



WISCONSIN LEGISLATIVE COUNCIL RULES CLEARINGHOUSE

Scott Grosz and Jessica Karls-Ruplinger
Clearinghouse Co-Directors

Terry C. Anderson
Legislative Council Director

Laura D. Rose
Legislative Council Deputy Director

CLEARINGHOUSE RULE 13-104

Comments

[NOTE: All citations to “Manual” in the comments below are to the Administrative Rules Procedures Manual, prepared by the Legislative Reference Bureau and the Legislative Council Staff, dated November 2011.]

1. Statutory Authority

a. Section ATCP 82.02 (8) (a) confers on certified industry inspectors authority “to perform all regulatory actions associated with issuing grade A permits for bulk milk tankers.”. What are “all regulatory actions associated with issuing grade A permits for bulk milk tankers”? Does this authority exceed the powers conferred upon dairy and food inspectors by s. 97.32 (3), Stats.? If so, under what authority does the department confer on certified industry inspectors “all regulatory actions associated with issuing grade A permits for bulk milk tankers”? In addition, the agency should consider specifying, in more detail, what regulatory actions can be performed by certified industry inspectors.

b. In s. ATCP 82.04 (9), the department creates a grade A permit for a bulk milk weigher and sampler. This provision roughly parallels an existing provision in s. ATCP 82.02 (7), which requires a person who operates a bulk milk tanker to hold a grade A permit. The grade A permit created by the proposed rule appears to be different than the existing grade A permit because the existing permit is issued annually, whereas the proposed permit is valid for two years. The grade A permit in the existing rule [s. ATCP 82.02 (7)] is explicitly authorized by statute. [s. 97.21 (2) (b), Stats.] It appears that no analogous explicit statutory authority exists for the grade A permit created by the proposed rule. Under what authority does the department create the new grade A permit?

2. Form, Style and Placement in Administrative Code

a. In SECTION 1, “ATCP” should be inserted after “Chapter” in the treatment clause. [s. 1.07 (2), Manual.]

b. In SECTION 2, the definition of “bulk milk weigher and sampler” should be created in s. ATCP 82.01 (1s), rather than s. ATCP 82.01 (2m), to maintain the alphabetical order of the definitions. The treatment clause in SECTION 2 should read: “ATCP 82.01 (1s) and (4m) are created to read:”. The introductory clause should also be modified to reflect this change. [See also comment 5. a., below, for a comment about the term “bulk milk weigher and sampler”.]

c. In SECTION 5, the treatment clause should read: “ATCP 82.02 (8) is created to read:”. The introductory clause should also be modified to reflect this change.

d. In s. ATCP 82.04 (5) (c), a title should be added to the paragraph because the other paragraphs in that subsection contain titles. [s. 1.05 (1), Manual.]

e. In SECTION 8, the treatment clause should read: “ATCP 82.04 (9) is created to read:”. The introductory clause should also be modified to reflect this change.

f. In s. ATCP 82.04 (9) (a) and (c), “two” should be replaced with “2”. [s. 1.01 (5), Manual.]

g. In SECTION 9, the treatment clause should read: “ATCP 82.08 (1) (a) to (c), (2), (3) (intro.) and (a), (4) (title), (a) (intro.), 2., and 3., (b), and (c) are amended to read:”. The introductory clause should also be modified to reflect this change. In addition, the text of s. ATCP 82.08 (4) (a) 1. and 4. should not be shown because those subdivisions are not amended in the proposed rule.

h. In SECTION 11, the treatment clause should read: “ATCP 82.10 (1), (2) (intro.) and (c) to (e), (3), (4) (b), and (5) (a) are amended to read:”. The introductory clause should also be modified to reflect this change.

i. In s. ATCP 82.10 (2) (e), “six” should be replaced with “6”. [s. 1.01 (5), Manual.]

j. In SECTION 13, the treatment clause should read: “ATCP 82.10 (6), (7), and (8) are amended to read:”. The introductory clause should also be modified to reflect this change.

k. In s. ATCP 82.10 (7), “~~hauler~~ weigher and sampler may shall” should be replaced with “~~hauler may~~ weigher and sampler shall”. [s. 1.06 (1), Manual.]

l. In s. ATCP 82.10 (8) (b), the first instance of “hauler” should be stricken-through. [s. 1.06 (1), Manual.]

m. In SECTION 16, the treatment clause should read: “ATCP 82.10 (10) (intro.), (a), (b), (d), and (e) and (11) (a) are amended to read:”. The introductory clause should also be modified to reflect this change. In addition, the text of s. ATCP 82.10 (10) (c) should not be shown because that paragraph is not amended in the proposed rule.

n. In s. ATCP 82.10 (10) (b), “bulk milk hauler’s weigher and sampler’s” should be replaced with “~~milk hauler’s~~ bulk milk weigher and sampler sampler’s” to reflect the current text of the rule.

o. In SECTION 19, the treatment clause should read: “ATCP 82.12 (1) (a) and (b) and (2) are amended to read:”. The introductory clause should also be modified to reflect this change.

p. In SECTION 20, renumbering should be avoided. [s. 1.03 (5) (a), Manual.] Instead, the treatment clause should read: “ATCP 82.12 (2m) (b), (3), (4) (d), (5) (intro.), and (6) are amended to read:”. The introductory clause should also be modified to reflect this change. In addition, if renumbering is avoided, “sub. ~~(5)~~ (6)” should be replaced with “sub. (5)” in s. ATCP 82.12 (4) (d) [or, as renumbered by the proposed rule, s. ATCP 82.12 (5) (d)]. Further, the text of s. ATCP 82.12 (5) (a) and (b) [or, as renumbered by the proposed rule, s. ATCP 82.12 (6) (a) and (b)] should not be shown because those paragraphs are not amended in the proposed rule.

q. In s. ATCP 82.12 (6) (b) [or, as renumbered by the proposed rule, s. ATCP 82.12 (7) (b)], “[under]” should be replaced with “~~under~~ under”.

r. In SECTION 22, renumbering should be avoided. [s. 1.03 (5) (a), Manual.] Instead, the treatment clause should read: “ATCP 82.14 (4) is amended to read:”. The introductory clause should also be modified to reflect this change.

s. In SECTION 23, “AND INITIAL APPLICABILITY” should be removed because the text of the SECTION does not contain an initial applicability clause. [s. 1.02 (3m), Manual.]

3. Conflict With or Duplication of Existing Rules

a. Section ATCP 82.04 (2m) and (9) (a), which prohibit anyone other than a licensed bulk milk weigher and sampler from measuring or sampling milk, appear to conflict with an existing exemption for buttermakers and cheesemakers. Section ATCP 82.04 (1) currently lists the tasks that may only be performed by persons holding a valid bulk milk weigher and sampler license. Section ATCP 82.04 (2) provides that s. ATCP 82.04 (1) does not apply to licensed buttermakers and cheesemakers. Should the exemption for licensed buttermakers and cheesemakers also reference s. ATCP 82.04 (2m) and (9) (a)?

b. As noted in comment 1. b., above, s. ATCP 82.04 (9) appears to create a new grade A permit for a bulk milk weigher and sampler. This permit seems to be different than the grade A permit for a bulk milk tanker operator. It is confusing to have two permits with the same name, assuming the department has in fact created a new type of permit. If, however, the department intended there be only one type of grade A permit, the requirements for the permit should be consolidated.

4. Adequacy of References to Related Statutes, Rules and Forms

a. In s. ATCP 82.04 (9) (b), “sub. (2)” should be replaced with “sub. (4)”.

b. In s. ATCP 82.08 (2) (b), “sub. (a)” should be replaced with “par. (a)”. [s. 1.07 (2), Manual.]

c. In s. ATCP 82.10 (11) (a), “sub. (am)” should be replaced with “par. (am)”. [s. 1.07 (2), Manual.]

5. Clarity, Grammar, Punctuation and Use of Plain Language

a. In s. ATCP 82.01 (2m), the department might reconsider its decision to replace the term “milk hauler” with “bulk milk weigher and sampler.” In the rule summary, the department explained that this change was made “to reflect current terminology which more fully encompasses the tasks they perform.” However, one reason to use definitions, when drafting rules or statutes, is “for reasons of efficiency or economy of expression.” [s. 2.01 (1) (as), *Wisconsin Bill Drafting Manual 2011-2012.*] Although the phrase “bulk milk weigher and sampler” may more precisely describe the tasks performed than the term “milk haulers,” this precision appears to sacrifice efficiency and economy of expression.

b. In s. ATCP 82.01 (2m), the proposed rule does not indicate what a “person who collects official samples” collects official samples of.

c. In s. ATCP 82.02 (7) (b), the phrase “is complete only upon proof, submitted by the bulk milk tanker operator, of” could be replaced by “shall include”. This paragraph also refers to “a current inspection”, but the rule does not define what a current inspection is.

d. In s. ATCP 82.02 (7) (b), the quotation marks around “A” in the newly created text should be removed. Other references to “grade A” in ch. ATCP 82 do not include quotation marks. This comment also applies to s. ATCP 82.08 (6) (d).

e. Section ATCP 82.02 (8) (b) raises the following questions and comments:

- In the first sentence, it appears that the second occurrence of “inspection” should be replaced with “inspectors” and that “certified” should be replaced with “certification”.
- The agency should specify, in the proposed rule, what “additional [certification] requirements” an applicant must meet in order to become a certified industry inspector.
- Should the agency follow s. 97.32 (4), Stats., for the denial, suspension, or revocation of a certification? If so, the paragraph should reference that statutory section.
- It appears that “certification at any time for failing” should be replaced with “the certification of an industry inspector if the inspector fails”.

f. In s. ATCP 82.02 (8) (c), the agency should specify the “procedures for implementing the certified industry inspection program” in the proposed rule, rather than doing so in a separate written program.

g. Section ATCP 82.04 (2m) raises the following questions and comments:

- The phrase “an inspection ... on their practices” is a vague requirement and the proposed rule does not elaborate on what such an inspection might entail. Is it the same as the “field examination” provided for under the current version of s. ATCP 82.04 (7) and (8)? If so, the department should use the same terminology.

- The proposed rule does not provide any guidance on who initiates the required inspection and how. The rule forbids a licensee from performing his or her functions, which implies that obtaining the inspection is the licensee's responsibility. However, the rule then directs that "an inspection shall be conducted by the department", which suggests it is the department's obligation to ensure inspections are conducted.
- The proposed rule prohibits a licensee from measuring and sampling milk at a dairy farm or dairy plant, unless he or she has passed the requisite inspection, but passing this inspection appears to have no effect on the person's license under the rule. Should the license be affected if the licensee has not passed an inspection as a means to enforce the inspection requirement? If so, this should be addressed in the rule.
- The phrase "they have" should be replaced with "the bulk milk weigher and sampler has" and "their" should be replaced with "his or her".
- It appears that the last sentence does not relate to the inspection requirement. As such, it should be placed in a more appropriate section.

h. In s. ATCP 82.04 (5) (c), under what circumstances would the department require a bulk milk weigher and sampler to pass a written examination in conjunction with a reinspection? If a written examination is not required for all reinspections, the department should specify the circumstances under which a written examination would be required. In addition, in that paragraph, "and" should be inserted after "weigher". Lastly, it appears that "to the bulk milk weigher and sampler" should be inserted after "charge".

i. In s. ATCP 82.04 (8), "previous 24 months from" should be replaced with "24 months preceding".

j. Section ATCP 82.04 (9) raises similar questions and comments as those identified in comment 5. g., above. Specifically, the proposed rule would be clearer if it provided some guidance on: what an inspection is, who initiates it, and whether it is tied to the issuance of the permit.

k. In s. ATCP 82.04 (9) (c), "or individual" should be inserted after "sampler" on the second and fourth lines. In addition, a period should be inserted at the end of the paragraph.

l. Beginning with SECTION 9, the department has systematically changed the existing rule from active voice to passive voice. Ideas should generally be expressed in active voice. [s. 1.01 (1), Manual.] By changing the rule from active to passive voice, the department has reduced the rule's clarity. This modification might also create confusion about who is responsible for complying with requirements.

m. In s. ATCP 82.08 (1) (c), the paragraph should be replaced with the following: "~~A bulk milk tanker operator shall clean and sanitize dairy~~ Dairy product pumps and hoses attached to the bulk milk tanker shall be cleaned and sanitized whenever those pumps or hoses remain unused for more than 4 hours.". However, see also comment 5. l., above.

n. In s. ATCP 82.08 (2) (a), the words “and its pumps and hoses” are inserted after “A bulk milk tanker”. “Bulk milk tanker” is defined in s. ATCP 82.01 (1) to mean “a mobile bulk container used to transport milk ... and includes all equipment and accessories related to the bulk milk container.”. Would the bulk milk tanker’s pumps and hoses be included within this definition? If so, the new language is superfluous. This comment also applies to s. ATCP 82.08 (2) (b).

o. In s. ATCP 82.08 (3) (a), “~~the operator~~ they” should be replaced with “the operator or employee”.

p. In s. ATCP 82.08 (4) (d), “they” should be replaced with “the operator or employee”. In addition, the phrase “apply seal(s) to the access port(s)” should be reworded to avoid the use of “(s)” to designate the plural form of a word. [s. 1.01 (9) (e), Manual.]

q. In s. ATCP 82.10 (1) (a), the word “applicable” appears to be unnecessary and should be stricken. Presumably, the milk must comply with all of the standards provided in s. ATCP 60.15. Further, “violates” should be replaced with “~~violates~~ does not comply with”.

r. In s. ATCP 82.10 (5) (a), “~~his or her~~ their” should be replaced with “his or her”.

s. In s. ATCP 82.10 (11) (a), “as long as” should be replaced with “if”.

t. In s. ATCP 82.10 (11) (am) 1., the bulk tank must be “equipped with a 7 day recording device acceptable to the department”. How will a person know whether a particular recording device is acceptable to the department? Will the department approve recording devices? If so, the proposed rule should say that.