

Clearinghouse Rule 06-136

DATCP Docket No. 04-R-01
Rules Clearinghouse No. _____

Proposed Hearing Draft
October 24, 2006

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

- 1 The state of Wisconsin department of agriculture, trade and consumer protection
2 proposes the following order to amend ch. ATCP 30 subch. VI(title), ATCP 30.22(4)(a),
3 (5)(intro.), (a)3. and 4., (b)1. and (c), (6)(a)(intro.), (c)(intro.), (c)3. and (c)3.(note), and
4 (7)(a)(intro.); to repeal and recreate ATCP 30.22(3); and to create ATCP 30.22(1)(am),
5 (f) and (g), relating to soil fumigant pesticides containing chloropicrin or metam sodium.

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

This rule regulates the use of soil fumigant pesticides containing chloropicrin or metam sodium active ingredients. This rule does all of the following:

- Creates new rules to regulate the use of chloropicrin soil fumigants.
- Modifies current rules regulating the use of metam sodium soil fumigants . Among other things, this rule relaxes current post-application monitoring requirements and current setback requirements for “tarpred” applications.

Statutory Authority

Statutory authority: ss. 93.07(1), and 94.69(1)(i), Stats.
Statutes interpreted: s. 94.69(1)(i), Stats.

The Wisconsin Department of Agriculture, Trade and Consumer Protection (“DATCP”) has general authority to adopt rules interpreting statutes under its jurisdiction (*see* s. 93.07(1), Stats.). DATCP is specifically authorized to adopt rules under s. 94.69(1)(i), Stats., to regulate the use of pesticides.

Background

DATCP administers Wisconsin's pesticide laws. Chloropicrin and metam sodium are soil fumigant pesticides, used mainly by potato growers to control nematodes. Under current DATCP rules, persons using *metam sodium* soil fumigants must take certain steps to prevent human exposure to volatilized fumigant (there are no equivalent rules for *chloropicrin* applications). Under current *metam sodium* rules:

- Applicators must be properly certified.
- No agricultural application may be made within ¼ mile of a hospital, nursing home, jail or prison, or within ¼ mile of a school that will be in session during the application or within 48 hours after the application.
- Agricultural application sites must be covered by a tarp or other impermeable barrier, except when the soil fumigant is injected into the soil or applied by specified chemigation procedures. Application by knife rig injection is prohibited when soil temperatures are too high.
- Applicators must pre-notify county public health authorities, and neighbors within ¼ mile, prior to any “chemigation” application. “Chemigation” applications must comply with specific rule standards.
- Applicators must monitor application sites after the application, and must take appropriate steps to prevent pesticide drift. Applicators must notify Wisconsin emergency management if it appears that pesticide drift may contact residences or public buildings.
- Applicators must keep specified records related to metam sodium applications.

Rule Contents

This rule regulates *chloropicrin* applications in the same way that current rules regulate *metam sodium* applications (see above). This rule also modifies current metam sodium regulations as follows (the same regulations will apply to chloropicrin):

- For “tarped” agricultural applications, this rule reduces the required minimum setback from schools, hospitals, nursing homes, jails and prisons from 1/4 mile to 1/8 mile. For “untarped” agricultural applications, the required minimum setback remains at 1/4 mile.
- The setback requirements applicable to schools are also made applicable to licensed daycare facilities. An exception is provided for an application to a plant nursery that was in existence prior to the first date the daycare facility was licensed if the nursery operator provides at least 24 hours prior notice of the application to the daycare facility operator.

- This rule relaxes current follow-up monitoring requirements. Under current rules, a certified applicator must inspect the application site 4-6 hours after the application is completed and again 9-12 hours after the application is completed. Under this rule, a certified applicator must only conduct one follow-up inspection, within one hour of sunset on the day of application.
- This rule updates current emergency government references, and makes other minor editorial changes.

Federal Regulation

The U.S. Environmental Protection Agency (EPA) regulates pesticides under the Federal Insecticide, Fungicide and Rodenticide Act. Pesticides must be registered with EPA. EPA registers pesticides and pesticide labels for specific uses. The pesticide manufacturer must provide safety, environmental and other data to support the registration. Pesticide labeling must conform to the EPA registration. Federal and state law prohibit sale or use inconsistent with label directions. Wisconsin and other states work with EPA to assure proper use and handling of pesticides.

States may regulate pesticide applications within their own territory. States may act on their own authority (independent of EPA), and may establish use restrictions that go beyond federal label restrictions. Wisconsin currently has restrictions on the use of metam sodium pesticides that go beyond federal label restrictions.

Surrounding State Regulation

Other states, like Wisconsin, regulate pesticide applications generally. However, none of the states surrounding Wisconsin has adopted specific requirements for metam sodium or chloropicrin applications, beyond requirements specified on the federally-approved pesticide labels.

Business Impact

Businesses Affected

This rule regulates commercial pesticide applicators and agricultural producers that apply or receive applications of metam sodium and chloropicrin soil fumigants. Many of the regulated businesses are small businesses, but others are large. Most of the regulated farmers are potato growers.

This rule protects neighboring farms and businesses from adverse effects of improper soil fumigant applications. Many of the protected businesses are small businesses.

Effects on Business

This rule imposes new regulations on the use of chloropicrin soil fumigants (see above). Approximately 71,000 acres of potatoes were planted in Wisconsin in 2004. Chloropicrin is currently applied on approximately 2,000 acres of potatoes and 25 acres of state-owned seedling nurseries in Wisconsin. Chloropicrin applications are made by commercial pesticide applicators that have the equipment and expertise to handle and apply chloropicrin. Chloropicrin-treated acreage is expected to increase due to pest problems and the efficacy of chloropicrin products.

DATCP estimates that this rule will cost \$8,000 to \$12,000 per year for the industry as a whole, mainly for increased costs of applying chloropicrin to approximately 2,000 acres of potatoes. Increased pesticide applicator costs will generally be passed on to farmers. Most of the farms that use chloropicrin are small businesses, but the single largest user (accounting for approximately 25% of the treated acreage) is not a small business.

This rule relaxes some current requirements related to metam sodium applications (post-application inspection requirements and setbacks for “tarped” applications). Farmers and pesticide application businesses that apply metam sodium soil fumigants may experience a small decrease in costs as a result of these changes.

By establishing clear application standards and procedures, this rule protects neighboring farms, businesses and individuals from improper applications. It also helps protect complying pesticide users from liability for improper applications.

This rule applies to large and small businesses alike. An exemption for small business would undermine the effectiveness of the rule in preventing human exposure to metam sodium and chloropicrin. This rule will not have a significant adverse economic impact on small business. Therefore, it is not subject to the delayed small business effective date provision in s. 227.22(2)(e), Stats. A business impact analysis is attached.

Fiscal Impact

This rule will not have a significant fiscal impact on Wisconsin state or local government. DATCP will incur some costs for compliance monitoring. However, DATCP expects to absorb those costs. The attached fiscal estimate is based on the current use of chloropicrin in Wisconsin. If chloropicrin use increases, as expected, the state fiscal impact could increase accordingly.

Environmental Impact

This rule regulates chloropicrin soil fumigant applications to prevent potentially hazardous off-site movement of volatilized chloropicrin. This will help prevent harm to human beings and sensitive animal species.

This rule will relax some current regulations related to applications of metam sodium soil fumigant (post-application inspection requirements and setbacks for “tarped” applications). However, this relaxation will not significantly reduce current safety protection, and will not

1 **NOTE:** A listing of licensed daycares in each county can be found at
2 http://dhfs.wisconsin.gov/rl_dcf/CC-Directories.HTM
3 (b) *Untarped applications.* No person may make an untarped application of a
4 chloropicrin pesticide or metam sodium pesticide for any agricultural purpose within 1/4
5 mile of any structure identified in par. (a).

6 **SECTION 4.** ATCP 30.22(4)(a), (5)(intro.), (a)3. and 4., (b)1. and (c),
7 (6)(a)(intro.), (c)(intro.), (c)3. and (c)3.(note), and (7)(a)(intro.) are amended to read:

8 ATCP 30.22(4)(a) A person who applies a chloropicrin pesticide or a metam
9 sodium pesticide for an agricultural purpose shall cover the application site with a tarp or
10 other impermeable barrier, as prescribed by the pesticide label, immediately after that
11 person applies the pesticide to the soil surface or incorporates it into the soil by discing or
12 tilling.

13 (5)(intro.) A chemigation application of a chloropicrin pesticide or a metam
14 sodium pesticide shall comply with s. ATCP 29.54 and all of the following:

15 (5)(a)3. The brand name of the chloropicrin pesticide or metam sodium pesticide
16 that will be applied.

17 (5)(a)4. Notice that eye irritation is an early symptom of chloropicrin or metam
18 sodium exposure, and that eye irritation may be alleviated by leaving the affected area.

19 (5)(b)1. A copy of the ~~metam sodium~~ pesticide label.

20 (5)(c) ~~An individual certified under s. ATCP 29.29 (2)~~ An applicator certified
21 according to s. ATCP 29.29(2) shall be present at the chemigation site at all times during
22 the chemigation application.

23 (6)(a)(intro.) Whenever a chloropicrin pesticide or a metam sodium pesticide is
24 applied for agricultural purposes, a ~~qualified~~ certified applicator ~~under sub. (2)~~ shall

1 inspect the application site ~~4 to 6 hours after the application is completed and 9 to 12~~
2 ~~hours after the application is completed~~ within one hour of sunset on the day of
3 application.

4 (6)(c)(intro.) If any person making a chloropicrin pesticide or a metam sodium
5 pesticide application has reason to believe that gas volatilization from the application
6 may result in significant pesticide drift under s. ATCP 29.50 (2), that person shall
7 immediately do all of the following:

8 (6)(c)3. Notify ~~the division of emergency government~~ Wisconsin emergency
9 management if it appears that a residential structure or public building may be exposed to
10 significant pesticide drift under s. ATCP 29.50(2). Notice shall include the location of
11 the application site and the affected residential structure or public building.

12 **NOTE:** The telephone number for ~~the division of emergency government~~
13 Wisconsin emergency management is ~~(608) 242-3232~~ 1-800-943-0003.
14 The telephone number for the department is (608) 224-4500.

15 (7)(a)(intro.) A person applying a chloropicrin pesticide or a metam sodium
16 pesticide shall keep all of the following records:

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

Dated this _____ day of _____, _____.

STATE OF WISCONSIN
DEPARTMENT OF AGRICULTURE,
TRADE AND CONSUMER PROTECTION

By _____

Rodney J. Nilsestuen,
Secretary