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Clearinghouse Rule 15-045

DATCP Docket No. 14-R-14
Rules Clearinghouse No. ____

Proposed Hearing Draft
April 29, 2015

**PROPOSED ORDER OF THE WISCONSIN DEPARTMENT OF
AGRICULTURE, TRADE AND CONSUMER PROTECTION
AMENDING RULES**

3 The Wisconsin department of agriculture, trade and consumer protection proposes the
4 following order to amend ATCP 40.14 (1) (c) and (3), relating to the manufacture and
5 distribution of fertilizer.

**Analysis Prepared by the Department of Agriculture,
Trade and Consumer Protection**

The Wisconsin Department of Agriculture, Trade and Consumer Protection (DATCP) regulates the manufacture and sale of fertilizer, pursuant to s. 94.64 Stats. DATCP regulates fertilizer to protect farmers and consumers against unfair and deceptive sales practices. Regulation is designed to prevent fraudulent sales of products, deceptive ingredient and performance claims, and latent safety hazards.

This rule updates standards for the nutrient content of fertilizer.

Statutes Interpreted

Statutes interpreted: s 94.64, Stats.

Statutory Authority

Statutory authority: ss. 93.07 (1), and 94.64 (9), Stats.

Explanation of Agency Authority

DATCP has authority under s. 93.07 (1), Stats., to make regulations as necessary for the proper enforcement of Chapters 93 to 100, Stats., including the administration of the fertilizer program under s. 94.64, Stats. DATCP has express authority to promulgate rules regulating the sale and labeling of fertilizer, governing methods of sampling, testing fertilizer and prescribing the manner in which grade and guaranteed analysis are declared on the product label. See s. 94.64 (9), Stats.

Related Rules or Statutes

Wisconsin statutes and rules relating to the manufacture, distribution, and use of fertilizer are set forth in ss. 94.64 to 94.645, Stats. and ch. ATCP 40, Wis. Admin. Code.

Plain Language Analysis

This proposed rule amends s. ATCP 40.14 (1) and (3), Wis. Admin. Code, relating to fertilizer content deficiencies.

Background

DATCP is authorized to regulate the manufacture, distribution, labeling, and storage of fertilizer. Fertilizer is a substance that contains one or more recognized plant nutrients, is used for plant nutrient content, and is designed for use or claimed to have value in promoting plant growth. See s. 94.64 (1) (e), Stats.

Under current fertilizer rules, a manufacturer or distributor that labels fertilizer is required to list percent guarantees of primary nutrients on the fertilizer's label. Primary nutrients consist of nitrogen ("N"), phosphorus ("P"), and potassium ("K"). Current rules also require that DATCP collect and analyze various samples of fertilizers.

Under current s. 40.16, Wis. Admin. Code, the department will analyze a fertilizer sample to determine if the content of the sample meets the guarantees of N, P, and K listed on the label. If the sample tested is found to be deficient in content of N, P, or K because it fails to meet one or more of the three standards in the rule, then the fertilizer is considered "mislabeled" under s. ATCP 40.14 (1), Wis. Admin. Code.

The third standard requires that the economic value of primary nutrients actually present be not less than 98% of the economic value of the amounts guaranteed, where economic value is calculated according to s. ATCP 40.14 (3), Wis. Admin. Code. The formula contained in s. ATCP 40.14 (3), Wis. Adm. Code is based upon wholesale prices for the nutrients.

Economic Value

After convening a group of representatives of the fertilizer industry and agricultural associations, and reviewing recent data concerning the wholesale prices of primary nutrients, the group concluded that the existing rule contains an outdated formula for the economic value of fertilizer. That formula was based on average wholesale prices of primary plant nutrients prior to its enactment in the 1970s.

Rule Content

The proposed rule does the following:

1. In place of the 2:2:1 ratio of N, P, and K, in the current s. ATCP 40.14 (3), Wis. Admin. Code, the proposed rule substitutes a ratio 1:1:1 of N, P, and K:

Current formula: Economic value = {[total nitrogen (N) guarantee] x 2} + {[available phosphate (P₂O₅) guarantee] x 2} + {soluble potash (K₂O) guarantee}

to

Amended formula: Economic value = {total nitrogen (N) guarantee} + {available phosphate (P₂O₅) guarantee} + {soluble potash (K₂O) guarantee}

The proposed formula more accurately reflects the actual economic value of fertilizer ingredients in the marketplace than the current economic value formula, which was developed over forty years ago.

2. The proposed rule changes the standard in s. ATCP 40.14 (1) (c), Wis. Admin. Code, for the economic value formula, so that the guarantee percentage, which currently is listed in the rule as 98%, is reduced to 97%. This conforms to the department's prior guarantee percentage in the rule, and is consistent with the percentage used by other states, such as Minnesota and Illinois.

Comparison with Existing or Proposed Federal Statutes and Regulation

There are no established federal laws regulating the content deficiencies for fertilizer, although there is regulation by other states (see below).

Comparison with Rules in Adjacent States

State fertilizer regulators have organized a national Association of American Plant Food Control Officials (AAPFCO) to promote uniform state laws related to fertilizer. Most surrounding states follow AAPFCO principles and have similar basic laws which benefit consumers and fertilizer manufacturers and distributors doing business in multiple states. However, there are minor variations in fertilizer regulations between states.

Illinois

In addition to the total combined value of the fertilizer, the value for each fertilizer ingredient is deficient if the actual amount is 97% or less than the guarantee.

Iowa

The economic value (called relative value) is determined based on a formula that is identical to the current Wisconsin requirements.

Michigan

Michigan has adopted the AAPFCO requirements that deem fertilizer deficient if the overall index value of the fertilizer is below 98%. The overall index value is calculated by comparing the guarantee of the nutrients to the actual value found within the sample. Michigan uses unit values for each of the fertilizer nutrients. These values vary and are based on annual publications of the values per unit of each nutrients.

Minnesota

Minnesota uses the same formula and multipliers as the current Wisconsin requirements, but considers a fertilizer deficient if the overall economic value is below 97% of the guaranteed value.

Summary of Factual Data and Analytical Methodologies

DATCP developed this rule in consultation with an industry working group that included representative members from agricultural associations and fertilizer manufacturers and distributors. A listening session was held with representatives of multiple agrichemical associations, fertilizer manufacturers and suppliers. Some members of this group previously had brought to DATCP its concerns over the economic value calculation that has been in use by DATCP since the 1970s. They questioned the effects that the current pricing structure has on the labeling of fertilizer content, when compared with how prior pricing models had affected the calculation of the economic value on numerous fertilizer blends over recent years.

DATCP responded by reviewing the current relative average wholesale prices for primary plant nutrients N, P, and K. At the listening session, the representatives were presented information gathered from the United States Department of Agriculture (USDA) concerning statistics on fertilizer ingredient pricing, shown the variations of pricing that has occurred throughout a number of years, and the hypothetical results if a different formula for economic value were used and compared those results with the current economic value formula. The formula used to determine the economic value of the fertilizers was no longer found to be accurate in relation to the multipliers that were being used for the primary nutrients N and P. Additionally, it was found that the prices for these primary nutrients, as well as that of K, were similar to one another.

The department also listened to concerns over the value used in calculating the threshold percentage of the economic value guarantee. In an effort to address variations such as granular size, overall availability of nutrients, and the lack of consistency between lots of primary nutrients, it was recommended that the percentage be changed to a number that

reflects current industry practices. The department demonstrated to the group using hypothetical results how the change from the current threshold percentage of 98% to 97% would bring the product's economic value guarantee in line with current product economic value guarantees. This change would take into account the variation in granular size, and the lack of consistency between lots of primary nutrients, while continuing to ensure that the fertilizer contains the nutrients guaranteed on the product label.

Analysis and Supporting Documents Used to Determine Effect on Small Business or in Preparation of an Economic Impact Analysis

DATCP considered data on wholesale nutrient prices obtained from USDA during its listening session (See Summary of Data and Analytical Methodologies, above), as well as any comments received through the economic impact analysis comment period.

Fiscal Impact

This rule will have no fiscal impact on DATCP or local units of government. This rule will clarify existing regulations and improve program administration. DATCP does not anticipate any additional costs or staffing needs. A complete fiscal estimate is attached.

Effects on Small Business

DATCP anticipates that this rule revision will have no negative economic impact on small business. The proposed rule will continue to benefit certain small businesses such as farmers, landscape and lawncare companies, farm supply stores, and cooperatives. This rule revision is designed to update the formulas used in analyzing fertilizer for its economic value and content deficiencies. This rule will continue to prevent unfair and deceptive sales practices, while adjusting formulas used to reflect updated fertilizer ingredient costs.

There are approximately 700 persons licensed to manufacture or distribute fertilizers in Wisconsin. Up to 30% of these license holders may be small businesses. Affected businesses include farm centers and cooperatives, lawncare businesses, and manufacturers of nonagricultural and specialty fertilizers.

The fertilizer industry serves about 30,000 Wisconsin farmers, many of whom are small businesses. This rule will benefit farmers, by continuing to prevent unfair and deceptive sales practices while adjusting formulas used to reflect current fertilizer ingredient costs.

Because this rule will not have a significant adverse impact on small business, it is not subject to the delayed small business effective date provision in s. 227.22 (2) (e), Stats. A business analysis ("initial regulatory flexibility analysis") is attached.

DATCP Contact Information

Questions and comments related to this rule may be directed to:

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1 **SECTION 1.** ATCP 40.14 (1) (c) is amended to read:

2 ATCP 40.14 (1) (c) The economic value of primary nutrients actually present is
3 less than ~~98%~~ 97% of the economic value of the amounts guaranteed, where economic
4 value is calculated according to sub. (3).

5 **SECTION 2.** ATCP 40.14 (3) is amended to read:

6 ATCP 40.14 (3) ECONOMIC VALUE. Economic value, for purposes of sub. (1) (c),
7 equals $\{ \{ \text{total nitrogen (N) guarantee} \times 2 \} + \{ \text{available phosphate (P}_2\text{O}_5 \text{) guarantee} \times$
8 $2 \} + \{ \text{soluble potash (K}_2\text{O) guarantee} \}$.

9 **SECTION 3. EFFECTIVE DATE.** This rule takes effect on the first day of the month
10 following publication in the Wisconsin administrative register, as provided under s.
11 227.22 (2) (intro.), Stats.

Dated this _____ day of _____, 2015

WISCONSIN DEPARTMENT OF AGRICULTURE,
TRADE AND CONSUMER PROTECTION

By _____
Ben Brancel

Secretary