FEDERAL LEGISLATION, DECISIONS, ORDERS, ETC.

Food and Drug Administration

PROPOSED CHANGES FOR CANNED OYSTERS: The Food and Drug Administration on October 10 issued a proposed definition and standards of identity for canned oysters on the Atlantic, Gulf, and Pacific Coasts. Previously, the standard of fill of container for oysters required a drained weight of oysters of not less than 68 percent of the water capacity of the container (7½ ounces for No. 1 picnic can) where the average drained weight per oyster was less than ½ ounce. The proposed standard will require that "the standard of fill of container for canned oysters is a fill such that the drained weight of oysters taken from each container is not less than 59 percent of the water capacity of the container."

The proposed order, as it appeared in the Federal Register for Friday, October 10, is reproduced below.

CANNED OYSTERS

DEFINITIONS AND STANDARDS OF IDENTITY: STANDARDS OF FILL OF CONTAINER

It is proposed that, by virtue of the authority vested in the Federal Security Administrator by the provisions of the Federal Food, Drug, and Cosmetic Act (secs. 401, 701; 52 Stat. 1046, 1055; 21 U. S. C. 341, 371); on the basis of the evidence received at the hearing duly held pursuant to notice issued on June 6, 1947 (12 F. R. 3726); and upon consideration of proposed findings of fact filed herein by the Gulf-South Atlantic Oyster Canners Association, which are adopted in part and rejected in part as is apparent from the detailed findings made below; the following tentative order be made:

IDENTITY

Findings of fact.[1] 1. Oysters are canned commercially in the United States on the Atlantic, Gulf, and Pacific Coasts. The oysters on the Atlantic and Gulf Coasts are of the species Ostrea virginica. (They are often referred to as "Eastern Oysters".) The common name of oysters of this species when canned, is "Oysters" or "Cove Oysters". Two species of oysters, Ostrea gigas and Ostrea lurida, are grown on the Pacific Coast. Oysters of the latter species, known as Olympia oysters, are not now commercially canned, but this is due to economic reasons, and oysters of this species are suitable for canning. Oysters of the species Ostrea gigas, commonly known as Pacific oysters, are canned in considerable quantities. (R. 33, 35, 95, 156–158, 161, 178–179, 523–525, 535, 536–537)

2. Pacific oysters are much larger, are somewhat more tender, and easier to break or tear, than Eastern oysters. The methods used for canning Eastern oysters and Pacific oysters are essentially the same. They are described in finding 3. (R. 8, 31, 52, 95, 158, 162, 174, 523–524, 526)

3. Oysters in the shell are steamed until the shell opens. The partially cooked oysters are removed from the shells, washed to remove extraneous matter, such as sand, pieces of shell, etc., and packed into containers. Water is added to fill the container, leaving only a small head space. (Such water is known as a "packing medium".) Salt may be added for seasoning. The containers are sealed and processed by heat to prevent spoilage. (R. 31–32, 48–49, 97–101, 109–111, 116–117, 134, 517–519)

4. Eastern oysters are commonly canned whole. Sometimes the large sizes of Pacific oysters are cut into two or more pieces before canning, or are sliced, and sometimes broken and torn oysters are segregated and canned together. Some oysters are broken or torn in removing them from the shells and some in washing and in packing into containers. During processing and subsequent handling of the canned product small pieces of the outer surface of the oysters often break off. When oysters are canned as they come from the shuckers without cutting or slicing, the name of the oyster ingredient is "Oysters", without any modifying term. When oysters are cut into two or more pieces, or when torn or broken oysters are segregated and canned, the oyster ingredient is known as "Pieces of Oysters". When oysters are sliced, the oyster ingredient is known as "Sliced Oysters". The designation "Diced" has sometimes been used but is not appropriate since the oyster does not lend itself to cutting into small cubes, and if so cut the pieces lose their shape in processing and subsequent handling. (R. 34–35, 41, 49–52, 69–71, 88–89, 110, 185, 269–270, 288, 417–419, 459–470, 477–486)

5. Canned Eastern oysters and canned Pacific oysters are sold in the same trade channels. Generally speaking, consumers distinguish between them on the basis of the difference in size. The canned Eastern oysters being smaller are generally used for oyster stews. The Pacific oysters being larger may be used for frying or for stews. (R. 17–21, 67, 75, 95, 158, 417–418, 445–446, 519, 524, 526, 532, 534–537, 624; Ex. 4, 5, 6, 7)

6. Canned oysters consist of cooked oysters in a watery liquid. The proportion of oysters to liquid depends largely on the quantity of oysters placed in the container before the packing medium was added. The watery liquid surrounding the oysters contains salt and soluble material extracted from the oysters. It has an oyster taste and is useful in making oyster stews, but is usually discarded if oysters are used for frying, although it may be used for some other purpose. This liquid is less valuable than the oysters. (R. 31–32, 42, 52 (a), 76, 167–170, 447–447 (a), 454, 513, 525–526, 535–536, 624, 625)

7. Occasionally oysters for canning are not steamed prior to removal from the shell. Such raw oysters, after washing, are packed directly into the container with or without packing medium, and the container sealed and processed. Even if no packing medium is added to the raw oysters, a watery liquid separates from them during processing. Raw oysters may be blanched and packed into containers with the liquid in which they are blanched as a packing medium, or with additional water and salt. Sometimes the liquid draining from cleaned shell oysters during the presteaming is collected and used, with or without added water and salt, as a packing medium. (R. 31–32, 39–42, 45, 49, 52–54, 55–57, 76, 78, 123–125, 134, 165–166, 168–169, 180–181, 453–454, 457, 513, 519, 523–524, 532, 553–555)

8. The flavor of canned oysters is influenced by the canning procedure used, but the final canned product in all cases is a mixture of cooked oysters and watery liquid. The processes described in finding 7 are suitable unless the product contains too much liquid and too little oysters. The quantity of oysters in a container, however, is more properly related to the fill of container than to identity. (R. 31–32, 42, 45–46, 76, 124–125, 453–457, 553–555)

[1] The citations following each finding of fact refer to the pages of the transcript of the testimony and the exhibits received in evidence at the hearing, which are the basis for these findings.

Conclusions. Based on the foregoing findings of fact it is concluded that it will promote honesty and fair dealing in the interest of consumers to adopt a definition and standard of identity for canned oysters as follows:

§ 36.5 *Canned oysters; identity; label statement of optional ingredients.* (a) Canned oysters is the food prepared from one or any mixture of two or more of the optional forms of oyster ingredients specified in paragraph (b) of this section, and a packing medium of water, or the watery liquid draining from oysters before or during processing, or a mixture of such liquid and water. The food may be seasoned with salt. It is sealed in containers and so processed by heat as to prevent spoilage.

(b) The optional forms of oyster ingredients referred to in paragraph (a) of this section and described in subparagraphs (1), (2), and (3) of this paragraph are prepared by removing oysters from their shells and washing. They may be blanched. The oysters may be steamed while in the shell.

(1) Whole oysters with such broken pieces of oysters as normally occur in removing oysters from their shells, washing, and packing.

(2) Pieces of oysters obtained by cutting oysters into pieces or by segregating pieces of oysters broken in shucking, washing, or packing whole oysters, or by both such cutting and segregation.

(3) Sliced oysters obtained by slicing whole oysters.

(c) (1) When the optional form described in paragraph (b) (1) of this section is used, the name of the food is "Oysters" or "Cove Oysters", if of the species Ostrea virginica; "Pacific Oysters", if of the species Ostrea gigas; or "Olympia Oysters", if of the species Ostrea lurida.

(2) When the optional form described in paragraph (b) (2) of this section is used, the name of the food is "Pieces of --------", the blank being filled in with the name "Oysters" or "Cove Oysters", if of the species Ostrea virginica; "Pacific Oysters", if of the species Ostrea gigas; or "Olympia Oysters", if of the species Ostrea lurida.

(3) When the optional form described in paragraph (b) (3) of this section is used, the name of the food is "Sliced --------", the blank being filled in with the words "Oysters" or "Cove Oysters", if of the species Ostrea virginica; "Pacific Oysters", if of the species Ostrea gigas; or "Olympia Oysters", if of the species Ostrea lurida.

(4) In case a mixture of the optional forms described in subparagraphs (1), (2), and (3) of this paragraph is used, the name is a combination of the names of the optional oyster ingredients used, arranged in order of predominance by weight of the optional forms.

FILL OF CONTAINER

Findings of fact. 1. Conservation Order M-81 of the War Production Board effective in 1942, required, among other things, that canned oysters be packed in cans of certain sizes, the smallest of which was the No. 1 picnic can, $2^{11}/_{16}$ inches in diameter and 4 inches high. It also required that the No. 1 picnic can of oysters be filled to yield a cut-out weight of not less than 7½ ounces. These requirements with respect to canned oysters remained in effect until 1946. (R. 67, 94, 204, 443, 448, 544, 550)

2. The standard of fill of container for canned oysters issued under authority of the Federal Food, Drug, and Cosmetic Act, effective February 23, 1945 (9 F. R. 14008), requires a drain weight of oysters of not less than 68 percent of the water capacity of the container (7½ ounces for the No. 1 picnic can), where the average drained weight per oyster is less than ½ ounce. There is no requirement in such standard for drained weight in case the canned oysters are of larger size. (R. 16, 36–38, 65–66, 94; Ex. 3)

3. Canned oysters packed on the Atlantic and Gulf Coasts are generally of such size as to be subject to the requirements of the standard of fill of container. Since the latter part of 1942 they have been so packed as to yield a drained weight of 7½ ounces for the No. 1 picnic can, with drained weights for other cans in proportion. The increased fill made necessary by Conservation Order M-81 and by the standard of fill of container under the Food, Drug, and Cosmetic Act, caused some minor manufacturing difficulties and some changes in the character of the canned oysters. The food contained much less liquid; sometimes the oysters tended to stick together in the can; possibly they were slightly softer; there was more likelihood of the oysters being twisted and of being broken in packing. (R. 17, 30, 44, 94–97, 126, 131–133, 139, 204, 451–453, 457–458, 459, 461–463, 466–467, 480, 481, 485–486, 493–494, 513, 519, 546–547, 551–552, 556, 562; Ex. 3)

4. Pacific oysters were not canned in any significant quantity while the requirements of Conservation Order M-81 with respect to canned oysters were effective, but canning was resumed in 1946. Most of the canned Pacific oysters, on account of their large size, are not subject to the requirements of the Food and Drug Administration's standard of fill of container for canned oysters, and when canning was resumed they were generally packed to yield the cut-out weight in use prior to 1942. The cans so packed were not well filled with oysters. (R. 17, 63–64, 78–81, 125–126, 150, 161, 177, 178, 192, 204, 265, 390–391, 418, 431–432, 443, 621, 634–635; Ex. 3, 8)

5. Soon there appeared on sale in the same market areas, canned Pacific oysters in No. 1 picnic cans with cut-out weights of slightly over 5 ounces of oysters, and from the Atlantic and Gulf Coasts canned oysters in the same size cans with cut-out weights of 7½ ounces of oysters. The canned Pacific oysters were often labeled to show the total weight of oysters and liquid in the can but not the drained weight of oysters. The difference in the amounts of oysters present was known to wholesale dealers, but was not generally known to retail dealers or to the final purchasers. This is a condition likely to confuse and deceive consumers. (R. 17–21, 62, 64, 67, 93–94, 125–126, 133, 158, 444–446, 633, 634; Ex. 4, 5, 6, 7, 21)

6. There has been no commercial canning of Pacific oysters where cans were filled to capacity with oysters, and it is impossible on the basis of commercial experience to determine the maximum fill of such oysters which can be used without impairment of quality. Experimental packs sponsored by canners of Pacific oysters were said to show impairment of quality at any point over the fill in use prior to 1942. The factors of quality used in judging these packs and the relative weights assigned such factors were arbitrary and not reasonably related to trade or consumer concepts of quality. (R. 44, 193, 204, 214–219, 238–251, 252–253, 267, 271–278, 279–409, 526–529, 566–602, 603–606, 620, 625, 653–700; Ex. 14 (A), (B), (C), (D); 15 (A), (B), (C); 16 (A), (B), (C), (D), (E), 17, 18, 19, 20, 21)

7. Experimental packs of Pacific oysters made by the Food and Drug Administration showed that it is possible to can Pacific oysters so as to comply with the standard of fill of container now applicable to canned oysters of an average drained weight of less than ½ ounce, without substantial change in quality from that of the commercially canned Pacific oysters having a much lower drained weight. (R. 37–38, 67, 93, 107, 114–115, 120, 121, 125–126, 630, 631, 638, 639, 640, 642, 653–700; Ex. 9 (A), (B) (C); 10 (A), (B), (C); 11 (A) to (Q) inclusive; 12)

Conclusions. It would not promote honesty and fair dealing in the interest of consumers to so reduce the requirements of the present standard of fill of container for canned oysters as to return to the fill in use prior to 1942.

It would not promote honesty and fair dealing in the interest of consumers to make separate standards of fill of container for canned oysters of different sizes or for oysters of different species.

A reasonable standard of fill of container based on drained weight of oysters, and applicable to oysters of all sizes and species, which takes into consideration the difference between commercial canning and experimental canning, is a standard requiring that the drained weight of oysters be not less than 59 percent of the water capacity of the can.

It will promote honesty and fair dealing in the interest of consumers to amend the standard of fill of container for canned oysters (§ 36.6) by striking out paragraphs (a) and (b) of § 36.6 and by substituting therefor a new paragraph (a) as follows:

(a) The standard of fill of container for canned oysters is a fill such that the drained weight of oysters taken from each container is not less than 59 percent of the water capacity of the container.

Paragraphs (c), (d), and (e) of § 36.6

are hereby designated as paragraphs (b), (c), and (d), respectively.

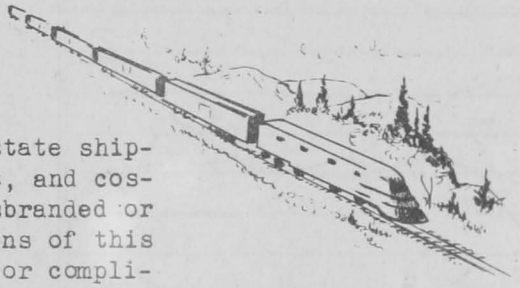
Any interested person whose appearance was filed at the hearing may, within 20 days from the date of publication of this order in the FEDERAL REGISTER, file with the Hearing Clerk of the Federal Security Agency, Office of the General Counsel, Room 3255, Federal Security Building, 4th Street and Independence Avenue, SW, Washington, D. C., written exceptions thereto. Exceptions shall point out with particularity the alleged errors in the order and shall contain specific references to the pages of the transcript of the testimony or to the exhibits on which each exception is based. Such exceptions may be accompanied with a memorandum or brief in support thereof. Exceptions and accompanying memoranda or briefs should be submitted in quintuplicate.

Dated: October 4, 1947.

[SEAL] OSCAR R. EWING,
Administrator.

FOOD, DRUG, AND COSMETIC ACT

Fishery products represent but one group of food commodities among many that are subject to the form of control provided by the provisions of the Food, Drug, and Cosmetic Act, but sea foods collectively constitute an important item for consideration in the planning of our regulatory operations. Let me explain briefly this form of control.



The Act prohibits the interstate shipment or importation of foods, drugs, and cosmetics which are adulterated or misbranded or otherwise violative of the provisions of this law. It places the responsibility for compliance upon the shipper, our functions in general being strictly regulatory in character. It provides for seizure by a process of libel of condemnation of violative articles found within its jurisdiction, also for criminal prosecution of the shipper, and for injunction proceedings to restrain manufacturers or shippers from violating the law. Under the import provisions articles offered for import are subject to examination by the Food and Drug Administration at time of entry. If found violative they must be refused admission or the importer may be given the opportunity to bring them into compliance. The law does not provide for the supervision of production and packing operations of foods by the Food and Drug Administration, except in one respect which is of interest in connection with this hearing. By the terms of the so-called Sea Food Amendment of 1934 to the old Food and Drugs Act, which has been continued in force and effect in the present Food, Drug, and Cosmetic Act of 1938, sea foods are granted rights to a form of voluntary supervisory inspection not provided for other commodities.

--Statement by L. D. Elliott, Assistant Commissioner of Food and Drugs, Food and Drug Administration, Federal Security Agency, before the National Resources Economic Subcommittee of the Senate Committee on Public Lands, July 2, 1947.