

pt. 1

98-014 ATP-323335-  
FERTILIZER STORAGE

Docket No. 96 - R - 6

STATE OF WISCONSIN  
DEPARTMENT OF AGRICULTURE, TRADE AND CONSUMER PROTECTION

NOTICE OF SUBMISSION OF PROPOSED RULES TO  
PRESIDING OFFICERS OF EACH HOUSE OF THE LEGISLATURE

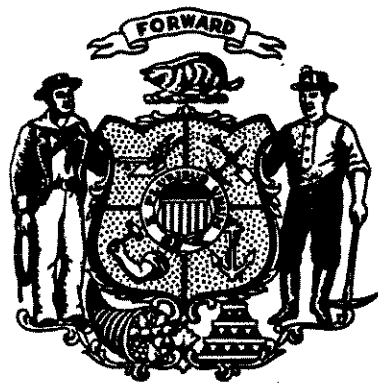
NOTICE IS HEREBY GIVEN, pursuant to s. 227.19(2), Stats., that the State of Wisconsin Department of Agriculture, Trade and Consumer Protection is submitting a final draft of proposed Clearinghouse Rule Number 98 - 014 to the presiding officer of each house of the legislature for standing committee review. The proposed rule repeals, amends and creates portions of chapters ATCP 32, 33 and 35; relating to bulk fertilizer and pesticide storage and agrichemical cleanups.

Dated this 29 day of May, 1998.

STATE OF WISCONSIN  
DEPARTMENT OF AGRICULTURE, TRADE  
AND CONSUMER PROTECTION

By Ben Brancel  
Ben Brancel, Secretary

*END*



*END*



State of Wisconsin  
Tommy G. Thompson, Governor

Department of Agriculture, Trade and Consumer Protection

Ben Brancel, Secretary



Date: May 29, 1998

To: The Honorable Brian Rude  
President, Wisconsin State Senate  
119 Martin Luther King Jr. Blvd., Room 102  
Madison, WI 53707

The Honorable Scott R. Jensen  
Speaker, Wisconsin State Assembly  
Room 211 W, State Capitol  
Madison, WI 53708

From: Ben Brancel, Secretary *Ben Brancel*  
Department of Agriculture, Trade and Consumer Protection

Subject: Proposed Rule Changes Relating to the Agricultural Chemical  
Cleanup Program and Bulk Fertilizer and Pesticide Storage  
(Clearinghouse Rule #98-014)

In accordance with § 227.19(2) and (3), Stats., the Department of Agriculture, Trade and Consumer Protection hereby transmits the above rule for legislative committee review. We are enclosing three copies of the final draft rule, together with the following report. In accordance with § 227.19(2), Stats., the department will publish a notice of this referral in the Wisconsin Administrative Register.

1. **SUMMARY; EXPLANATION OF NEED FOR RULE**

**Fertilizer and Pesticide Bulk Storage**

The department currently regulates fertilizer and pesticide bulk storage under chs. ATCP 32 and 33, Wis. Adm. Code. The current rules are designed to prevent and contain fertilizer and pesticide spills that could contaminate groundwater or surface water. The department adopted the current rules in 1985, and last updated them in 1988. This rule updates and clarifies the current rules. It also makes some substantive changes, including the following changes which will require additional construction at some facilities:

**Dry Fertilizer Unloading Areas**

Under current rules, bulk liquid fertilizer and all bulk pesticides must be mixed and

loaded over a spill containment pad designed to catch and contain spills. Under this rule, non-liquid fertilizer must also be mixed and loaded over a spill containment pad, beginning on January 1, 2000. The department is proposing this new requirement because it has found high levels of soil and water contamination at dry fertilizer loading areas.

### Clay for Containment

Under current rules, fertilizer and pesticide storage containers must be kept within a secondary containment structure that is designed to catch and contain spills from the storage containers. The current rules spell out design and construction standards for secondary containment structures. Under the current rules, clay liners may be used for fertilizer and pesticide secondary containment.

This rule prohibits the use of clay liners for pesticide secondary containment. Pesticide manufacturers no longer allow the use of clay, and no such systems exist in Wisconsin. Clay liners may still be used for fertilizers; but under this rule, the liners must be tested and reconstructed or re-compacted every 15 years. Several Wisconsin facilities have clay structures for fertilizer, constructed in the 1980's. Because of repeated freezing and thawing, these structures will develop cracks with age.

### **Agricultural Chemical Cleanup Program**

The department currently administers an agricultural chemical cleanup program under s. 94.73, Stats. Under the current program, the department may order a "responsible person" to clean up environmental contamination resulting from an agricultural chemical spill (e.g., at a storage facility). The department may also reimburse a "responsible person" for certain cleanup costs. A "responsible person" includes a person who owns or controls an agricultural chemical, a person who causes a discharge, or a person on whose property a discharge occurs.

Recently, under 1997 Wis. Act 27 (biennial budget act), the Legislature made substantial changes to the agricultural chemical cleanup program. This rule modifies the department's current rules under ch. ATCP 35, Wis. Adm. Code, to incorporate the legislative changes. This rule also makes a number of changes aimed at clarifying and streamlining the cleanup program. These changes should increase program participation, and encourage timely cleanups. They will also help to control program costs.

### Discharge Site

Current rules limit the amount of cleanup cost reimbursement which the department can pay per "discharge." 1997 Wis. Act 27 changed this reimbursement cap, and reformulated it as a limit per "discharge site." For licensed fertilizer or pesticide facilities, the current rules define a "discharge site" to include all contiguous land owned or controlled by the facility operator at the time of the discharge, plus any other areas

affected by the discharge. This rule applies the current definition to all discharge sites, not just licensed fertilizer or pesticide facilities.

#### Landspreading Fertilizer and Pesticides Recovered from a Discharge Site

Under current law, the department may authorize a responsible person to "landspread" soil or water, recovered from a discharge site, that contains discharged fertilizer or pesticides. Landspreading is often a good way to destroy or recycle spilled agricultural chemicals. Under this rule, the department may issue a landspreading permit if the agricultural chemicals are applied at rates comparable to those used in normal agronomic practice. The landspreading must comply with conditions specified in this rule.

#### Reimbursement Application Process

This rule clarifies the procedure by which a responsible person may apply for reimbursement of agricultural chemical cleanup costs. Among other things, an applicant must provide a spreadsheet that matches eligible costs to supporting documentation (contractor bids, invoices and payment documents). This will help the department to process applications quickly and effectively. The department will provide forms and examples to assist applicants.

To be eligible for reimbursement under 1997 Wis. Act 27 and this rule, a responsible person must apply for reimbursement by October 14, 2000, or within 3 years after that person incurs the cleanup costs, whichever is later.

#### Reimbursing Cost of Using Own Equipment

Under current rules, the department may not reimburse a responsible person for the cost of using that person's own equipment in an agricultural chemical cleanup (unless the person buys and uses the equipment solely for that purpose). This rule allows the department to reimburse these costs if they are reasonable and necessary.

#### Contracting For Cleanup Services

Under current rules, a responsible person must obtain competitive bids for cleanup contract services costing more than \$500. Additional bidding may be required as the cleanup proceeds (e.g., if the project is performed in stages, or entails unexpected cleanup work), even though the responsible person wishes to continue with the same contractor. A responsible person is not required to pick the low bidder. But for some contract services, reimbursement is limited to the low bid amount.

This rule modifies current competitive bidding requirements. Under this rule, a responsible person must use a competitive bidding process to select a contractor if the contract costs exceed \$3,000. Under this rule, as under the current rule, the department may require a responsible person to explain that person's initial choice of

contractors, or obtain additional bids. The responsible person is not required to pick the low bidder, but reimbursement for the following services is limited to the low bid amount:

- Excavating.
- Trucking.
- Landspreading and waste disposal services.
- Drilling, including at-depth soil sampling and well installation.

Under this rule, a responsible person may obtain additional services from the same contractor without competitive bids if the contractor first provides a detailed and reasonable estimate for those services. If the contractor's estimate for the additional work is more than \$1,500, the responsible person must give the department a copy of the estimate before authorizing the additional work. The department may require competitive bids if the estimate is unreasonable. The department will not reimburse contract service costs that exceed the contractor's bid or estimate for those services.

#### Reimbursement Amount Per Discharge Site

Under current rules, prior to 1997 Wis. Act 27, the department could pay 75% of the cleanup cost for the first discharge, and 50% of the cleanup cost for any subsequent discharge at a discharge site. Act 27 changed the reimbursement cap, and reformulated it as a limit per discharge site (rather than per discharge, as before).

Under Act 27 and this rule, the department may reimburse 80% of cleanup costs totaling not more than \$400,000 per discharge site, regardless of the number of discharges that occur at that site. There is an initial "deductible" of \$3,000 (\$7,500 for licensed entities and larger businesses). For reimbursement purposes, whenever a responsible person spills agricultural chemicals while transporting them from a site owned by that person, the discharge is deemed to occur at that site.

#### Reimbursement Priorities and Payment Schedule

Current rules require the department to withhold reimbursement of most cleanup costs until the last day of the state fiscal year. This rule allows the department to make payments throughout the year on a first-in, first-out basis, unless the agricultural chemical cleanup fund balance drops below \$1,000,000. If the balance drops below \$1,000,000, the department may continue to make initial payments of up to \$50,000 per discharge site on a first-in, first-out basis, but may not make further payments until the last day of each state fiscal year.

## 2. RULE MODIFICATIONS AFTER PUBLIC HEARINGS

On January 27, 1998, the DATCP Board authorized public hearings on this rule. Following hearings, the DATCP Board approved a final draft rule on May 19, 1998. The final draft rule includes the following modifications from the hearing draft:

- The definition of a storage facility was clarified as it related to in-field loading from mobile containers.
- A storage facility operation is not required to make weekly inventory measurements if storage tanks are kept indoors and the operator conducts weekly inspections of the tank and containment areas.
- Costs incurred for tillage or planting of land where landspreading occurs was noted as an ineligible cost for reimbursement.
- Legislative Council Rules Clearinghouse comments were incorporated as noted below.

## 3. HEARING TESTIMONY

Public hearings were held on March 3, 4, and 5, 1998, in Madison, Appleton and Eau Claire. Written comments were also accepted for inclusion in the hearing record.

**Appendix A** contains a summary of hearing testimony along with a list of persons attending, testifying or submitting written comments for the hearing record.

## 4. RESPONSE TO RULES CLEARINGHOUSE COMMENTS

All of the comments from the Legislative Council Rules Clearinghouse (LCRC) were incorporated except for the following:

- Comment 1.b. LCRC questioned whether the department intended to provide the Agricultural Chemical Cleanup Council with approval authority exceeding that given to an advisory council. The department intends to give the Council this authority until the Council is eliminated on July 1, 1999.
- Comment 2.d. LCRC felt that the terms "hydrostatic head", "lifts" and "nurse tank" were jargon. The department kept them because they are accepted terms within the industry.
- Comment 2.h. The department believes that the language is correct as written.
- Comment 2.i. LCRC identified language that was duplicative. However, the department kept the language because it helps to clarify the rule.



- Comment 2.t. The LCRC suggested moving language regarding reimbursement amounts because it was more appropriate elsewhere. The department kept the language in its current section to limit the other reimbursement provisions of that section.
- Comment 5.c. LCRC suggested that a note be changed from “should” to “is required to”. The department did not make this change because there is no statutory requirement.
- Comment 5.d. LCRC felt the term “non-household pesticide” was illogical. The term could be confusing, but is defined by statute and was kept in the rule.

**5. FISCAL ESTIMATE**

A fiscal estimate on the proposed rule is attached as **Appendix B.**

**6. REGULATORY FLEXIBILITY ANALYSIS**

No comments were received during the public comment period on the draft regulatory flexibility analysis. A copy of the final analysis is attached to this rule report as **Appendix C.**

**7. ENVIRONMENTAL ASSESSMENT**

In accordance with s. 1.11, Stats. and ch. ATCP 3, Wis. Adm. Code, DATCP prepared an environmental assessment on the proposed rule changes which is attached as **Appendix D.**

This rule will not have a major impact on the environment. In general, this rule will enhance environmental protection by helping regulated persons to understand and comply with current rules. It will help protect groundwater and surface water against fertilizer and pesticide spills, and will facilitate timely and effective spill cleanup.

# APPENDIX A

## Summary of Testimony Proposed Amendments to ATCP 32, 33 and 35

### Introduction

The Wisconsin Department of Agriculture, Trade and Consumer Protection (DATCP) help public hearings in Eau Claire, Appleton and Madison to record oral testimony on the proposed changes to Chapters ATCP 32, 33 and 35, Wis. Adm. Code. DATCP also accepted written testimony until March 19, 1998. DATCP is proposing revisions in a number of different areas of the rules and is updating the rule language to make it easier to understand and use.

Each hearing session with public attendees started with a 1/2 hour presentation at which DATCP staff explained the proposed changes and answered questions. Informational materials available at each hearing included a summary sheet identifying the proposed rules changes and a comparison sheet identifying the differences between the existing and proposed bidding requirements section of ATCP 35, Wis. Adm. Code.

A total of 15 people attended the public hearings. Five provided oral testimony. The other 10 attendees completed appearance cards to register their opinion of the proposed changes but did not provide oral testimony. One person submitted written testimony as part of the hearing process.

A summary of the public participation is shown in Table 1. A summary of the primary concerns about the proposed rule changes is included in Table 1. A list of suggested modifications to the proposed rules is also attached, followed by a summary of each participant's oral or written testimony.

**Table 1. Public Participation**

Position	Public Hearings (# participants)	Written Testimony (# participants)	All Testimony (# participants)
Support	2	0	2
Support with Minor Modifications	5	1	6
Oppose	0	0	0
Neither/Other	8	0	8
Totals	15	1	16

## **Summary of Testimony Proposed Amendments to ATCP 32, 33 and 35**

### **Summary of Public Hearing Testimony**

**The following is a summary of the oral testimony provided at the Madison hearing:**

1. John Manske: Mr. Manske was in support of the rule. His suggested changes reflected editorial comments to be incorporated into the new rule language.
2. Paul Zimmerman: Mr. Zimmerman feels that ATCP 32 and 33 should be modified to include rule language similar to ATCP 29, which would allow farmers to be exempt from the rules if they are using the products on their neighbors fields.
3. Dave Wantland: Mr. Wantland is in support of the proposed rule changes.
4. Scott Moe: Mr. Moe had two main concerns both of which related to ATCP 32 and 33. His first concern related to the spill response plans which he felt unnecessarily required that the actual tank labels be placed into the plan. He said they were large and clumsy and were unnecessary because a copy of the label booklet could be placed in the plan which had all of the useful and necessary information. His second concern related to the weekly tank level measurements for pesticide tanks stored inside or outdoors and on concrete floors. He felt the weekly tank readings were unnecessary for the purposes of determining whether or not a release had occurred because this could be done through visible inspection of the containment dike. This would eliminate the danger of climbing the tanks to take readings of the levels of product.

**The Appleton hearing did not have any oral testimony.**

**The following is a summary of the oral testimony provided at the Eau Claire hearing:**

1. Don Healy: Mr. Healy's concern related to weekly tank level measurements for all tanks whether stored inside or outdoors on concrete. He felt this was unnecessary for the purposes of determining whether or not a release had occurred because this could be done through visible inspection of the containment dike. This would eliminate the danger of climbing the tanks to take readings of the levels of product. He is in support of conducting the annual reconciliation at these facilities.

## **Summary of Testimony Proposed Amendments to ATCP 32, 33 and 35**

### **Summary of Written Testimony**

One person submitted written testimony on the proposed amendments to Chapters ATCP 32, 33 and 35.

1. Mike Elder: Mr. Elder had two main concerns both of which related to ATCP 32 and 33. His first concern related to the spill response plans which he felt unnecessarily required that the actual tank labels be placed into the plan. He said they were large and clumsy and were unnecessary because a copy of the label booklet could be placed in the plan which had all of the useful and necessary information. His second concern related to the weekly tank level measurements for tanks stored both inside and outdoors. He felt this was unnecessary for the purposes of determining whether or not a release had occurred because this could be done through visible inspection of the containment dike if it is kept clean. This would eliminate the danger of climbing the tanks to take readings of the levels of product.

## APPENDIX B

**FISCAL ESTIMATE**

DOA-2048 (R 10/94)

- ORIGINAL       UPDATED  
 CORRECTED       SUPPLEMENTAL

LRB or Bill No. / Adm. Rule No.  
ATCP 32, 33 and 35

Amendment No. (If Applicable)

**Subject**

Fertilizer Bulk Storage, Pesticide Bulk Storage and Agricultural Chemical Cleanup Program

**Fiscal Effect**

State:  No State Fiscal Effect

Check columns below only if bill makes a direct appropriation or affects a sum sufficient appropriation

- Increase Existing Appropriation       Increase Existing Revenues  
 Decrease Existing Appropriation       Decrease Existing Revenues  
 Create New Appropriation

Increase Costs - May be possible to Absorb Within Agency's Budget       Yes       No

Decrease Costs

Local:  No local government costs

1.  Increase Costs  
     Permissive       Mandatory  
 2.  Decrease Costs  
     Permissive       Mandatory

3.  Increase Revenues  
     Permissive       Mandatory  
 4.  Decrease Revenues  
     Permissive       Mandatory

5. Types of Local Governmental Unit Affected:

- Towns       Villages       Cities  
 Counties       Others \_\_\_\_\_  
 School Districts       WTCS Districts

**Fund Source Affected**

- GPR       FED       PRO       PRS       SEG       SEG-S

Affected Ch. 20 Appropriations

**Assumptions Used in Arriving at Fiscal Estimate**

The Department of Agriculture, Trade and Consumer Protection anticipates no fiscal effect.

The proposed revisions to ATCP 32 and 33 will require expanded inspections of some agrichemical facilities by department staff. However, inspections are already being performed, and modifying them to include the new areas will not affect the time spent or costs incurred on the inspections.

Any of the proposed changes to ATCP 35 having fiscal impacts are the result of changes to s. 94.73, Stats., which have been incorporated into these rules.

One change included in ATCP 35 which is not the result of statutory changes is to reimburse responsible persons a reasonable rate for the use of their own equipment if it was used to cleanup contamination. We are assuming this will not have a fiscal impact because we are substituting the cost of the responsible person's equipment for the cost of other equipment we have reimbursed in the past (rental equipment, etc.).

**Long - Range Fiscal Implications**

None

Agency/prepared by: (Name & Phone No.)

DATCP  
Mathew A. Laak      224-4518

Authorized Signature/Telephone No.

*Barbara Knapp*  
Barbara Knapp (608) 224-4746

Date

5/1/98

## APPENDIX C



**FINAL REGULATORY FLEXIBILITY ANALYSIS**  
for revisions to chs. ATCP 32, 33 and ATCP 35, Wis. Adm. Code

The proposed changes to ATCP 32 and ATCP 33, Wis. Adm. Code, will have impacts to small businesses that will cause them to have some increases in expenditures. The proposed changes in ATCP 35, Wis. Adm. Code, will allow greater reimbursement of business expenses when a business cleans up a spill of fertilizer or pesticide.

**Expected Business Expense Increases**

Business expenses for dry fertilizer distributors would increase due to an added requirement that all loading and unloading of dry bulk fertilizer be performed over a surface that allows for the recovery of all spilled material (s. 32.03). According to licensee records and tonnage reports, there are 151 different facilities from which dry bulk fertilizer is distributed in Wisconsin. Approximately 40% of those, or 60, would classify as small businesses. The department estimates that of those 60 sites, approximately 15%, or 9, currently do not utilize some method of spill containment at their dry fertilizer load-out area. Approximately 85%, or 51 of the 60 dry fertilizer sites, do not utilize some method of spill containment at their dry fertilizer load-in area. Virtually all the small businesses that distribute dry fertilizer would need to provide for a dry fertilizer spill containment surface for load-in, load-out or both. The impacts to these small businesses would be minimized because the use of tarpaulins, in addition to constructed load pads, would be permitted. Tarpaulins of sufficient size and strength to contain any spill and recover all spilled material are estimated to cost \$500 per year. Facilities which choose to construct or install a permanent dry fertilizer load in/out pad are estimated to expend approximately \$3,000 to \$3,500. The department estimates the construction of a permanent dry fertilizer rail-unload pad to be approximately \$1,000.

Business expenses for liquid fertilizer distributors would increase due to an added requirement that all soil liners within containment structures must be physically analyzed for permeability and mechanical properties and chemically analyzed for the nutrient stored within the containment structure over the previous 15 years. In addition, the soil liners must be reconstructed. The department estimates there are fewer than 10 facilities currently utilizing compacted clay liners in Wisconsin and 5 or fewer small businesses with clay liners. The department estimates the cost for performing this action on a small containment structure to be approximately \$3,000 to \$3,500.

**Expected Business Income**

The proposed changes to ATCP 35, Wis. Adm. Code, will decrease business costs for cleaning up spills. Most of these proposed changes are the result of changes to s. 94.73, Stats., which have been incorporated into the rules. These statutory changes are outlined below.

- The cost-share rate was modified from 75% to 80% of all eligible costs above the deductible and below \$100,000.

- The reimbursement cap was modified from \$300,000 for each discharge at a site to a life-time cap of \$400,000 per discharge site. Modifications have also been made to the \$100,000 cap. The changes to the reimbursement caps have two significant impacts:
  1. A “deductible” is only paid once for each discharge site because the cap is based upon a discharge site and not every time a discharge occurs. As a result, costs for cleaning up subsequent discharges at a site will be reimbursed at a rate of 80%. Prior to this change, subsequent discharges could only be reimbursed at a rate of 50%.
  2. In the past, the \$100,000 cap could only be exceeded if groundwater remediation was ordered for a specific discharge. The \$100,000 cap is still in effect for each discharge, but in the future, the \$100,000 cap can be exceeded if approved by the department prior to incurring costs.
- Additional reimbursement for transportation-related spills can be received. Transportation-related spills were each treated individually in the past and thus, each was required to pay a separate deductible. Because of this, many claims for these spills did not get submitted. The proposed language for transportation spills does not require small businesses to pay a separate deductible and thus allows more of these costs to be reimbursable in the future, subject to the \$400,000 limit for the site from which the product was distributed.

One change included in ATCP 35 which is not the result of statutory changes is to reimburse responsible persons a reasonable rate for the use of their own equipment if it was used to cleanup contamination. This will allow small businesses to get reimbursed for using their own equipment rather than hiring another contractor or renting equipment to complete the job and should provide small businesses with additional cost savings at no added expense to the state.

#### Alternative Options Considered

The department considered several options for the requirement of a dry fertilizer loading pad. Not requiring dry fertilizer loading area-containment is not a viable option based on the cost of cleaning up fertilizer contamination from the chronic discharges. Alternate options could require that a permanent mix/load surface constructed of concrete or asphalt, or that a permanent structure constructed of steel or wood be installed or constructed to contain all dry fertilizer released during loading or unloading. The department feels that a permanent surface or structure is a more sound way of limiting fertilizer discharges to the environment, but the department also realizes that such a requirement could create a serious hardship for small businesses. Therefore, the proposal allows the use of a tarpaulin which would contain and allow for the recovery of all dry fertilizer spilled during dry fertilizer loading or unloading operations.

The department also considered prohibiting the use of clay or soil liners for fertilizer secondary containment structures. This prohibition has been proposed for pesticide secondary containment structures because there are no known facilities in Wisconsin that use a soil liner for pesticide secondary containment purposes and because pesticide manufacturers do not view soil liners as acceptable for pesticide secondary containment purposes. However, for liquid bulk fertilizer, prohibiting the use of soil liners could cause serious hardships for some businesses that currently use them. For small businesses, prohibition of soil liners would require that a completely new secondary containment structure be constructed at an estimated minimum cost of \$10,000 to \$12,000. The estimated cost of the current proposal for testing and re-compaction is significantly less than the cost of building a completely new containment structure.

Most of the fiscal impacts for small businesses contained in proposed revisions to ch. ATCP 35, Wis. Adm. Code, are costs savings and are a result of implementing statutory changes. No alternatives were considered.

Dated this 4th day of May, 1998

STATE OF WISCONSIN  
DEPARTMENT OF AGRICULTURE,  
TRADE AND CONSUMER PROTECTION

By Nicholas J. Neher  
Nicholas J. Neher  
Administrator  
Agriculture Resource Management Division

## APPENDIX D

DEPARTMENT OF AGRICULTURE, TRADE AND CONSUMER PROTECTION  
FINAL ENVIRONMENTAL ASSESSMENT

**Division Affected:** Agricultural Resource Management

**Rule Number:** ATCP 32, ATCP 33 and ATCP 35

**Clearinghouse Rule Number:**

**HISTORY AND BACKGROUND**

**1. Rule number and title:**

- New Rule
- Modification of Existing Rules

**2. Statutory Authority**

- A. To adopt the proposed rule: Sections 93.07(1), 94.645, 94.67-.71 93.73
- B. Statutes(s) being interpreted by proposed rule:  
Sections 94.645, 94.67-.71 and 94.73, Stats.

**3. Summarize the history of the proposed rule and the reason the rule was developed:**

Chapters ATCP 32 and ATCP 33 of the Wisconsin Administrative Code were originally promulgated as AG 162 and 163, Wis. Adm. Code in 1985. Minor revisions of the administrative rules occurred in 1988. Authority to develop and implement rules is granted under s. 94.645 of the Wisconsin Statutes to protect waters of the state.

Revisions to chapters ATCP 32 and ATCP 33 of the Wisconsin Administrative Code are being proposed to strengthen the rules' effectiveness in protecting the waters of the state and to make the rules more clear and understandable for the regulated public. The revisions also address changing industry practices and maintenance of aging containment systems.

Chapter ATCP 35, Wis. Adm. Code, was originally promulgated as a rule in 1994. The rules were created to implement the Agricultural Chemical Cleanup Program. This program directs the cleanup of fertilizer and pesticide spills in Wisconsin, and reimburses some of the costs of those persons that conduct the cleanups. Rule revisions are needed to address statutory revisions to this program and other issues that have arisen as the program develops.

**4. Description of the Proposed Rule**

**A. Objective of the proposed rule (be specific and cite internal and external studies, reports, and other information or rationale used in establishing the objectives of the proposed rule).**

**(1) Environmental Objectives(s)**

The primary objective of the rule revisions is to strengthen the storage requirements for protecting the waters of the state from fertilizer and pesticide contamination that could occur due to fertilizer and pesticide storage. DATCP environmental site assessments have shown that the lack of loading pads at dry bulk fertilizer unloading sites is directly responsible for extremely high levels of fertilizer contamination. Bulk storage inspections have shown that many facilities have not fully complied with the intent of certain rule provisions because the rules were unclear. Changes to ch. ATCP 35, Wis. Adm. Code, may improve environmental quality by decreasing the cost and time needed for a cleanup.

**(2) Programmatic/Administrative Objectives(s):**

The rule revisions will make it easier for regulated parties to comply with the rules by making them more understandable for both the regulated public and DATCP staff. Improved timeliness and increased amount of ACCP awards should speed case review and the reimbursement process.

**B. Summarize the key assumptions on which the proposed rule is based.**

The current bulk rules are being reorganized to create a better understanding of what is needed for compliance. The department assumes that a person who understands what is required is more likely to comply.

Chapter ATCP 32, Wis. Adm. Code, adds loading area requirements for non-liquid fertilizer (dry granular products). This provision is designed to address frequent contamination problems found at these loading areas and assumes that containment pads will help facilities better see spilled material and help them recover these spills.

The reconstruction provision for clay containment systems is based on knowledge that frost/thaw cycles create fractures in soils, including compacted clays. If left unaddressed, a compacted clay liner will over time become increasingly permeable.

Some changes to ch. ATCP 35, Wis. Adm. Code, are intended to ease the remediation and reimbursement processes, both for applicants and the agency. Most of the relevant assumptions were made for the statutory changes implemented in this rule, rather than assumptions made during this rulemaking. The most significant assumption in this rulemaking is that the cleanup process has been impeded by the current bidding process. The department assumes that prior submission and review of cost estimates as well as detailing that costs do not exceed these estimates in the application will provide greater accountability to consultants in providing accurate bids and will assure all parties have anticipated these costs before they are incurred.

**C. Provide a summary of procedures required by the proposed rule:**

The proposed rules will require unloading of dry bulk fertilizer from railcars and mixing equipment be done over a containment pad. The proposed rules will require reconstruction of clay containment liners for fertilizer bulk storage systems. The proposed rule will reduce bidding requirements between phases of a fertilizer or pesticide cleanup and will provide better organization on reimbursement applications

**D. Identify and explain implicit or explicit exemptions to the proposed rule and explain why they are exempt (e.g., what similar activities or entities would not be affected);**

Currently, chapters ATCP 32 and 33, Wis. Adm. Code, allow a person to be exempt from any provision if compliance is not technically feasible and alternate methods provide substantially similar protection to waters of the state. This rule would eliminate the "not technically feasible" provision, while retaining the requirement for department concurrence that alternative measures provide substantially similar protection to waters of the state. This revision allows the department to consider equivalent or improved containment technologies in situations where the existing rules may be feasible but not preferable for any number of reasons.

**5. Specifically identify those governmental units, industries, organizations, and other parties that would be affected by the proposed rule. Explain how each would be affected:**

The Department of Agriculture, Trade and Consumer Protection (WDATCP), distributors of bulk fertilizers and pesticides and persons that own agricultural chemicals or sites that may be contaminated with agricultural chemicals will be affected by this rulemaking. Because the proposed rule would clarify the rules and make them more understandable, the proposed rules would make both voluntary compliance and agency enforcement of the rules easier. Loading area containment for dry fertilizers and reconstruction of clay containment systems will increase short-term costs for some sites, but both can be directly linked to lesser long-term cleanup costs. All sites will also benefit from statutory changes incorporated in ch. ATCP 35, Wis. Adm. Code, which will increase reimbursements for cleanups. The department expects clarifications in this rule will also improve the agencies ability to better anticipate and estimate reimbursement costs and more efficiently provide these reimbursements.

**6. List agencies, groups, individuals contacted regarding the proposed rule.**

An advisory committee assisted development of each of these rules. Membership of these committees is available from the department. Contact on issues related to ch. ATCP 35, Wis. Adm. Code has been extensive during the past year, particularly those aspects related to rule provisions incorporating statutory changes from the state budget bill, 1997 Wis. Act 27.

**7. List the existing administrative code (affected or replaced by the proposed rule.**

Chapters ATCP 32, 33 and 35, Wis. Adm. Code, are being revised by this action.

**8. List department directives and/or publications the proposed rule would affect.**

The proposed rule would affect the Department publications, *Explanations and Interpretations of ATCP 32, Wis. Adm. Code Fertilizer Bulk Storage* and *Explanations and Interpretations of ATCP 33, Wis. Adm. Code Pesticide Bulk Storage*. These publications contain the rule language and additional information explaining compliance options and are used to assist persons storing or considering storage of bulk fertilizers or bulk pesticides.

**9. If a specific physical and biological setting would be directly affected by the proposed rule, briefly describe the type of the affected area.**

No specific physical and biological setting would be directly affected by the proposed rule. The rules affect storage areas for bulk fertilizer and bulk pesticides and areas where fertilizers or pesticides are spilled. Such activities are not restricted in location, but occur most frequently in intensive crop production areas of Wisconsin and the small communities in these areas.

**10. Beneficial and adverse environmental impacts of the proposed rule:**

**A. Identify and briefly describe anticipated direct and indirect impacts on the physical and biological environment.**

The proposed rule is anticipated to have no direct impacts on the physical and biological environment. Indirectly, requiring loading pads for dry fertilizer will reduce potential for nutrient contamination of the biological and physical environment. Indirectly, increased reimbursements for agricultural chemical cleanups may increase the speed at which these cleanups are completed.

**B. Identify and briefly describe anticipated direct and indirect economic impacts. Attach a copy of the administrative rule, fiscal estimate, and fiscal estimate work sheet.**

This rule will require that storage facilities that handle dry bulk fertilizers have a containment pad for their loading areas. The department believes most sites already have load-out pads that would comply with this rule with little or no revisions, but many sites will need containment surrounding rail load-in areas. These facilities would be affected by initial construction costs, which could be up to several thousand dollars. At the same time, however, this provision would decrease cleanup costs, which can be far greater than the new construction cost for a containment pad. This provision should not result in a significant economic impact to individuals or businesses.

The revisions to ch. ATCP 35 will result in additional department reimbursement of expenses incurred by persons that clean up agricultural chemical discharges. These cost increases are a result of statutory changes in 1997 Wis. Act 27, that are incorporated in this rule. This rule also, however, better defines the reimbursement process, making the process easier to follow. The department does not anticipate that this rule has any direct economic impacts that were not anticipated and caused by 1997 Wis. Act 27.



- C. Identify and briefly describe anticipated direct and indirect impacts on the social and cultural environments (lifestyle) of the parties affected by the proposal.**

The proposed rule is not anticipated to have any direct or indirect impacts on the social and cultural environments of the parties affected by the proposal.

- D. Identify and briefly describe anticipated direct and indirect impacts on the availability and use of energy (Section 1.12, Wisconsin Statutes).**

The implementation of this rule is not expected to affect the overall availability or use of fuel in Wisconsin.

- 11. Identify which of the impacts are adverse impacts that cannot be avoided if the proposed rule is implemented.**

Initial loading area containment construction for dry bulk fertilizer distributors can not be avoided if the proposed rule is implemented. However, this should be a one-time expense, and maintenance costs for the new containment pads should not significantly increase the overall cost of maintaining the entire facility in question.

Reconstruction costs for clay containment systems cannot be avoided under this rule. This would be an additional cost for several Wisconsin facilities once every 15 years, with the first fifteen year period likely ending in the next five years for most known sites. Failure to require re-compaction of these containment systems at some regular interval will not provide the groundwater protection that these systems are required to provide. No known testing procedure would determine compliance without first allowing a release from the containment system.

- 12. Identify and briefly describe and discuss the environmental and administrative impacts of alternatives to the proposed rule, including the following:**

- A. No action or not implementing the proposed rule.**

The most significant impacts of not implementing the proposed rule are environmental. Unloading of dry bulk fertilizer would continue to be performed without any pad to contain any fertilizer spills. Significant soil contamination has already been documented at such sites. Likewise, clay containment systems if not periodically re-compacted will crack and no longer comply with the rule. This failure would likely go undetected until contamination is discovered outside the containment.

There is no alternative to some revisions to ch. ATCP 35, Wis. Adm. Code, since the current rule conflicts with 1997 Wis. Act 27. Other provisions of this rule if not revised would continue inefficiencies that have been discovered as the program has developed.

- B. Legislative modifications of existing statutes to accomplish the objectives of the proposed rules:**

No legislation is needed to achieve the objectives of these rules. Portions of this rulemaking are to implement legislation that revises the agricultural chemical cleanup program consistent with the program's intent.

- C. Modify the proposed rule (describe major changes that could be made in the rule to satisfy known or obvious concerns of interested parties and the impacts that would result):**

The proposed rule is a revision of a current rule.

## **EVALUATION**

- 13. Evaluation: Discuss each category using additional sheets or pertinent information if necessary. Specifically identify those factors which may distinguish the proposed rule as a major action significantly affecting the quality of the human environment.**

- A. Secondary Effects: To what extent would the proposed rule result in other actions which may significantly affect the environment? Identify the parties affected by secondary effects in item 5.**

The proposed rule in itself is not expected to generate other actions that could affect the natural and human environment.

- B. New Environmental effects: To what extent would the proposed rule result in new physical, biological, or socio-economic impacts.**

This rule makes no known new physical, biological or socio-economic effects. The rule furthers the intended environment effects of established programs.

- C. Geographically Scarce Resources: To what extent would the proposed rule affect existing environmental features that are scarce, either locally or statewide.**

This rule would not affect existing environmental features that are scarce. It is anticipated that the proposed rule would positively impact the general quality of Wisconsin groundwater.

- D. Controversy: What reaction has been received or anticipated from the public or affected parties on the proposed rules or the objective of the proposed rule? Which of the parties identified in item 5 have been contacted? Summarize their comments. (Attach additional sheets if necessary.)**

No controversial reactions are anticipated on the proposed rules, beyond those that can be anticipated as they relate to cost increases for certain bulk fertilizer facilities.

- F. Consistency with Plans: To what extent is the proposed rule consistent or inconsistent with local, state, or national long-range plans or policies.**

The rule is being proposed to be as consistent as practical with proposed federal standards and the standards for protecting the waters of the state.

- G. Exercise of Discretion: The law(s) which authorize or are interpreted by this rule will provide for varying degrees of discretion to be used by the department in formulating the policies and procedures contained in the rule. In some cases, the department is bound by or limited to federal rules or regulations dealing with the same issues. To what extent is the proposed rule limited by Wisconsin or federal statutes or regulations.**

Chapter ATCP 32, Wis. Adm. Code, is limited in scope by state statute to persons that manufacture or distribute fertilizer. Persons that store on their own land for their own use are not required to comply with these requirements, regardless of storage amounts. No other state or federal regulation impedes the intended environmental protection provided by these rules.

**H. Regulatory Change:**

- 1. Identify and describe any new or expanded regulation contained in the proposed rule:**

The proposed rules would require that facilities that handle bulk dry fertilizers have a containment pad to contain all material spilled during unloading. The loading pad must be of sufficient size to contain any spill or overflow to or from the vehicle being filled or emptied. Previous rules only required cleanup of dry bulk fertilizer spills.

The proposed rules would require reconstruction of existing earthen containment structures after every 15 years of use.

The proposed rules prohibit underground liquid fertilizer storage and prohibit earthen secondary containment structures for bulk pesticides. Both of these are practices that do not currently exist in Wisconsin.

- 2. Identify and describe deregulation or reduced regulation explicit or implied in the proposed rule:**

The proposed rules would change the requirement for bulk fertilizer and pesticide inventory reconciliation from semi-annually and monthly, respectively, to annually. These changes reflect current reporting requirements under applicable statutes. The new rule would add the months of June and July to the months in which weekly liquid fertilizer levels need not be recorded, but maintains weekly inspection requirements during these periods.

- 3. Identify requirements of other state, federal and local agencies that may be relevant to the proposed rule and explain the differences.**

The proposed rules do not overlap or conflict with any other state, federal or local agencies.

- I. **Other: Identify and describe (or cross-reference) other relevant factors which relate to the effects of the proposed rule on the quality of the human environment (e.g., foreclose future options, socio-cultural impacts, cumulative impacts to affected entities, visual impacts, and irreversible commitments of resources.**

There are no other anticipated effects from this rulemaking.

## CONCLUSION


This preliminary assessment finds that promulgation of the revisions to chs. ATCP 32, 33 and 35, Wis. Adm. Code, would have no significant adverse environment impact and is not a major state action significantly affecting the quality of the human environment. Alternatives to this rule, discussed in this assessment will not reach program goals as effectively as the proposed rule.

Signed this 9<sup>th</sup> day of April 1998

By   
Signature of Evaluator

The decision indicating that this document is in compliance with S. 1.11, Stats., is not final until certified by the Administrator of the Agricultural Resource Management Division

Signed this 4<sup>th</sup> day of May 1998

By   
Signature of Administrator  
Agricultural Resource Management Division