



State of Wisconsin
Jim Doyle, Governor

Department of Agriculture, Trade and Consumer Protection
Rod Nilsestuen, Secretary

DATE: July 18~~5~~, 2006

TO: The Honorable Alan J. Lasee
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FROM: Rodney J. Nilsestuen, Secretary
Department of Agriculture, Trade and Consumer Protection

SUBJECT: Fertilizer and Pesticide Bulk Storage Technical Rule Changes
(Clearinghouse Rule #056-108028)

The Department of Agriculture, Trade and Consumer Protection is transmitting this rule for legislative committee review, as provided in s. 227.19(2) and (3), Stats. The department will publish notice of this referral in the Wisconsin Administrative Register, as provided in s. 227.19(2), Stats.

SUMMARY:

Background

The Department of Agriculture, Trade and Consumer Protection (DATCP) administers almost 90 rule chapters, covering a wide variety of different subjects. From time to time, DATCP does routine "housekeeping" amendments to update and correct current rules. At the June 28, 2006 Board meeting, the department will ask the Board to approve a final draft "housekeeping" rule. This rule makes non-substantive and minor substantive changes to a number of current rule chapters.

Rule Content

Agriculture generates \$51.5 billion for Wisconsin

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Small Business Enforcement Discretion

Under s. 895.59, Stats. (created by 2003 Wisconsin Act 145), state agencies are required to adopt rules describing the discretion they may exercise when enforcing regulations against small businesses. This rule describes the discretion that DATCP may exercise when enforcing regulations against small businesses. DATCP already exercises enforcement discretion, as described in this rule.

Technical Changes to Current Rules

This rule makes the following minor technical changes to rules administered by DATCP:

- Conforms fertilizer tonnage fee (agricultural chemical cleanup surcharge) to the current statute. The department is already charging the (lower) statutory fee, not the obsolete (higher) fee that appears in the current rule (ATCP 40).
- Updates technical standards that are incorporated by reference in current commercial feed rules (ATCP 42). The updates refer to the latest edition (2006) of the official publication of the Association of American Feed Control Officials.
- Updates current standards for the professional certification of agricultural engineering practitioners. DATCP coordinated these revisions with the United States Department of Agriculture (NRCS) and county land conservation departments, including practitioners who serve federal, state and county conservation programs.
- Clarifies DATCP's meat holding order and condemnation authority (ATCP 55).
- Eliminates an inconsistency between rules related to the legal "shelf life" of smoked fish (one rule says 17 days, the other says 21 days). This rule makes the standard 21 days.
- Changes current dairy plant rules (ATCP 80) to make them consistent with current federal standards. This includes minor technical changes related to pasteurization standards, thermometers and temperature readings, as well as updates to technical standards incorporated by reference (ATCP 80 Appendix). The updates refer to the latest editions of the 3-A Sanitary Standards and Accepted Practices published by the 3-A Sanitary Standards, Inc.
- Updates technical standards that are incorporated by reference in current weights and measures rules (ATCP 92). The updates refer to the latest editions (2006) of current weights and measures handbooks published by the National Institute of Standards and Technology.

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- Clarifies that local weights and measures inspectors must be civil service employees (conforms rule to current statute).
- Eliminates minor obsolete accounting provisions in ATCP 105 related to the calculation of cigarette “cost” for purposes of the Unfair Sales Act (“minimum markup law”).
- Clarifies the relationship between the home improvement code (ATCP 110) and the basement waterproofing code (ATCP 111), both of which apply to basement waterproofing services.
- Conforms car rental notice requirements (ATCP 118) to current statute.
- Clarifies prohibition against misleading charity claims in coupon book schemes (ATCP 131).
- Repeals current rules related to dairy cattle grades (ATCP 158), because the rules are obsolete and no longer used.
- Corrects typographical errors and cross-references, eliminates obsolete provisions, conforms rules to current statutes, creates clarifying notes, and makes other non-substantive drafting and organizational changes to current rules.

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Fiscal Estimate

DATCP already exercises small business enforcement discretion, as described in this rule, so the effect will be minimal. Fines and forfeitures are paid to the state school fund, not DATCP. Other provisions of this rule will have no fiscal effect on DATCP or local units of government. A fiscal estimate is attached.

Public Hearings

DATCP held one public hearing on this rule on April 13, 2006 in Madison, WI. No one appeared at this hearing and no written comments were received.

Changes from Hearing Draft

DATCP made the following changes to this rule:

- Technical changes and clarifications, including editorial changes suggested by the Legislative Council Rules Clearinghouse.
- Amended ch. ATCP 118 relating to notice requirements for car rentals and notice of rental liability to conform to current statute.
- Deleted the creation of ATCP 97.04(4)(c) and (note) relating to license requirements for public warehouse keepers.

Response to Rules Clearinghouse

The Legislative Council Rules Clearinghouse made several minor editorial comments on the proposed rule. DATCP incorporated all Clearinghouse suggestions in the final draft rule.

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Business Impact

DATCP already exercises small business enforcement discretion, as described in this rule. The current exercise of discretion prevents unnecessary costs to small businesses. The codification of DATCP's current enforcement policy will not change that policy, or have a major additional impact on business. The other provisions of this rule will have no significant effect on business. A business impact analysis is attached.

Background

~~The Department of Agriculture, Trade and Consumer Protection (DATCP) led the nation in regulating fertilizer and pesticide bulk storage, to prevent spills to surface water and groundwater. Current rules, which first took effect in 1985, are contained in chs. ATCP 32 (Fertilizer) and ATCP 33 (Pesticides), Wis. Adm. Code. Surrounding states have adopted similar, but not identical rules.~~

~~This rule updates current rules, and consolidates them into a single chapter (ATCP 33). This rule accommodates changes in the bulk storage industry, and reflects 20 years of regulatory experience under the current rules. The rule consolidation will make the rules easier to read and understand.~~

~~DATCP investigations have found leaking containment systems at many bulk storage facilities. This rule improves current spill protection. Improved construction standards will help eliminate leaks, and minimize cleanup costs (cleanup costs greatly exceed preventive construction costs). However, this rule also eliminates some unnecessary regulations that have been shown to provide no real environmental protection.~~

Rule Coverage

~~This rule applies to commercial facilities that store unpackaged bulk fertilizer or pesticides. This rule does not apply to any of the following:~~

- ~~Manure storage.~~
- ~~On-farm storage, mixing or loading of fertilizer or pesticides for on-farm use (not for sale or distribution).~~
- ~~Facilities that store only packaged fertilizer or pesticides.~~

Rule Consolidation

~~DATCP currently administers separate bulk storage rules for fertilizer and pesticides. Since many facilities store fertilizer and pesticides, this rule consolidates fertilizer and pesticide bulk storage rules. This consolidation will eliminate unnecessary repetition, and make it easier for operators to understand and comply with the rules.~~

Effect on Existing Facilities

~~This rule establishes some new construction standards for fertilizer and pesticide storage facilities. The new standards address problems (such as leaking structures) found in current storage facilities. But the new standards apply only to structures that are constructed or substantially altered after the rule effective date.~~

Spill Prevention and Cleanup Costs

~~DATCP currently administers an agricultural chemical cleanup program, funded by fertilizer and pesticide license fees. Under that program, DATCP compensates facility operators for fertilizer and pesticide spill cleanup costs. Proper construction and maintenance of storage facilities can reduce spills and spill cleanup costs.~~

~~This rule does not change the agricultural chemical cleanup program. But by improving storage facility construction and maintenance, this rule will help minimize spills and spill cleanup costs. That will help to control costs under the agricultural chemical cleanup program.~~

Rule Contents

Construction Plans

~~Under current rules, fertilizer and pesticide bulk storage facilities must be constructed to certain standards. A professional engineer is often involved. However, current rules do not require plan review by a professional engineer or by DATCP. Under this rule:~~

- ~~□ An operator who constructs or substantially alters a storage facility must file plans (design specifications) with DATCP.~~
 - ~~□ A professional engineer must certify that the plans comply with this rule.~~
- ~~□ DATCP may review and comment on the plans (it is not required to do so). An operator is not required to obtain DATCP approval.~~
- ~~□ DATCP may grant a variance for a nonconforming feature that provides substantially equivalent spill protection.~~
- ~~□ The operator or a person chosen by the operator must inspect the construction of new concrete structures (mixing and loading pads or secondary containment structures) to ensure that construction conforms to plans filed with DATCP. The operator must file an inspection report with DATCP.~~

Storage Facility Siting

~~Under this rule, new mixing and loading pads, secondary containment structures and bulk dry fertilizer buildings must be located at least 5 feet above bedrock and groundwater, at least 1,000 feet from any navigable lake, at least 300 feet from any navigable stream, and outside any 100-year floodplain. These siting limitations do not affect the use, reconstruction, expansion or alteration of an existing structure.~~

Storage Containers and Appurtenances

~~This rule updates and clarifies current standards related to:~~

- ~~□ Construction of storage containers and appurtenances:
 - ~~□ Storage container security.~~
 - ~~□ Filling, labeling and venting storage containers.~~
 - ~~□ Underground storage restrictions.~~
 - ~~□ Storage container inspection and maintenance.
 - ~~□ Abandoned storage containers.~~
 - ~~□ Dry product storage.~~~~~~

This rule incorporates American Petroleum Institute construction and inspection standards for field-erected tanks (which are typically over 50,000 gallons). Since 1985, the number of fertilizer storage tanks with a capacity over 50,000 gallons has more than doubled, and some new tanks have a capacity of up to 2 million gallons. Recently, 2 of these tanks have developed significant leaks. In other Midwest states, 4 large fertilizer tanks (each containing more than one million gallons) have ruptured since 1997. This rule will help protect against these types of incidents.

Mixing and Loading Pads

Current rules require mixing and loading pads, to catch spills from mixing and loading operations. This rule clarifies construction requirements, to prevent leaks. A mixing and loading pad must comply with the following requirements (there are limited exceptions):

- It must be liquid-tight.
- It must have adequate capacity (per this rule).
- It must be constructed of concrete, according to standards specified in this rule.
- It must be served by a pump and storage container that can be used to recover and store spilled liquid.
- It must be designed and constructed to withstand foreseeable load conditions.
- It must be protected from precipitation runoff from surrounding surfaces.
- It may not have a precipitation drain.

Secondary Containment Structures; General

Under current rules, liquid storage containers must be located within a secondary containment structure that can contain discharges from the storage containers (there are limited exceptions). This rule clarifies construction requirements for secondary containment facilities, to prevent leaks. This rule permits any of the following types of secondary containment structures (the rule specifies construction standards for each type):

- A portland cement concrete structure.
- A block-wall structure (this rule allows continued use of preexisting facilities for one year only).
- A secondary containment system that uses a synthetic membrane as the spill containment liner.
 - One or more prefabricated basins.
 - A steel structure constructed in place.
 - An earthen structure with an earthen liner.
- A building floor (secondary containment for mobile and mini-bulk containers only).
 - A mixing and loading pad that complies with this rule (see above).
 - A bladder tank.
 - A tank-in-tank.

Sumps

If a mixing and loading pad or secondary containment structure drains to a sump, the sump must comply with standards under this rule (DATCP has found many leaking and inoperable sumps). The sump must be liquid-tight, and must be served by a pump and storage container. New sumps must be constructed of concrete, according to standards in this rule. Sumps must be periodically inspected, and maintained as necessary.

Discharge Response

This rule updates discharge response procedures, including spill reporting requirements (no spill report is required if a discharge is fully contained by a mixing and loading pad or secondary containment structure). This rule also updates current discharge response plan requirements.

Disposal of Discharges, Rinsate and Collected Precipitation

~~An operator must safely use or dispose of discharges, rinsate and precipitation recovered from a mixing and loading pad or secondary containment structure. This rule spells out practical use and disposal options.~~

~~Transporting Bulk Fertilizer or Pesticide~~

~~This rule establishes basic standards for safe transportation of bulk fertilizer and pesticides by storage facility operators.~~

~~Environmental Assessments~~

~~Under this rule, an operator must check for possible environmental contamination whenever a mixing and loading pad, sump or secondary containment structure leaks, is removed, or remains out of service for over 5 years. The operator must conduct preliminary soil and groundwater tests, as necessary, and must report the results to DATCP.~~

~~Recordkeeping~~

~~Under current rules, an operator must keep records related to a storage facility. This rule adds some record keeping requirements, but eliminates others. An operator must keep records for at least 3 years, or for as long as the operator owns the facility (depending on the type of record).~~

~~Real Estate Sale or Lease; Disclosure~~

~~Under this rule, an operator must do all of the following before the operator sells or leases storage facility real estate for a different use (this rule does not limit other disclosures that may be required under other applicable law):~~

- ~~□ Notify DATCP of the impending sale or lease.~~
- ~~□ Disclose to the purchaser or lessee that the real estate has been used as a storage facility.~~

~~Federal and Surrounding State Programs~~

~~Federal Programs~~

~~There are no comparable federal programs to regulate the storage of bulk fertilizer or pesticides (Wisconsin is a national leader).~~

~~Michigan~~

~~Michigan's bulk fertilizer and pesticide storage rules are similar to Wisconsin's. Michigan requires mixing and loading pads and secondary containment structures, but does not have minimum design or construction standards for those structures (nor does it require professional engineering review of design specifications).~~

~~Minnesota~~

~~Minnesota's bulk pesticide storage rules are similar, in many respects, to Wisconsin's. Minnesota has not promulgated bulk fertilizer storage rules, but has been enforcing proposed rules that are similar to Wisconsin's. Minnesota requires mixing and loading pads and secondary containment structures and has minimum design and construction standards for those structures. However, Minnesota does not require professional engineering review of design specifications.~~

Indiana & Iowa

Indiana and Iowa have rules that are similar to each other, and somewhat similar to Wisconsin's. They require mixing and loading pads and secondary containment structures, but they do not set minimum design or construction standards or require professional engineering review of design specifications.

Illinois

Illinois has rules that are somewhat similar to Wisconsin's. Illinois requires mixing and loading pads and secondary containment structures, and Illinois also sets minimum design or construction standards or requires professional engineering review of design specifications.

Public Hearings

DATCP held 3 public hearings on this rule. DATCP held the hearings in Madison on January 24, Eau Claire on January 25 and Oshkosh on January 26, 2006. A total of 7 people attended the hearings. Four attendees provided oral testimony and 3 attended for informational purposes only. Fourteen people submitted written testimony. No one opposed the rule as such, but many of those who testified or submitted written testimony requested changes to portions of the rule. DATCP modified the final draft rule in response to many of the requests (see below). A hearing summary is attached.

Changes from Hearing Draft

DATCP made the following changes to the final draft rule following public hearings, in consultation with an industry advisory committee:

- Provided more flexible options for managing precipitation that collects in fertilizer secondary containment structures.
- Expanded the exemption for unloading rail cars without a mixing and loading pad (operator may use a 75-gallon containment pan, rather than a 150-gallon pan as required in the hearing draft).
- Clarified requirements related to piping runs and off-season drains in secondary containment structures.
- Clarified the inspection requirements for synthetic liners that have exceeded their guaranteed effective life.
- Clarified, by note, that storage container anchors located outside a secondary containment structure place no stress on the structure.
- Added a note recommending that construction inspections be performed by qualified persons.

This rule exempts facilities (temporary and permanent) in which farmers store fertilizer or pesticides for their own use. It also exempts temporary facilities (not permanent facilities) in which farmers store bulk fertilizer or pesticides for custom application to other farms (up to 3 farms and 500 acres). DATCP rejected a proposal to expand the current on-farm storage exemption, so that it would also exempt permanent facilities used to store bulk fertilizer or pesticides for custom applications to other farms. DATCP believes that an expanded exemption may discriminate against other custom applicators, and could undermine the public health, safety, welfare and environmental objectives of this rule.

Response to Rules Clearinghouse Comments

The Legislative Council Rules Clearinghouse made a several minor editorial comments on the proposed rule. DATCP incorporated the Clearinghouse suggestions in the final draft rule except for the following two items:

The Legislative Council Rules Clearinghouse suggested that DATCP consider whether standards that are incorporated by reference should be included in a separate section following the definitions, as a means of contributing clarity to the rule. DATCP did not create a separate section because there were only two standards incorporated by reference, and these standards were identified in the definitions. DATCP did not feel that adding a separate section would contribute to the clarity of the rule.

The Legislative Council Rules Clearinghouse questioned whether the title of the rule should include the word "transportation", since the chapter includes regulations on transportation of bulk fertilizer and pesticides. DATCP did not add the word "transportation" to the rule title because the transportation part of the rule is a small element of the overall regulation of the storage of bulk fertilizer and pesticides.

Fiscal Impact

This rule will increase DATCP costs by approximately \$24,400 per year. Additional staff time will be needed to train storage facility operators, review and comment on storage facility construction plans, and monitor compliance with construction standards and other requirements. This rule will not generate any new revenue to cover the increased costs, so DATCP will need to absorb the increase at the expense of other program activities. A complete fiscal estimate is attached.

This rule does not increase industry fees. By minimizing agrichemical discharges to the environment, this rule may limit the long-term growth of reimbursement claims under the agricultural chemical cleanup program. That would have a positive effect on DATCP's agricultural chemical cleanup fund, which is financed by industry fees. However, DATCP cannot accurately estimate the impact at this time.

Business Impact

This rule applies to commercial operators who store unpackaged bulk fertilizer or pesticides for sale or distribution. Many of these operators are "small businesses." A complete business impact analysis, including a small business impact analysis, is attached. The business impact analysis has been updated from the preliminary analysis. Cost estimates have been updated, and DATCP's previous estimate of the percentage of businesses affected that are small businesses was corrected to 55% from the previous estimate of 10 to 15%.

DATCP presented the updated information (up to 55% of affected business may be small businesses) at the public hearings. In addition, DATCP staff met with the Small Business Regulatory Review Board on February 23, 2006 to discuss the preliminary small business analysis and the revised data.

This rule does not apply to any of the following:

- Manure storage.
- On farm storage of fertilizer or pesticide for on farm use (not for sale or distribution).
- Facilities that store only packaged fertilizer or pesticides.

This rule establishes some new construction standards for fertilizer and pesticide storage facilities. These new standards apply to structures that are constructed or substantially altered after the effective date of this rule. This rule will not have a significant impact on an existing facility unless the operator substantially alters structures in that facility. Routine maintenance and repair is not considered a substantial alteration.

Under this rule, an operator must have construction plans reviewed by a professional engineer, and must submit the construction plans for discretionary review by DATCP. This may entail some additional costs for some operators, but will help prevent much more costly design and construction errors. This rule does not require DATCP pre-approval of new construction or alterations. This rule allows design flexibility, consistent with minimum standards.

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~~Improved design and construction of storage facilities will minimize environmental contamination and costly cleanups that pose a large financial risk to storage facility operators. Environmental cleanup costs are typically much higher than preventive design and construction costs. Reduction of cleanup costs will also minimize financial demands on the industry-funded agricultural chemical cleanup program.~~

~~This rule reduces the overall recordkeeping burden for affected businesses (it adds some recordkeeping requirements but eliminates others). Consolidation of current fertilizer and pesticide bulk storage rules will make the rules easier to read, understand and implement.~~

~~DATCP has worked with University of Wisconsin Extension to spell out basic design standards for concrete structures, so that engineering firms will not have to design those structures from scratch. That will reduce design costs for facility operators.~~