant 2015 Program Performance Audit. The audit listed 29 observations and over 150 recommendations. Given these large numbers of details to follow-up on and track, this report will note the actions taken in the quarter for which we are accounting.

At the request of DHHS, a Health and Human Services Oversight Subcommittee for the Food Protection Performance Audit was formed made up of legislators with expertise in food laws. The first meeting of this working group was held on 12/8/15, with a target of completing the review by April 2016 and producing a report by May 2016 with practical recommendations, primarily legislative. The Department was an active participant in the meetings and developed a list of the 16 RSA related focus areas (audit observations 2, 3, 4, 7, 8, 9, 10, 12, 13, 15, 16, 18, 19, 20, 22 and 23) based on the audit (available as a separate attachment with a crosswalk to the relevant RSAs that needed review and clarification). Primarily the topic areas selected for subcommittee review focused on items that would need legislative clarification and direction, with some areas related to policy, rule and program practice added where this aspect was an important component of feasibility assessment as well as public health.

The policy guidance recommendations from this committee are provided in their final report of May 2016. This FPS update will highlight some of the areas for which DHHS plans to file legislation or where subcommittee clarification will result in keeping some systems intact. The core group of committee members who attended most meetings included Representatives Bob Haefner, Tara Sad, Peter Bixby, John O'Connor, Ken Weyler and Donald Lebrun. The Department thanks these Representatives for their diligence and sincere concern over the state of the State's food safety system.

What follows are the HHS Subcommittee's recommendations and the related action items FPS will pursue. A discussion summary which provides context for the Subcommittee's recommendations is available in the May 2016 report. These recommendations that follow and action items are taken directly from that report to assure alignment with the subcommittee's reviewed and approved language for these items.

**Observations 2 – Expand scope of operations, and 8 – Inspect unlicensed establishments based on risk.**

HHS SUBCOMMITTEE RECOMMENDATION: Explore the feasibility of coordinating food safety inspections with the inspections that may be occurring by third party inspectors. Where feasible, leverage and integrate these third party inspections into the development of a DHHS/FPS inspector training program.

ACTION ITEM: DHHS/FPS will contact the NH Grocers Association and the NH Lodging and Restaurant Association to explore current practice of third party inspectors.

HHS SUBCOMMITTEE RECOMMENDATION: Request to hire additional inspectors to achieve a capacity that is more protective of public health based on the FDA risk-based inspection frequency guidelines, at a minimum using all fees collected annually from food establishments to support program costs (i.e. based on the current annual surplus of collected fees this would allow for 4-5 added inspector positions). Consider increasing food establishment fees to further support an acceptable level of inspectors given the FDA risk-based recommended inspection frequency.

ACTION ITEM: FPS will make this request to the DHHS management via the SFY 18/19 biennial budget process.

HHS SUBCOMMITTEE RECOMMENDATION: Clarify RSA 143-A:5 to clarify that “exempt from licensing” is also “exempt from inspection” (this includes RSAs 143-A:12 pertaining to homestead foods, RSA 143-A:15, 16 pertaining to poultry and rabbits and RSA 143-A:5 for establishments listed as exempt from DHHS/FPS licensing because they are licensed and inspected by another agency), except in situations where an imminent health hazard is suspected. The committee advises to keep licensing and inspection (to include food) for summer camps with DES, and for nursing homes and child care centers with DHHS Facilities Licensing.

HHS SUBCOMMITTEE RECOMMENDATION: Committee agrees that FPS can submit clarifying language to RSA 143-A:2 to associate how state has discretion to direct inspection resources based on need and risk levels.

ACTION ITEM: DHHS/FPS will include this change in proposed amendments to food laws in October 2016 and upon passage of the amended version will make related changes to rule and practice.

HHS SUBCOMMITTEE RECOMMENDATION: FPS should develop an inspector training program which can be offered to various partner agencies with inspection responsibilities that involve food and can also be used for self-inspecting cities and towns and state staff. However, the committee advises FPS to consider when developing and providing further training for these partners on doing food inspections, to seek a balanced approach that provides for reasonable assurance that the food component of such inspections would be adequate *within the means and resources of these agencies* which have broad inspection responsibilities and with basic public food safety standards. Consideration should be given to making participation in training required in statute for other agencies performing food inspections or arrangements should be made to clarify this training role in a MOU.

ACTION ITEM: FPS will collaborate with the Manchester Institute for Public Health Practice to develop a food inspector training program, some of which can be offered on-line.

HHS SUBCOMMITTEE RECOMMENDATION: The committee supports changing RSA 143-A:5, III to add permit/licensing requirement for large-scale temporary and occasional food service establishments.

The committee advises that FPS not inspect and regulate farmers markets or pet foods.

ACTION ITEM: DHHS/FPS will include this change in proposed amendments to RSA 143-A:5 in October 2016, and upon passage of the amended version will make related changes to rule and practice.

DPHS/FPS will study and propose a model for the types of temporary events to be inspected based on duration of operation, menu and number of people served.

DPHS concerns include that the word “shall” creates a broad mandate without regard to resources or risk. Perhaps replace with “may investigate based on assessed risk level”. This is also a staff resource problem given the inadequate staffing levels as noted in a previous section.

**HHS SUBCOMMITTEE RECOMMENDATION:** The committee agrees to changing this language in RSA 130:3 from “shall” to “may” and including risk based language.

**ACTION ITEM:** DHHS/FPS will include this change in proposed amendments to RSA 130:5 October 2016 and upon passage of the amended version will make related changes to rule and practice.

**HHS SUBCOMMITTEE RECOMMENDATION:** Committee agrees that FPS can submit clarifying language to RSA 143:4 to associate how state has discretion to direct inspection resources based on need and risk levels and clarify that this is not a broad mandate to inspect all food but instead use of inspection resources should be prioritized based on relative risk to public health.

**HHS SUBCOMMITTEE RECOMMENDATION:** The committee was not aware of RSA 130:2 and though it was not cited in the LBA audit of FPS, there is general agreement that this should be repealed because it is not a current practice and FPS has authority to inspect and remove any food that is a health hazard in other sections of RSA. Establishing an actual “meat inspection program” would require additional food protection program resources and expertise.

**ACTION ITEM:** DHHS/FPS will include this change in proposed amendments to RSA 130:2 in October 2016.

**Observation 23 – Charging inspection fees for every inspection, dairy and shellfish underfunding (also includes # 27 regarding can DPHS provide “free” TA/consultation) and Fee exempt municipal cafeterias.**

**HHS SUBCOMMITTEE RECOMMENDATION:** The committee recommends changing the RSA 143-A:6 to reflect the practice of not-charging for inspections, as this is more pragmatic and common practice and costs for the Food Establishment segment of FPS are already covered in the annual licensing fee structure. Costs for the dairy and shellfish programs are not sufficiently covered by licensing fees, and the committee reviewed this aspect and makes a recommendation in another section of this report. For food venues that require more frequent repeat inspections, the fines and sanctions structure should be used to incentivize compliance rather than inspection fees and to cover FPS cost for reinspections.

ACTION ITEM: DHHS/FPS will include this change in proposed amendments to RSA 143-A:6 in October 2016 and upon passage of the amended version will make related changes to rule and practice.

Dairy and shellfish underfunding:

HHS SUBCOMMITTEE RECOMMENDATION: The committee recommended changing the RSA 184:85 to allow the dairy industry to **not** be required to be cost neutral due to the reality of the economics of these industries. If this industry is thus subsidized by general funds the committee finds that to be an acceptable business practice to assist these important industries. However, further review of the few very large dairy companies based in NH that may be paying too little is recommended, and that should be tied in with data that shows the proportion of hours staff must spend with the larger players. From there, consideration of raising fees proportionately can be reviewed.

ACTION ITEM: DHHS/FPS will include this change in proposed amendments to RSA 184:85 in October 2016 and upon passage of the amended version will make related changes to rule and practice.

ACTION ITEM: DHHS/FPS will review timekeeping records to determine % of staff time in dairy program being spent on the larger producers and make a determination if fees should be adjusted accordingly.

HHS SUBCOMMITTEE RECOMMENDATION: The committee further recommends that the *food establishment* fees collected annually be used to support proportionate staffing levels, with an emphasis on increasing the number of inspectors to get closer to the FDA recommended risk-based inspection frequency levels. (See matrix in appendix that shows the FDA recommended levels and the current state for FPS capacity to meet only 30% of these levels.) *Food establishment* license fees are deposited in the State General Fund, and in fact as Table 3 shows are generating a substantial surplus beyond the costs of that program component. Inspection fees should not be used to enrich or subsidize the general fund, especially where the up-front licensing fees are already covering the costs of the *food establishment* program component that serves these businesses.

Observation 19 – Doing required inspections (including second inspection for all “provisional” approvals) and 7 Vehicle Inspections.

HHS SUBCOMMITTEE RECOMMENDATION: The committee supports making changes to RSA 143-A:6 and to rule to allow FPS to have discretion to determine when to do a second inspection. This

must be balanced with transparent language that businesses can understand regarding what is in rule that determines conditions for closure.

**ACTION ITEM:** FPS will review RSA 143-A:6 to assess if clarifying changes are needed and revise rule regarding re-inspection to more realistically align with practice based on risk and inspection resources. FPS will include guidance for staff regarding protocol for repeat inspections in our Standard Operating Procedures manual (to be developed).

**HHS SUBCOMMITTEE RECOMMENDATION:** The committee recommends FPS establish a written protocol that prioritizes when staff should be inspecting vehicles.

**ACTION ITEM:** FPS will establish a written protocol that prioritizes when staff should be inspecting vehicles. A draft was completed for discussion of this item.

**Observation 9 – Register out-of-state non-commercial producers.**

**HHS SUBCOMMITTEE RECOMMENDATION:** Revise RSA 143:29 to achieve parity between in-state and out-of-state exempt producers.

**ACTION ITEM:** DHHS/FPS will include this change in proposed amendments to RSA 143:29 in October 2016 and upon passage of the amended version will make related changes to rule and practice

**Observation 20 – Align rules with statute –penalties, Requirements for re-opening closed establishments – “re-inspection” upon request in RSA vs. our 3 year wait to re-apply in rule.**

The 3-year wait rule for a re-application of a suspended license (which FPS has in rule but not in statute) was reviewed.

**HHS SUBCOMMITTEE RECOMMENDATION:** DHHS/FPS should change their rule to align with the RSA 143:5-a.

**ACTION ITEM:** DHHS/FPS will revise their rule to more appropriately match RSA 143:5-a.

**Observation 18 – Graduated sanctions regime.**

**HHS SUBCOMMITTEE RECOMMENDATION:** The committee recommends revising fine structures to more realistically include lower penalties for types of fines that are small health risk and adding an

“up to” maximum amount for the compliance problems that present the greater risks to food safety, with FPS working out the details.

**ACTION ITEM:** FPS will review current fine structure and language in rule and make revisions that reflect the committee’s recommendation.

**Observation 12 – Dairy and Department of Agriculture Markets and Food (DAMF), milk distributors, accredit transfer stations.**

**HHS SUBCOMMITTEE RECOMMENDATION:** Change RSA 184 to consolidate licensing of milk haulers within DHHS/FPS. Accredite (license) transfer stations. Consider pricing change to come closer to actual costs for the license fee. Consider removing the fee from statute and placing in rule.

**ACTION ITEM:** DHHS/FPS will include this change in proposed amendments to RSA 184 in October 2016 and upon passage of the amended version will make related changes to rule and practice.

**Observation 13 – Milk Sanitation Board, and 22 – 2009 FDA Food Code conflicts with RSA or rule: dairy.**

**HHS SUBCOMMITTEE RECOMMENDATION:** The Milk Sanitation Board should remain in place as it provides a structured collaboration between the DPHS/FPS and interested parties with expertise in the area being regulated. DPHS/FPS should continue to participate in this collaboration.

**HHS SUBCOMMITTEE RECOMMENDATION:** Dairy Practices Committee (DPC) is a free-standing association, not dependent or coordinated or funded by DHHS/FPS, thus it continues to operate at its discretion. DHHS participation in this association is educational and can continue to be supported as such.

**Observation 19 - LBA Audit recommendation- We recommend the Commissioner revise rules: related to in- and out-of-State dairy operations.**

**HHS SUBCOMMITTEE RECOMMENDATION:** This slight difference between the minimum required FDA score of 90% and the NH required score of 95% for new dairy farm’s first assessment is in favor of a higher standard for new dairy farms being rated for the first time by the NH dairy program and since it has not caused any farms to be disqualified the committee supports leaving it as is.

**Other Items relative to obsolete sections of RSA 184 were presented (details provided in appendix).**

HHS SUBCOMMITTEE RECOMMENDATION: DHHS/FPS propose amendments that were presented for RSA 184 in the next legislative session.

ACTION ITEM: DHHS/FPS will include the suggested changes in proposed amendments to RSA 184 in October 2016 and upon passage of the amended version will make related changes to rule and practice.

**Observation 16 – Food sampling and testing**

HHS SUBCOMMITTEE RECOMMENDATION: The committee is in favor of continued and expanded testing (if resources are available) as a public health measure and even offered to have NH representatives transport samples if that could be arranged logistically and work within the protocols for chain of custody and avoidance of cross-contamination of samples. A revision to RSA 130:3 may not be necessary, but can be considered to include language that recognizes that sampling and testing will be risk-based and proportionate to available resources. The word “may” in “may take samples” in RSA 130:3 seems appropriate in that it allows DPHS discretion as needed, thus no change in RSA is needed.

ACTION ITEM: DHHS/FPS/PHL will further review this practice and develop SOPs for expanded testing and response when the sampling and testing reveals the presence of food hazards to the extent currently feasible with existing resources and can go further as more resources become available.

ACTION ITEM: DHHS/FPS/PHL will develop a chain of custody courier protocol for transport of samples and report back to the committee regarding feasibility and logistics of the offer for state representatives to act as transporters of such samples.

**Observation 3 - Repeal food safety statute and replace**

HHS SUBCOMMITTEE RECOMMENDATION: The committee favors further review of outdated sections of this RSA and may take this on over the summer – at least to focus on the food components and to consider the value and clarity that could be gained. It is also worth noting that substantial sections of RSA 146 that may not be and possibly never were implemented is a lesson for future audits to consider where what is in statute and what is in realistic practice due to resources may indeed conflict in part due to the passage of time and the erosion of capacity or need for programs.

During October/November 2016, DHHS plans to file amendments to current RSAs based on the subcommittee's recommendations.

Additional audit related activities this quarter include:

**Observation 26 Risk Management – Strategic Planning.**

A contract was approved by the Governor and Executive Council in mid-March 2016 to enter into a strategic plan to develop prioritized measurable annual objectives for program direction and improvement. The first meeting with the contractor was held on 3/30/16. The planning meetings were completed by June 30 and the contractor is drafting the written plan for review by FPS.

LBA Audit Observation 24 Performance Measurement and Records Management - The Food Protection Licensing and Inspection Information System (LIIS) work continues on a daily basis with a DPHS/FPS team that includes the Section Administrator, Licensing Coordinator, a DHHS Project Manager and various FPS staff where work on certain program segments is being done. The project "Go-Live" date has been moved to August 2016 due to:

- Corporate Merger: reduced/shifting resources within Decade/Accela on the project, internal process changes, etc.
- 5.4 release – bugs: problems saving documents to Rackspace, synching and installing of the new version.

Three performance measures have been entered into the DPHS Performance Management Application (PMA). However, baseline data and targets have not been added as the tracking of these measures is mostly dependent upon the LIIS being stood up.

The Honorable Neal M. Kurk, Chairman

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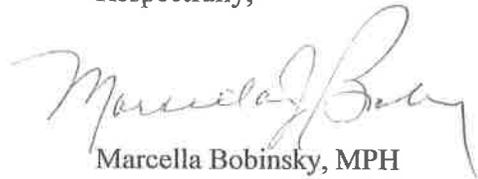
This concludes the third quarterly update. Please contact the following staff if further documentation or clarifications are needed.

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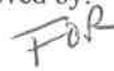
Please let us know if any further information is needed beyond what is provided in this first quarterly report. A second report will be provided at the end of the first quarter of calendar year 2016.

Respectfully,



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Acting Director

Approved by:

Jeffrey A. Meyers  
Commissioner

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Enclosure (1)  
MD/gaz