

Chairman:  
Agriculture Committee



00-058 44

Member:  
Conservation & Land Use  
Consumer Affairs  
Natural Resources  
Utilities

**Al Ott**

State Representative • 3rd Assembly District

**Assembly Agriculture Committee**

**MEMO**

**TO: Members of the Assembly Agriculture Committee**

**FROM: Representative Al Ott, Chair**

**DATE: August 10, 2000**

The following clearinghouse rule has been referred to the Assembly Agriculture Committee for a thirty-day review period:

**Clearinghouse Rule 00-058**

**Relating to the agricultural chemical cleanup program.**

**Submitted by the Department of Agriculture, Trade and Consumer Protection.**

The deadline for action on this rule is **September 8, 2000.**

A brief summary is enclosed. If you would like a copy of the rule in its entirety, please contact Beata Kalies in my office at 266-5831.

WISCONSIN LEGISLATIVE COUNCIL STAFF



**RULES CLEARINGHOUSE**

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**CLEARINGHOUSE REPORT TO AGENCY**

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[THIS REPORT HAS BEEN PREPARED PURSUANT TO S. 227.15, STATS. THIS IS A REPORT ON A RULE AS ORIGINALLY PROPOSED BY THE AGENCY; THE REPORT MAY NOT REFLECT THE FINAL CONTENT OF THE RULE IN FINAL DRAFT FORM AS IT WILL BE SUBMITTED TO THE LEGISLATURE. THIS REPORT CONSTITUTES A REVIEW OF, BUT NOT APPROVAL OR DISAPPROVAL OF, THE SUBSTANTIVE CONTENT AND TECHNICAL ACCURACY OF THE RULE.]

**CLEARINGHOUSE RULE 00-058**

AN ORDER to repeal ATCP 35.16 (2) (c) 4. and 35.22 (4) (b); to renumber ATCP 35.03 (3) (f); to amend ATCP 35.01 (4), 35.03 (3) (intro.), 35.04 (3), 35.06 (1) (f) and (j) (intro.) and 1., 35.08 (3) and (5) (b), 35.14 (5) and (6), 35.16 (1), (2) (a) and (c) 3., (2m) (d) and (6) (b) and (c) and 35.22 (1), (2) (a) (intro.) and (4) (a); to repeal and recreate ATCP 35.03 (6) (a) and (b), 35.04 (4) to (6), 35.14 (30), 35.16 (8) and 35.18 (1) (a); and to create ATCP 35.01 (17m), 35.03 (3) (f) and (g) and (6) (c) to (e), 35.06 (5), 35.16 (2m) (e), (6) (d), (7) and (9) and 35.31, relating to the agricultural chemical cleanup program.

Submitted by **DEPARTMENT OF AGRICULTURE, TRADE AND CONSUMER PROTECTION**

03-16-00 RECEIVED BY LEGISLATIVE COUNCIL.  
04-11-00 REPORT SENT TO AGENCY.

RNS:DLL:jal;ksm

**LEGISLATIVE COUNCIL RULES CLEARINGHOUSE REPORT**

This rule has been reviewed by the Rules Clearinghouse. Based on that review, comments are reported as noted below:

1. STATUTORY AUTHORITY [s. 227.15 (2) (a)]

Comment Attached      YES       NO

2. FORM, STYLE AND PLACEMENT IN ADMINISTRATIVE CODE [s. 227.15 (2) (c)]

Comment Attached      YES       NO

3. CONFLICT WITH OR DUPLICATION OF EXISTING RULES [s. 227.15 (2) (d)]

Comment Attached      YES       NO

4. ADEQUACY OF REFERENCES TO RELATED STATUTES, RULES AND FORMS  
[s. 227.15 (2) (e)]

Comment Attached      YES       NO

5. CLARITY, GRAMMAR, PUNCTUATION AND USE OF PLAIN LANGUAGE [s. 227.15 (2) (f)]

Comment Attached      YES       NO

6. POTENTIAL CONFLICTS WITH, AND COMPARABILITY TO, RELATED FEDERAL  
REGULATIONS [s. 227.15 (2) (g)]

Comment Attached      YES       NO

7. COMPLIANCE WITH PERMIT ACTION DEADLINE REQUIREMENTS [s. 227.15 (2) (h)]

Comment Attached      YES       NO

# WISCONSIN LEGISLATIVE COUNCIL STAFF

## RULES CLEARINGHOUSE

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## CLEARINGHOUSE RULE 00-058

### Comments

**[NOTE: All citations to "Manual" in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council Staff, dated September 1998.]**

#### 1. Statutory Authority

Section 94.73 (3) (a), Stats., establishes time frames within which applications for reimbursement may be made, which are approximately reproduced in s. ATCP 35.10 (1); s. ATCP 35.06 (5) allows retroactive eligibility for reimbursement, notwithstanding those time frames. Is it the intent of s. ATCP 35.06 (5) to create an exception to s. 94.73 (3), Stats.? This should be clarified and if the intent is to create such an exception, the statute authorizing this should be cited.

#### 2. Form, Style and Placement in Administrative Code

- a. In s. ATCP 35.01 (17m) (d) and (f), "pipelines" should replace "pipe lines."
- b. In the treatment clause for SECTION 4, "ATCP 35.03 (3)" should be inserted before "(h)."
- c. On page 4, line 3, the notation "ATCP 35.03 (3)" should be omitted.
- d. A note should be added following s. ATCP 35.03 (3) (g) indicating where copies of the landspreading authorization form, referred to in that paragraph, can be obtained. Also, a copy of the form should be included in the rule package.

e. On page 5, lines 7 and 8, both occurrences of the word “and” should be replaced by the word “or.”

f. In s. ATCP 35.04 (6) (intro.), second sentence, “any of the following corrective measures” should replace “corrective measures under pars. (a) to (c)” and a colon should replace the period.

g. The language being inserted into s. ATCP 35.08 (3) does not belong in sub. (3), since it does not relate to requests for additional information; rather, it belongs in sub. (5), with other provisions relating to the disapproval of applications.

h. On page 11, lines 1 and 2, the rule fails to use proper striking and underscoring to indicate the changes being made. Specifically, that provision should end with the following format: “under ~~sub.~~ subs. (6) and (7).”

i. The placement of s. ATCP 35.31 interrupts the flow of provisions relating to determining the amount of reimbursement. It would be better placed after s. ATCP 35.32. Also, “chapter” should replace “rule” in sub. (1). Note, however, that this section is not necessary, since the department has the authority to establish the proposed council under s. 15.04 (1) (c), Stats., and since rule-making is not necessary to exercise that authority.

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

a. On page 6, line 21, the reference to s. ATCP 30.36 should be omitted, since the referenced section does not establish requirements with which containment structures can comply.

b. On page 10, line 8, should the inserted language refer to subs. (2) to (7)? The same question applies with regard to page 12, lines 7 and 9.

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

a. In s. ATCP 35.03 (3) (intro.), it might be clearer to require that an application be made at least five days prior to the *proposed* date of landspreading, since landspreading cannot be done without a permit. Also, is a “department business day” different from what is commonly understood by the term “business day”? If so, that term should be defined or otherwise explained; if not, the more common term “business day” should be used instead.

b. The material on page 5, line 11, should read as follows: “Reasonable costs for tillage that is in excess of normal tillage and that is needed to reduce soil compaction . . . .”

c. The term “pre-landspreading screening,” used on page 6, lines 14 and 15, is jargon. The term should be replaced by a more descriptive phrase.

d. It appears that the word “complied” on page 6, line 21, should be replaced by the word “complies.”

e. The containment structures described on page 6, line 20, are described differently than those described in the sections referred to on the following line--the former are limited to those constructed of concrete, asphalt, steel or synthetic materials, while the latter are those constructed of asphalt, concrete or other nonabsorbent material. Is there an actual difference between these? Should this language be made consistent? The language on page 7, line 3, is different still.

f. The new s. ATCP 35.14 (30) seems unnecessary, since the cross-referenced sections are quite explicit as to what is allowed and the clear implication is that other such expenses are not allowed.

g. Section ATCP 35.16 (2m) (e) creates a requirement that applies only to costs related to contract services. However, it would appear that this requirement would appropriately apply to other project costs, as well. Should this requirement be included in s. ATCP 35.06?

h. On page 11, line 19, should the word "bids" be replaced with the phrase "submits a bid or cost estimate," to be consistent with the changes being made in the preceding paragraphs?

i. Much of the language in s. ATCP 35.18 (1) (a) duplicates language in the introduction, and so should be omitted. That paragraph should simply be amended by striking through the phrase "if the responsible person took the corrective action after October 13, 1997." Also, the word "eligible" is omitted from the recreated version of this paragraph, although it is being inserted into two subsequent provisions of the rule--is this omission intentional?



State of Wisconsin  
Tommy G. Thompson, Governor

Department of Agriculture, Trade and Consumer Protection  
Ben Brancel, Secretary

August 11, 2000

Senator Judy Robson  
Attn: David Austin  
Room 15 North  
State Capitol  
P.O. Box 7882  
Madison, WI 53707-7882

Re: Agricultural Chemical Cleanup Rule (Clearinghouse Rule #00-058)

Dear Senator Robson:

Your office, by electronic mail to this department's legislative liaison, recently asked the Department of Agriculture, Trade and Consumer Protection to explain its response to a Rules Clearinghouse comment on one provision of the above rule. This letter provides that explanation.

The department administers an agricultural chemical cleanup program under s. 94.73, Stats. The program is designed to clean up spills of agricultural chemicals and minimize environmental contamination. Under this program, the department may reimburse a portion of the cleanup costs. Cleanups and reimbursements must comply with department rules under ch. ATCP 35, Wis. Adm. Code. Department rules specify the cleanup costs that are reimbursable.

Clearinghouse Rule #00-058 amends the department's current rules under ch. ATCP 35, Wis. Adm. Code. The rule change will authorize the department to reimburse certain cleanup costs (costs to move utilities, equipment and other fixtures) that are not reimbursable under current rules. The rule change will also permit responsible persons to amend their prior reimbursement applications to include the newly allowed costs.

The Rules Clearinghouse, citing s. 94.73(3)(a), Stats., asked the department if it was creating an exception to this section and if the department had authority to allow claims for costs incurred more than 3 years ago. Under s. 94.73(3)(a), Stats., a responsible person seeking reimbursement of cleanup costs must file a reimbursement application within 3 years after corrective action costs are incurred.

The department's rule proposal is consistent with s. 94.73(3)(a), Stats. The department is **not** proposing to create an exception to this section or extend the 3-year filing deadline. It is merely allowing responsible persons to amend applications **already filed within the**

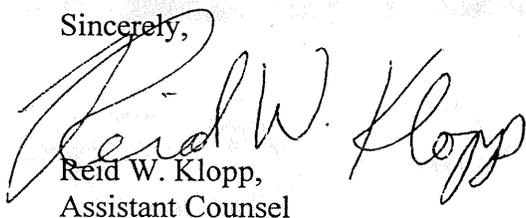
**deadline.** If a responsible person has filed a timely application for corrective action costs related to a specific cleanup site, the responsible person will be allowed to amend the filed application for that site. If a responsible person has not filed an application within the 3-year period, an amendment can not be filed and will not be allowed.

Under s. 94.73(11), Stats., the department may adopt rules related to reimbursement application procedures and reimbursement eligibility. The department believes that this rule is a reasonable exercise of that authority. The rule ensures fair treatment of responsible persons who **filed timely applications**, but were denied reimbursement of these costs or who, in reliance on the department's prior stated policy, refrained from seeking reimbursement of the costs the department is now making eligible for reimbursement.

The department's Agricultural Chemical Cleanup Advisory Council requested and endorsed this rule change. Hearing participants supported the rule change. The department has not received any comments opposing this rule change. The department has reviewed past applications, and has determined that a small number of prior applicants will qualify for additional reimbursement under the rule change. The amount of additional reimbursement will be fairly minimal.

At the suggestion of Ronald Sklansky, Rules Clearinghouse Director, a copy of this letter has been sent to the chairperson of the legislative committees that received the rule so this letter may be inserted into the rule jackets.

Sincerely,



Reid W. Klopp,  
Assistant Counsel

cc: Senator Alice Clausing, Agricultural, Environmental Resources and Campaign  
Finance Reform Committee Chairperson  
Representative Alvin Ott, Agriculture Committee Chairperson  
Ronald Sklansky, Rules Clearinghouse Director  
Secretary Brancel  
Keeley Moll, Legislative Liaison  
Nick Neher, ARM Division Administrator  
Jim Matson, Counsel

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 00-058 to the presiding officer of each house of the legislature for standing committee review. The proposed rule repeals, amends and creates portions of Chapter ATCP 35, Wis. Adm. Code, relating to the agricultural chemical cleanup program.

Dated the 18 day of July, 2000.

STATE OF WISCONSIN  
DEPARTMENT OF AGRICULTURE, TRADE  
AND CONSUMER PROTECTION

By Ben Brancel  
Ben Brancel, Secretary



State of Wisconsin  
Tommy G. Thompson, Governor

Department of Agriculture, Trade and Consumer Protection  
Ben Brancel, Secretary

DATE: July 17, 2000

TO: The Honorable Fred Risser  
President, Wisconsin State Senate  
Room 220 S, State Capitol  
Madison, WI 53702

The Honorable Scott R. Jensen  
Speaker, Wisconsin State Assembly  
Room 211 W, State Capitol  
Madison, WI 53702

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

SSUBJECT: **Agricultural Chemical Cleanup Program; Final Draft Rules**  
**(Clearinghouse Rule # 00-058)**

In accordance with ss. 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 s. 227.19(2), Stats., we will publish a notice of this referral in the Wisconsin Administrative Register.

### Rule Summary and Background

The Department of Agriculture, Trade and Consumer Protection ("DATCP") administers the agricultural chemical cleanup program under s. 94.73, Stats. This program is designed to clean up spills of agricultural chemicals and minimize environmental contamination. Under this program, DATCP may reimburse a portion of the cleanup costs. Cleanups, reimbursement applications and reimbursement payments must comply with current DATCP rules under ch. ATCP 35, Wis. Adm. Code. This rule makes the following changes to the current rules:

- It clarifies landspreading requirements and expands DATCP's authority to reimburse landspreading costs incurred in a cleanup project.
- It clarifies and expands DATCP's authority to reimburse the cost of removing or relocating utilities and other fixtures.
- It modifies competitive bidding and other cost control procedures.

- It requires consultants to identify, in their project bids to persons needing cleanup services, any contract services and costs that are not eligible for DATCP reimbursement.
- It authorizes DATCP to reimburse a person for some reasonable and necessary cleanup costs, even if the person fails to comply with competitive bidding or other cost control requirements. (Current rules prohibit reimbursement.) This rule authorizes DATCP to pay reimbursement at its discretion, at a reduced rate.
- It creates an advisory council to advise DATCP on the cleanup program.

### **Landspreading**

Current rules authorize landspreading of soils contaminated with fertilizers or pesticides if those fertilizers or pesticides can be legally applied to land. Landspreading reduces the concentration of the fertilizer or pesticide, and provides an economical and potentially useful disposal option in many cases. Persons proposing to landspread soils contaminated with fertilizers or pesticides must obtain a permit from DATCP. This rule clarifies permit application requirements, and describes the documentation required. This rule also authorizes DATCP to reimburse some additional landspreading costs.

### **Costs to Move Utilities, Equipment and Other Fixtures**

This rule authorizes DATCP to reimburse costs for moving utilities, equipment and other fixtures, so that contaminated soils can be removed. Current rules prohibit reimbursement of these costs. Under this rule, claimants may amend their prior reimbursement applications to request reimbursement of costs that are newly eligible for reimbursement.

### **Bidding for Services**

Under current rules, a person seeking DATCP reimbursement of cleanup costs must use a competitive bidding process to contract for cleanup services. This rule modifies the current bidding requirements. Under this rule:

- The applicant must submit the initial bids to DATCP. DATCP must also approve any revised cost estimate.
- The general contractor (consultant) must give the responsible person written notice of any costs that the contractor knows or should know are not eligible for reimbursement.

### **Failure to Implement Cost Controls; Partial Reimbursement**

Under current rules, DATCP must deny a reimbursement claim if the applicant fails to comply with competitive bidding or other cost control measures. This rule authorizes DATCP to reimburse a portion of the *reasonable and necessary* cleanup costs, even if the claimant fails to comply with required cost control measures. Under this rule, DATCP *may* pay up to 75% of the reasonable and necessary costs that would have been eligible for reimbursement, had the claimant complied with all required cost control measures.

### **Advisory Council**

This rule creates an advisory council for the agricultural chemical cleanup program. The agricultural chemical cleanup council will advise DATCP on reimbursement decisions, program funding and rulemaking needs. This advisory council will replace the statutory advisory council that was recently eliminated.

### **Rule Modifications after Public Hearing**

DATCP held a public hearing on April 11, 2000 in Madison and Wisconsin Rapids. DATCP used videoconference technology to conduct the Wisconsin Rapids hearing. DATCP also accepted written comments for the hearing record.

Three people provided oral testimony at the hearings: two testified in favor of the proposed rule and one in favor with some suggested changes. Two people filed written comments: one in favor of the proposed rule and the other in favor with minor changes. A hearing summary is attached as *Appendix A*.

DATCP modified the final draft rule in response to hearing comments. The final draft rule:

- Allows a responsible party to specify the time period to which a reimbursement claim applies. If the responsible party fails to set an ending date, the ending date is the date on which DATCP receives the complete claim.
- Adds a note clarifying contractor insurance requirements.
- Changes a hearing draft provision requiring contractors to notify responsible parties of costs that are not eligible for DATCP reimbursement. The final draft requires notification if the contractor "knows or should know" that the costs are not eligible for reimbursement.

## Response to Rules Clearinghouse Comments

The Legislative Council Rules Clearinghouse made several comments on the hearing draft rule. DATCP incorporated most of the comments in the final draft rule. However, DATCP declined to make some changes suggested by the Rules Clearinghouse. The following are the reasons why the noted Rules Clearinghouse comments were not incorporated into the rule:

- The Rules Clearinghouse questioned DATCP's authority to permit prior claimants to file amended claims for costs that will be newly eligible for reimbursement under this rule. (These include costs to move utilities, equipment and other fixtures.) DATCP believes that it has adequate statutory authority to allow the amended claims.
- The Rules Clearinghouse stated that a copy of the landspreading agreement form referred to in s. ATCP 35.03(3)(g), Wis. Adm. Code should be attached to the rule. DATCP created a note in the appropriate rule section stating where and how a copy of this agreement may be obtained removing the need to attach a copy of the agreement to the rule.
- The Rules Clearinghouse suggested the language in s. ATCP 35.16(2m)(e), Wis. Adm. Code be placed in s. ATCP 35.06, Wis. Adm. Code. DATCP kept the language in s. ATCP 35.16(2m)(e), Wis. Adm. Code because it is more appropriate in this section and provides a clear explanation for responsible persons to follow during the bidding or estimate process rather than an after-the-fact explanation during the application for reimbursement process.
- The Rules Clearinghouse suggested changes to the language of s. ATCP 35.18(1)(a), Wis. Adm. Code were not incorporated because the language as drafted by DATCP repealed the language the Rules Clearinghouse suggested needed changing. The recreated subsection as drafted by DATCP is more concise and appropriate to the present circumstances.
- The Rules Clearinghouse suggested that use of the words "department business day" in s. ATCP 35.03(3)(intro), Wis. Adm. Code was unclear and the term "business day" should be used. This language was not changed because the words are clear and do not need further definition or revision.

## Fiscal Estimate

DATCP reimburses agricultural chemical cleanup costs with funds derived mainly from agrichemical industry license fees. There is currently a surplus in the agricultural chemical cleanup fund. This rule will cause an estimated \$40,000 one-time increase in fund expenditures, and an estimated \$76,000 annual increase in fund expenditures. A copy of the fiscal estimate is attached as *Appendix B*.

Honorable Fred Risser  
Honorable Scott R. Jensen  
July 17, 2000  
Page 5

### **Small Business Analysis**

This rule will increase reimbursement payments to small businesses, and make it easier for small businesses to clean up spills of agricultural chemicals. A small business analysis ("final regulatory flexibility analysis") is attached as *Appendix C*. There were no hearing comments on the small business analysis.

### **Environmental Assessment**

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 the current rules. A final environmental assessment is attached as *Appendix D*.

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

1 The state of Wisconsin department of agriculture, trade and consumer protection proposes an order to  
2 repeal ATCP 35.16(2)(c)4. and 35.22(4)(b); renumber ATCP 35.03(3)(f); amend ATCP 35.01(4),  
3 35.03(3)(intro.), 35.04(3), 35.06(1)(f), 35.06(1)(j)(intro.) and 1., 35.08(5)(b), 35.14(5) and (6),  
4 35.16(1), (2)(a), (2)(c)3., (2m)(d), and (6)(b) and (c), 35.22(1), (2)(a)(intro.) and (4)(a); repeal and  
5 recreate ATCP 35.03(6)(a) and (b), 35.04(4) to (6), 35.06(4), 35.14(30), 35.16(8) and 35.18(1)(a); and  
6 to create ATCP 35.01(17m), 35.03(3)(f) and (g), 35.03(6)(c) to (e), 35.06(1)(a)5., 35.06(5), 35.08(6),  
7 35.16(2m)(e), (6)(d), (7) and (9), and 35.34; relating to the agricultural chemical cleanup program.

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

Statutory Authority: ss. 93.07(1) and 94.73(11), Stats

Statute Interpreted: s. 94.73, Stats.

This rule modifies current rules related to Wisconsin's agricultural chemical cleanup program. This program is designed to clean up spills of agricultural chemicals and minimize environmental contamination. Under this program, the Department of Agriculture, Trade and Consumer Protection (DATCP) may reimburse a portion of the cleanup cost. Cleanups, reimbursement applications and reimbursement payments must comply with DATCP rules under ch. ATCP 35, Wis. Adm. Code.

This rule makes the following changes to the current rules:

- It clarifies landspreading requirements, and expands DATCP's authority to reimburse landspreading costs incurred in a cleanup project.
- It clarifies and expands DATCP's authority to reimburse the cost of removing or relocating utilities and other fixtures.
- It modifies competitive bidding and other cost control procedures.

- It requires consultants to identify, in their project bids to persons needing cleanup services, any contract services and costs that are not eligible for DATCP reimbursement.
- It authorizes DATCP to reimburse a person for some reasonable and necessary cleanup costs, even if the person fails to comply with competitive bidding or other cost control requirements. (Current rules prohibit reimbursement.) This rule authorizes DATCP to pay reimbursement at its discretion, at a reduced rate.
- It creates an advisory council to advise DATCP on the cleanup program.

### **Landspreading**

Current rules authorize landspreading of soils contaminated with fertilizers or pesticides if those fertilizers or pesticides can be legally applied to land. Landspreading reduces the concentration of the fertilizer or pesticide, and provides an economical and potentially useful disposal option in many cases. Persons proposing to landspread soils contaminated with fertilizers or pesticides must obtain a permit from DATCP. This rule clarifies permit application requirements, and describes the documentation required. This rule also authorizes DATCP to reimburse some additional landspreading costs.

### **Costs to Move Utilities, Equipment and Other Fixtures**

This rule authorizes DATCP to reimburse costs for moving utilities, equipment and other fixtures, so that contaminated soils can be removed. Current rules prevent reimbursement of these costs. Under this rule, claimants may amend their prior reimbursement applications to request reimbursement of costs that are newly eligible for reimbursement.

### **Bidding for Services**

Under current rules, a person seeking DATCP reimbursement of cleanup costs must use a competitive bidding process to contract for cleanup services. This rule modifies the current bidding requirements. Under this rule:

- The applicant must submit the initial bids to DATCP. DATCP must also approve any revised cost estimate.
- The general contractor (consultant) must give the responsible person written notice of any cleanup costs that are ineligible for reimbursement.

## Failure to Implement Cost Controls; Partial Reimbursement

Under current rules, DATCP must deny a reimbursement claim if the applicant fails to comply with competitive bidding and other cost control measures. This rule authorizes DATCP to reimburse a portion of the reasonable and necessary cleanup costs, even if the claimant fails to comply with cost control measures. Under this rule, DATCP *may* pay up to 75% of the reasonable and necessary costs that would have been eligible for reimbursement, had the claimant complied with all required cost control measures.

## Advisory Council

This rule creates an advisory council for the agricultural chemical cleanup program. The agricultural chemical cleanup council will advise DATCP on reimbursement decisions, program funding and rulemaking needs. This advisory council will replace a statutory advisory council that was recently eliminated.

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1           **SECTION 1.** ATCP 35.01(4) is amended to read:

2           ATCP 35.01(4) "Agricultural chemical cleanup council" means the council ~~created under s.~~  
3 ~~15.137(4), Stats.~~ appointed under s. ATCP 35.34.

4           **SECTION 2.** ATCP 35.01(17m) is created to read:

5           ATCP 35.01(17m) "Fixture" means any of the following:

6           (a) Railroad tracks, ties and ballast.

7           (b) Culverts.

8           (c) Fences.

9           (d) Gas mains, pipelines and related structures.

10          (e) Electric poles, power lines and related structures.

11          (f) Water and sewer mains and pipelines.

12          (g) Facilities for the transmission of telecommunications or television services, including  
13 wires, optics, cables, poles and towers.

14          **SECTION 3.** ATCP 35.03(3)(intro.) is amended to read:

1 ATCP 35.03(3) PERMIT APPLICATION. A person applying for a landspreading permit under  
2 sub. (1) or (2)(a) shall apply on a form prescribed by the department. The person shall submit the  
3 application at least 5 department business days before any landspreading occurs. The application shall  
4 include all of the following:

5 SECTION 4. ATCP 35.03(3)(f) is renumbered ATCP 35.03(3)(h).

6 SECTION 5. ATCP 35.03(f) and (g) are created to read:

7 ATCP 35.03(3)(f) Any proposed tillage for which the applicant may request reimbursement.

8 (g) A landspreading agreement form, provided by the department and completed by the  
9 applicant. The completed form shall document all the following:

10 1. That the owner of the proposed landspreading site has consented to the proposed  
11 landspreading.

12 2. That the applicant has disclosed in writing, to the owner of the proposed landspreading site,  
13 the kinds and anticipated amounts of agricultural chemicals that will be landspread on the site. The  
14 disclosure shall state that persons applying agricultural chemicals to the site must, by law, take account  
15 of the pesticides applied by landspreading.

16 3. That the owner of the proposed landspreading site has agreed to provide a copy of the  
17 disclosure under subd. 2 to any other person who may grow crops on that site within 18 months after  
18 the landspreading is completed.

19 **NOTE:** To obtain a copy of the landspreading agreement form, contact the Department of  
20 Agriculture, Trade and Consumer Protection, Agricultural Resource Management  
21 Division, P.O. Box 8911, Madison, Wisconsin 53708.  
22

23 SECTION 6. ATCP 35.03(6)(a) and (b) are repealed and recreated to read:

24 ATCP 35.03(6)(a) The dates and fields on which the landspreading occurred.

25 (b) The rate at which the landspread materials were applied to each field.

26 SECTION 7. ATCP 35.03(6)(c) to (e) are created to read:

1           ATCP 35.03(6)(c) Written confirmation that the responsible person notified the owner of the  
2   landspreading site of the actual kinds and amounts of agricultural chemicals that were applied to the  
3   site as a result of the landspreading.

4           (d) A description of any problems incurred in connection with the landspreading.

5           (e) A description of the tillage performed in connection with the landspreading.

6           **SECTION 8.** ATCP 35.04(3) is amended to read:

7           ATCP 35.04(3) Costs to excavate contaminated soils and other contaminated materials,  
8   including backfilling and grading to restore the contours or drainage characteristics of land altered by  
9   the corrective action. ~~This paragraph does not authorize the reimbursement of costs incurred for the~~  
10 ~~removal of buildings or other fixtures, except paving materials that are necessarily removed in the~~  
11 ~~course of excavation.~~

12           **SECTION 9.** ATCP 35.04(4) to (6) are repealed and recreated to read:

13           ATCP 35.04(4) Costs to collect, handle, transport, treat or dispose of contaminated soils,  
14   groundwater or other contaminated materials. If the responsible person disposes of contaminated soils  
15   by means of landspreading under s. ATCP 35.03, the department may reimburse the following  
16   additional costs related to that landspreading:

17           (a) Reasonable costs for tillage that is in excess of normal tillage and that is needed to reduce  
18   soil compaction caused by the landspreading. The department may not reimburse costs for more than 2  
19   tillage passes.

20           (b) Costs for pre-plant nitrogen testing of the landspreading site to determine appropriate  
21   nitrogen credits for landspread soil that includes a significant nitrogen component. The department  
22   may reimburse pre-plant nitrogen testing only if that testing uses sampling and analytical methods that  
23   are scientifically recognized and standard within the agronomic community.

1 (c) Locally reasonable rent, not to exceed rent for one growing season, for cropland taken out  
2 of production for any of the following reasons:

- 3 1. The necessary stockpiling of soil, pending landspreading.
- 4 2. Crop harvesting restrictions in the landspreading permit.

5 (d) Costs to compensate a landowner for crop loss or yield reduction that occurs within one  
6 year after the landspreading if the landowner demonstrates, to a reasonable degree of certainty, that the  
7 crop loss or yield reduction was caused by one of the following:

- 8 1. Agricultural chemicals that were present in the landspread soil, but not known to be present  
9 when the landspreading occurred.
- 10 2. Planting delays caused by the landspreading.
- 11 3. Soil compaction caused by landspreading, notwithstanding reasonable tillage of the  
12 landspreading site.

13 (e) Costs to compensate a landspreading site owner for access, scheduling and like costs  
14 related to landspreading, if that compensation is necessary to obtain access to a landspreading site. The  
15 department may reimburse costs that are locally reasonable, and do not exceed \$0.50 per cubic yard of  
16 landspread soil. This paragraph does not apply to landspreading on a site owned by the responsible  
17 person.

18 (f) Costs to remove rocks and other debris from landspread soils. The department may  
19 reimburse costs to remove rocks and other debris before or after the landspreading occurs, but not both.  
20 The department may not reimburse costs to remove rocks or debris more than 90 days after  
21 landspreading is completed. If a responsible person obtains competitive bids to screen the soil before it  
22 is landspread, the responsible person may not substitute the costs for post-landspreading debris  
23 removal without obtaining competitive bids under s. ATCP 35.16.

1 (5) Costs for any of the following corrective measures that the department requires, or pre-  
2 approves in writing, if the department finds that those measures are less expensive than the available  
3 alternatives:

4 (a) Removal and disposal of containment structures that comply with s. ATCP 29.45, 32.03,  
5 32.04, 33.03 or 33.04 at the time of the corrective action. The department may not reimburse costs for  
6 the removal or disposal of a containment structure constructed after January 1, 1998 unless the  
7 responsible party proves to the department, by credible laboratory tests, that the construction site was  
8 free of agricultural chemical contamination when the structure was constructed. The cost to remove a  
9 containment structure may include its depreciated value, calculated as the original construction cost  
10 less the depreciation claimed to date for tax purposes.

11 (b) Installation of concrete or asphalt as an engineered barrier to limit infiltration of existing  
12 contaminated materials, provided the responsible person has agreed in writing to maintain the barrier at  
13 that person's expense until the contamination is removed or has degraded.

14 (6) Costs for any of the corrective measures in pars. (a) to (c) that the department requires, or  
15 pre-approves in writing, if the department finds that those measures are less expensive than the  
16 available alternatives. The department may not reimburse costs for any of the following corrective  
17 measures that pertain to any surface, structure, equipment or fixture constructed after January 1, 2001  
18 unless the responsible party proves to the department, by credible laboratory tests, that the construction  
19 site was free of agricultural chemical contamination when that surface, structure, equipment or fixture  
20 was constructed:

21 (a) Removal and disposal of concrete or asphalt parking areas or roadways, and associated  
22 curbs and sidewalks. The department may not reimburse costs incurred for the replacement of these  
23 surfaces, curbs or sidewalks.

1 (b) Temporary removal and reinstallation of equipment or structures, if the equipment or  
2 structures are returned to their original use and approximate original location.

3 (c) The following corrective measures related to fixtures that are in good condition and  
4 operating adequately when the corrective measure occurs:

5 1. Removal and reinstallation at approximately the same location.

6 2. Temporary or permanent relocation.

7 3. Removal and replacement with a new fixture of the same size and quality, including any  
8 upgrade required by law.

9 4. Protection during a corrective action, through shoring or other methods.

10 **SECTION 10.** ATCP 35.06(1)(a)5. is created to read:

11 ATCP 35.06(1)(a)5. The last date for which an eligible corrective action cost paid by the  
12 responsible person is being submitted for reimbursement. If the last date is not specified on the  
13 application form, the last date will be the day the department receives the application.

14 **SECTION 11.** ATCP 35.06(1)(f) is amended to read:

15 ATCP 35.06(1)(f) An accurate legal description of the land parcel on which the discharge site  
16 is located. If the agricultural chemical was discharged while being transported from a site owned or  
17 controlled by a person who owned or controlled the agricultural chemical at the time of the discharge,  
18 the application shall also include an accurate legal description of the land parcel on which that site is  
19 located. A parcel description under this paragraph shall correspond to the ~~most recent~~ parcel  
20 description filed that was on record, at the time the discharge occurred or was discovered, with the  
21 register of deeds in the county where the land parcel is located.

22 **SECTION 12.** ATCP 35.06(1)(j)(intro.) and 1. are amended to read:

23 ATCP 35.06(1)(j)(intro.) ~~For~~ All of the following, for each cost item under par. (g), a  
24 summary of all the following:

1 1. Every bid required under s. ATCP 35.16(2)(a), including every accepted and rejected bid.

2 ~~For each~~ Each bid, ~~the summary~~ shall indicate the name of the contractor and the amount of the bid.

3 **SECTION 13.** ATCP 35.06(4) is repealed and recreated to read:

4 ATCP 35.06(4) FAILURE TO SEEK REIMBURSEMENT IN PRIOR APPLICATION. A  
5 responsible person may not apply for reimbursement of an eligible corrective action cost which the  
6 responsible person paid during or before the period for which a prior reimbursement claim has been  
7 submitted for that discharge site, unless the corrective action cost was not eligible for reimbursement  
8 under this chapter at the time of any prior reimbursement application for that discharge site.

9 **SECTION 14.** ATCP 35.06(5) is created to read:

10 ATCP 35.06(5) RETROACTIVE ELIGIBILITY. Notwithstanding s. ATCP 35.10(1), the  
11 department may reimburse corrective action costs under s. ATCP 35.04(5) or (6) that are related to any  
12 claim filed under this chapter prior to **[revisor inserts effective date of ss. ATCP 35.04(5) and (6)]** if  
13 all the following apply:

14 (a) The responsible person files by **[revisor inserts date that is one year after the effective**  
15 **date of ss. ATCP 35.04(5) and (6)]** an amended application for reimbursement of those costs.

16 (b) The amended application complies with other applicable requirements under this chapter,  
17 and includes all the following information:

- 18 1. The claim number of any prior application for reimbursement of the same costs.  
19 2. Invoices, cancelled checks or other documentation substantiating the corrective costs under  
20 s. ATCP 35.04(5) or (6).

21 **SECTION 15.** ATCP 35.08(5)(b) is amended to read:

22 ATCP 35.08(5)(b) If the department finds that any portion of an applicant's reimbursement  
23 claim is ineligible, and that the applicant knew or should have known that it was ineligible, the  
24 department shall deduct twice the amount of the ineligible claim from the applicant's total claim.

1 Deductions under this paragraph may not exceed the total amount of the applicant's claim. ~~The~~  
2 ~~department may not make~~ Before making a deduction under this paragraph ~~from a reimbursement~~  
3 ~~claim awarded before July 1, 1999 unless,~~ the department may consult with the agricultural chemical  
4 cleanup council ~~adopts a motion approving the deduction~~ appointed under s. ATCP 35.31.

5 **SECTION 16.** ATCP 35.08(6) is created to read:

6 ATCP 35.08(6) FAILURE TO SUBMIT INFORMATION. If an applicant for reimbursement  
7 fails to provide an adequate report of the corrective measures taken or corrective action costs incurred,  
8 or fails to provide any other relevant information required by the department, the department may  
9 disapprove all or part of the application for reimbursement.

10 **SECTION 17.** ATCP 35.14(5) and (6) are amended to read:

11 ATCP 35.14(5) Costs to construct, repair, replace, improve, relocate or demolish any building  
12 structure, equipment or fixture, except as provided under s. ATCP 35.04(5) and (6).

13 (6) Loss or impairment of property values or other assets, except as provided under s. ATCP  
14 35.04(5) and (6).

15 **SECTION 18.** ATCP 35.14(30) is repealed and recreated to read:

16 ATCP 35.14(30) The following costs related to landspreading under s. ATCP 35.03:

17 (a) Compensation for crop damage, except as provided in s. ATCP 35.04(4)(d).

18 (b) Residue sampling for nutrients or pesticides, except as provided in s. ATCP 35.04(4)(b).

19 (c) Land rental or access charges, except as provided in s. ATCP 35.04(4)(c) and (e).

20 **SECTION 19.** ATCP 35.16(1) is amended to read:

21 ATCP 35.16(1) GENERAL REQUIREMENT. ~~If a responsible person hires a contractor to provide a~~  
22 ~~contract service~~ Except as provided in sub. (8), the department may not reimburse ~~the~~ a responsible  
23 person for the cost of ~~that~~ a contract service unless the responsible person contracts that service  
24 according to ~~this section~~ subs. (2) to (7).

1           **SECTION 20.** ATCP 35.16(2)(a) is amended to read:

2           ATCP 35.16(2) BIDS AND ESTIMATES REQUIRED. (a) The department may not reimburse a  
3 responsible person for contract services performed at a discharge site unless the responsible person  
4 selects the contractor to provide services at that site on the basis of at least 3 competitive bids. The  
5 responsible person shall provide the department with a copy of the accepted bid before authorizing the  
6 contractor to proceed. ~~The department may require a responsible person to obtain additional bids if the~~  
7 ~~department finds that existing bids are unreasonable.~~

8           **SECTION 21.** ATCP 35.16(2)(c)3. is amended to read:

9           ATCP 35.16(2)(c)3. The contractor provides the responsible person and the department with a  
10 cost estimate for the additional services, and obtains the approval of the responsible person and the  
11 department, before performing those services. ~~The department may require the responsible person to~~  
12 ~~obtain competitive bids for the additional services if the department finds that the cost estimate is~~  
13 ~~unreasonable.~~

14           **SECTION 22.** ATCP 35.16(2)(c)4. is repealed.

15           **SECTION 23.** ATCP 35.16(2m)(d) is amended to read:

16           ATCP 35.16(2m)(d) Every certification and disclosure required of the contractor under ~~sub.~~  
17 ~~subs. (6) and (7).~~

18           **SECTION 24.** ATCP 35.16(2m)(e) is created to read:

19           ATCP 35.16(2m)(e) The basis for attributing project costs to corrective measures under this  
20 chapter, if the project is also designed to investigate or repair environmental contamination involving  
21 substances that are not agricultural chemicals. The attribution shall take into account the reasons for  
22 which the overall project was initiated, and the end goals of the project.

23           **SECTION 25.** ATCP 35.16(6)(b) and (c) are amended to read:

1 ATCP 35.16(6)(b) If a contractor ~~bids~~ submits a bid or cost estimate under sub. (2) to provide  
2 ~~drilling~~, engineering, hydrogeologic, field technician or general contractor services, the contractor's bid  
3 shall certify that the contractor has and will maintain insurance coverage for errors and omissions,  
4 including pollution impairment liability coverage of not less than \$1,000,000 per claim, for not less  
5 than \$1,000,000 in annual aggregate claims, with a deductible of not more than \$100,000 per claim.

6 NOTE: If a general contractor solicits other contractors on behalf of a responsible person and  
7 the responsible person contracts directly with or directly compensates the other  
8 contractors, the general contractor is subject to the insurance provisions contained in  
9 this paragraph. A contractor who subcontracts for corrective action services and  
10 directly compensates the subcontractor is not acting as a general contractor with regard  
11 to that subcontracted service.  
12

13 (c) If a contractor ~~bids~~ submits a bid or cost estimate under sub. (2) to provide laboratory  
14 services, the contractor's bid shall certify that the contractor has and will maintain insurance coverage  
15 for errors and omissions (professional liability) of not less than \$1,000,000 per claim, for not less than  
16 \$1,000,000 in annual aggregate claims, with a deductible of not more than \$100,000 per claim.

17 **SECTION 26.** ATCP 35.16(6)(d) is created to read:

18 ATCP 35.16(6)(d) If a contractor submits a bid or cost estimate under sub. (2) to provide  
19 drilling services or soil probing, the contractor's bid shall certify that the contractor has and will  
20 maintain insurance coverage for pollution impairment liability coverage of not less than \$1,000,000 per  
21 claim, for not less than \$1,000,000 in annual aggregate claims, with a deductible of not more than  
22 \$100,000 per claim.

23 **SECTION 27.** ATCP 35.16(7) is created to read:

24 ATCP 35.16(7) CONTRACTOR DISCLOSURE. If a contractor's bid or cost estimate under sub. (2)  
25 includes any contract service or cost a contractor knows or should know is not eligible for  
26 reimbursement under this chapter, the bid or cost estimate shall clearly identify that service or cost and  
27 shall clearly disclose that it is not eligible for reimbursement by the department.

1           **SECTION 28.** ATCP 35.16(8) is repealed and recreated to read:

2           ATCP 35.16(8) EXEMPTIONS. The department may reimburse necessary and reasonable  
3 contract service costs incurred by a responsible person who fails to comply with subs. (2) to (7) if any  
4 of the following applies:

5           (a) The responsible person demonstrates that compliance with subs. (2) to (7) is not reasonably  
6 possible.

7           (b) The contract service costs charged by the contractor do not exceed \$3,000.

8           (c) The department pays reimbursement at a rate that is no more than 75% of the rate normally  
9 allowed under s. ATCP 35.22.

10          **SECTION 29.** ATCP 35.16(9) is created to read:

11          ATCP 35.16(9) DISAPPROVED BIDS OR ESTIMATES. If the department finds that a bid or cost  
12 estimate under sub. (2) is unreasonable, or that all or part of the contract service is unnecessary, the  
13 department may do any of the following:

14          (a) Disapprove the bid or estimate.

15          (b) Require the responsible person to obtain up to 3 additional bids or estimates. Additional  
16 bids or estimates, if any, shall comply with this section.

17          (c) Determine that the corrective action cost eligible for reimbursement is less than the amount  
18 bid or estimated.

19          **SECTION 30.** ATCP 35.18(1) (a) is repealed and recreated to read:

20          ATCP 35.18(1) WORKPLAN REQUIRED. (a) Except as provided in par. (b) or (c), the  
21 department may not reimburse a responsible person for eligible corrective action costs exceeding  
22 \$7,500 unless the department approves a written workplan for the corrective action before the  
23 responsible person takes the corrective action.

24          **SECTION 31.** ATCP 35.22(1) is amended to read:

1           ATCP 35.22(1) GENERAL REIMBURSEMENT FORMULA. Except as provided in subs. (2) or (4),  
2 the department shall reimburse a responsible person for each discharge site an amount equal to 80% of  
3 the eligible corrective action costs that are greater than \$3,000 and less than \$400,000. To this amount  
4 the department shall add interest costs under s. ATCP 35.25. The total amount reimbursed under this  
5 subsection, including interest costs under s. ATCP 35.25, may not exceed \$317,600.

6           **SECTION 32.** ATCP 35.22(2)(a)(intro.) is amended to read:

7           (2)(a)(intro.) Except as provided in sub. (4), the department shall reimburse a responsible  
8 person for each discharge site an amount equal to 80% of the eligible corrective action costs that are  
9 greater than \$7,500 and less than \$400,000 if any of the following applies at the time the discharge  
10 occurs or is discovered:

11           **SECTION 33.** ATCP 35.22(4)(a) is amended to read:

12           ATCP 35.22(4)(a) The department may not reimburse corrective action costs that exceed  
13 \$100,000 for any discharge unless the department, after determining that the costs are reasonable and  
14 necessary based on the nature, size and complexity of the corrective action, approves the additional  
15 costs before the responsible person incurs them. The department may specify conditions and  
16 limitations on its approval. An approval under s. ATCP 35.16(2)(c)3. constitutes an approval under  
17 this paragraph.

18           **SECTION 34.** ATCP 35.22(4)(b) is repealed.

19           **SECTION 35.** ATCP 35.34 is created to read:

20           **ATCP 35.34 Agricultural chemical cleanup council.** (1) CREATION. The department shall  
21 appoint an advisory council to advise the department on matters related to the administration of this  
22 chapter. The advisory council shall be called the agricultural chemical cleanup council.

23           (2) MEMBERS. The agricultural chemical cleanup council shall consist of the following  
24 members, appointed for 2-year terms:

- 1 (a) Two farmers.  
2 (b) Two pesticide dealers or commercial applicators.  
3 (c) One environmental consultant.  
4 (d) One agricultural chemical manufacturer or wholesaler.

5 (3) MEETINGS. The agricultural chemical cleanup council shall meet, at the call of the  
6 department, to advise the department on any of the following matters on which the department seeks  
7 advice:

- 8 (a) Rules proposed under s. 94.73, Stats.  
9 (b) Fees and surcharges to fund reimbursement of corrective action costs.  
10 (c) Proposed department actions under s. ATCP 35.08(5)(b) and (c).  
11 (d) Other matters related to the administration of this rule.

12 **EFFECTIVE DATE.** The rules contained in this order shall take effect on the first day of the  
13 month following publication in the Wisconsin administrative register, as provided under s.  
14 227.22(2)(intro.), Stats.

15 Dated this \_\_\_\_\_ day of \_\_\_\_\_, 2000.

16  
17 STATE OF WISCONSIN  
18 DEPARTMENT OF AGRICULTURE,  
19 TRADE AND CONSUMER PROTECTION  
20

21  
22 By \_\_\_\_\_  
23 Ben Brancel, Secretary  
24

**APPENDIX A**

## Summary of Testimony

### Proposed Amendments to Chapter ATCP 35, Wis. Adm. Code

#### Introduction

The Wisconsin Department of Agriculture, Trade and Consumer Protection (department) held a public hearing in Madison and simultaneously in Wisconsin Rapids via videoconference technology, to record oral testimony on the proposed changes to Chapter ATCP 35, Wis. Adm. Code. The public hearing started with a ½ hour presentation during which department staff explained the proposed changes and answered questions. Information materials available at the hearing included the proposed hearing draft dated February 28, 2000.

A total of nine people attended the public hearings. Three provided oral testimony. The other six attendees completed appearance cards to register their opinion of the proposed rule changes, but did not provide oral testimony. Two people submitted written testimony as part of the hearing process.

**Table 1. Public Participation**

Position	Public Hearings (# participants)	Written Testimony (# participants)	All Testimony (# participants)
Support	3	1	4
Support with Minor Modifications	1	1	2
Oppose	0	0	0
Neither/Other	5	0	5
Totals	9	2	11

#### Summary of Oral Testimony

##### Madison hearing:

1. John Manske: Mr. Manske was in support of the proposed rule changes.
2. Betsy Ahner: Ms. Ahner was in support of the proposed rule changes.

##### Wisconsin Rapids hearing:

1. Mark Dawson: Mr. Dawson was in support of the proposed rules changes. Mr. Dawson had two additional recommended changes to the rule. Mr. Dawson recommended that the cost for building foundation removal and disposal be a reimbursable cost. This could encourage responsible parties to remove additional

contaminated soil beneath these structures, which could reduce the long-term groundwater monitoring costs and the need for an engineered barrier. His second concern related to reimbursement claims. Mr. Dawson would like the rule to allow the responsible party to establish the reimbursement claim period cutoff date for each reimbursement claim submitted. He feels that this would eliminate confusion in the current rule relating to the reimbursement claim cutoff date.

## Summary of Written Testimony

Two people submitted written testimony on the proposed amendments to Chapter ATCP 35, Wis. Adm. Code.

1. David Crass: Mr. Crass provided comments on behalf of Coop Country Partners (CCP) in his role as their legal counsel. CCP wrote to express its support for all of the proposed revisions to Chapter ATCP 35, Wis. Adm. Code. In particular, they support the revision proposed to the rule that would provide partial reimbursement to responsible parties who fail to comply with the cost-control measures in Chapter ATCP 35, Wis. Adm. Code. They believe that this code revision will empower department staff to reach an equitable result when cost-effective cleanups occur, which are not in strict conformance with the provisions of Chapter ATCP 35, Wis. Adm. Code.
2. Mark Tusler: Mr. Tusler had two main concerns related to Chapter ATCP 35, Wis. Adm. Code. His first concern was related to general contractor insurance. He believes that the definition of a general contractor applies to contractors that are often hired to perform soil remediations (excavation firms). The excavation firms typically hire subcontractors, therefore, he believes that the excavation firm meets the definition of a general contractor as defined in the rule and would be required to carry professional liability insurance. The intent of the rule is not to unfairly burden excavation firms with these insurance requirements. He believes that the code language should be revised and that the term "general contractor" should be replaced by "consultant".

Mr. Tusler's second concern was related to the proposed revisions to s. ATCP 35.16(7), Wis. Adm. Code which would require contractors to disclose in their bid or cost estimate costs that are not eligible for reimbursement by the department. The proposed code revisions would require the contractor to know, before hand, what the department will determine to be eligible at the time the claim is reviewed. Contractors can identify ineligible costs that are clearly ineligible items identified in s. ATCP 35.14, Wis. Adm. Code. He suggested the proposed language be revised so that contractors would only be required to identify to the responsible party, those items specifically identified as ineligible under s. ATCP 35.14, Wis. Adm. Code.

**APPENDIX B**

FISCAL ESTIMATE

DOA-2048 (R 10/94)

ORIGINAL  UPDATED  
 CORRECTED  SUPPLEMENTAL

LRB or Bill No. / Adm. Rule No.  
 ATCP 35

Amendment No. (If Applicable)

Subject

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

Increase Existing Appropriation  Increase Existing Revenues

Decrease Existing Appropriation  Decrease Existing Revenues

Decrease Costs

Revenues

Create New Appropriation

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  
 20.115(7)(w)

Assumptions Used in Arriving at Fiscal Estimate

The Department of Agriculture, Trade and Consumer Protection anticipates a cost increase as a result of the proposed rules which can be absorbed. Most of the costs result from expanding the eligibility of certain remedial activities at sites conducting cleanups of agricultural chemicals. As a result, the following is a listing of items that will have an annual fiscal impact to the ACCP fund, an estimated amount and a brief explanation of how that estimate was calculated. The total annual increase is estimated to be \$76,000.

- Facility equipment moving: \$12,000 based upon 5 sites/year at \$3,000/site at 80% reimbursement.
- Fixture or structure removal and reinstallation: \$20,000 based upon 5 sites/year at \$5,000/site at 80% reimbursement.
- Landspreading incentive payment: \$12,000 based upon 30,000 yards of soil spread per year at \$.50 per yard at 80% reimbursement.
- The rule proposes to reimburse a portion of all reasonable and necessary corrective action costs even if they were incurred without following all of the cost control provisions of the rules. This is expected to increase the annual expenditures by about \$12,000 based upon \$30,000 denied annually because of not following cost control provisions. The department might pay 50% of those costs eligible of which they would get reimbursed 80%.

A one time impact to the ACCP reimbursement fund will also occur based upon allowing past claimants to submit old costs for the first three items above to the fund after the rule becomes effective. This total amount is estimated to be \$40,000 and is based upon sites where we are aware of fixtures or equipment being moved in the past.

Long - Range Fiscal Implications

None

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

Authorized Signature/Telephone No.

Date

DATCP  
 Duane Klein

608/224-4519

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

2/24/00

**FISCAL ESTIMATE WORKSHEET**

1999 SESSION

Detailed Estimate of Annual Fiscal Effect  
DOA-2047 (R10/94)

ORIGINAL  UPDATED  
 CORRECTED  SUPPLEMENTAL

LRB or Bill No/Adm.Rule No.  
ATCP 35

Amendment No.

Subject

Agricultural Chemical Cleanup Program

I. One-time Cost or Revenue Impacts for State and/or Local Government (do not include in annualized fiscal effect):  
40,000

II. Annualized Cost:

Annualized Fiscal Impact on State funds from:

A. State Costs by Category	Annualized Fiscal Impact on State funds from:	
	Increased Costs	Decreased Costs
State Operations - Salaries and Fringes	\$	\$ -
(FTE Position Changes)	( FTE)	(- FTE)
State Operations - Other Costs		-
Local Assistance		-
Aids to Individuals or Organizations	76,000	-
<b>TOTAL State Costs by Category</b>	<b>\$</b>	<b>\$ -</b>
B. State Costs by Source of Funds	Increased Costs	Decreased Costs
GPR	\$	\$ -
FED		-
PRO/PRS		-
SEG/SEG-S	76,000	-
III. State Revenues	Increased Rev.	Decreased Rev.
<small>Complete this only when proposal will increase or decrease state revenues (e.g., tax increase, decrease in license fee, etc.)</small>		
GPR Taxes	\$	\$ -
GPR Earned		-
FED		-
PRO/PRS		-
SEG/SEG-S		-
<b>TOTAL State Revenues</b>	<b>\$</b>	<b>\$ -</b>

**NET ANNUALIZED FISCAL IMPACT**

	<u>STATE</u>	<u>LOCAL</u>
NET CHANGE IN COSTS	\$ 76,000	\$ 0.00
NET CHANGE IN REVENUES	\$ 0.00	\$ 0.00

Agency Prepared by: (Name & Phone No.) DATCP Duane Klein (608/224-4519)	Authorized Signature/Telephone No. <i>Barbara Knapp</i> Barbara Knapp (608) 224-4746	Date 2/24/00
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**APPENDIX C**

**FINAL REGULATORY FLEXIBILITY ANALYSIS**  
for revisions to Chapter ATCP 35, Wis. Adm. Code

The proposed changes to 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 Income

The proposed changes to Chapter ATCP 35, Wis. Adm. Code, will decrease business costs for cleaning up spills. The proposed changes to Chapter ATCP 35, Wis. Adm. Code include:

- Expanding reimbursement eligibility to include costs that have been ineligible in the past. Additional costs proposed to be eligible include removing and replacing fixtures (railroad tracks, ties and ballast; culverts; fences; and utility equipment).
- Expanding reimbursement eligibility to include a portion of costs that a responsible person incurred without complying with the cost control provisions of the rule. The current rule language denies all of these costs whether or not they were reasonable or necessary corrective actions.
- Expanding reimbursement eligibility to include payment to landowners for use of their land to landspread the soil containing agricultural chemicals.
- Modifying the contracting language to require contractors to be more accountability to the responsible persons and the agency.

Alternative Options Considered

Most of the fiscal impacts for small businesses contained in proposed revisions to Chapter ATCP 35, Wis. Adm. Code, are costs savings. Maintaining the status quo was the only other alternative option. That option was considered, but rejected since it was not as advantageous to small businesses as the proposed revisions to the rule.

Dated this 10th day of May, 2000.

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 35

**Clearinghouse Rule Number:** 00 - 058

**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 and 94.73(11), Stats.
- B. Statutes(s) being interpreted by proposed rule: Section 94.73, Stats.

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

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 issues that have arisen as the program has developed.

**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:

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:

The rule revisions will make it easier for regulated parties to comply with the rules by making them more understandable for the regulated public, the ACCP Council 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.**

Some changes to chapter ATCP 35, Wis. Adm. Code, are intended to ease the remediation and reimbursement processes, both for applicants and the agency. The most significant assumption in this rulemaking is that DATCP approval of all cost estimates will provide greater accountability of consultants in providing accurate estimates and will assure all parties have anticipated these costs before they are incurred.

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

Under the current rules, parties conducting cleanups submit cost estimates to the department if they expect the costs for the next phase of work to exceed \$1,500. Under the proposed rule changes all cost estimates would be submitted for department approval.

**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)**

The existing rule language exemptions would still apply to the above procedure change. The exemptions apply when compliance is not reasonably possible (e.g. emergency cleanup of agricultural spills) or when the costs for an individual contractor will not exceed \$3,000.

**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 will make the rule requirements more understandable, the proposed rule will make both voluntary compliance and agency enforcement of the rules easier. In addition, the changes expand eligibility of certain costs which will impact individuals conducting cleanups. The department expects clarifications in this rule will also improve the agency's 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 in development of these rules. Membership of the committee is available from the department.

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

Chapter ATCP 35, Wis. Adm. Code, is 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, *Interpretations and Clarifications of ATCP 35*, Wis. Adm. Code. This publication contains the rule language and additional information explaining compliance options and is used to assist persons conducting cleanups under the provisions of chapter ATCP 35, Wis. Adm. Code.

**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 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, 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 revision will result in additional reimbursement of expenses incurred by persons that clean up agricultural chemical discharges. Rule changes expand reimbursement eligibility to include removal and reinstalling certain fixtures and structures. They also propose to reimburse a portion of costs that were incurred without following the cost control provisions of the rule.

**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.**

There are no adverse environmental impacts anticipated.

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.**

If the existing rule is not revised as proposed in these rule revisions, inefficiencies discovered in the rule as the program has developed would continue.

- 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.

- 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 should not result in new physical, biological or socio-economic effects. The rule furthers the intended environmental 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.

- 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.**

No 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 rule requires that all cost estimates for corrective actions be approved by the department in advance of the work being performed.

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

The rule is not proposing reduced regulations, but clarifying and expediting existing regulations.

- 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.

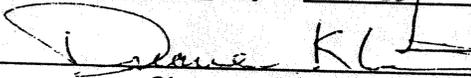
- I. **Other: Identify and describe (or cross-reference) other relevant factors which relate to the effects of the proposed rule on the quality of the human environment (e.g., foreclose future options, socio-cultural impacts, cumulative impacts to affected entities, visual impacts, and irreversible commitments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

There are no other anticipated effects from this rulemaking.

## CONCLUSION

This preliminary assessment finds that promulgation of the revisions to ch. ATCP 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 10<sup>th</sup> day of May, 2000.

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 10<sup>th</sup> day of May, 2000.

By   
Signature of Administrator  
Agricultural Resource Management Division