

Clearinghouse Rule 09-023

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DATCP Docket No. 08-R-05
Rules Clearinghouse No. _____

Proposed Hearing Draft
January 28, 2009

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

- 1 The Wisconsin department of agriculture, trade and consumer protection proposes the
- 2 following order *to repeal* ATCP 149.03(1)(d) and (e); *to amend* ATCP 149.03(1)(intro.),
- 3 149.04(1) and (2), and 149.06(1) and *to repeal and recreate* ATCP 149.03(1)(a) to (c)
- 4 and (2), *relating to* the Wisconsin potato marketing order.

The department of agriculture, trade and consumer protection (DATCP) has adopted a potato marketing order (ch. 149, Wis. Adm Code), pursuant to ch. 96, Stats. (Wisconsin agricultural marketing act). A potato industry board, elected by potato producers, administers the marketing order. The potato industry board collects assessments from potato producers, and spends assessment revenues for potato market development, research and education.

This rule changes the election and membership of the potato industry board, and authorizes the board to charge higher assessments to potato producers. This rule must be approved in a referendum of affected producers, as provided in s. 96.08 (1) (b) 3., Stats., before it can take effect.

Statutes Interpreted

Statutes interpreted: Chapter 96, Stats.

Statutory Authority

Statutory authority: ss. 93.07(1) and 96.15, Stats.

Explanation of Agency Authority

DATCP has general authority, under s. 93.07(1), Stats., to adopt rules interpreting statutes under its jurisdiction. DATCP is specifically authorized, under s. 96.15, Stats., to adopt rules to administer the marketing order program under ch. 96, Stats.

Related Statutes and Rules

DATCP has adopted general rules under ch. ATCP 140, Wis. Adm. Code, to govern the creation and operation of marketing orders, including the operation of marketing boards.

Background

DATCP administers Wisconsin's agricultural marketing order program under ch. 96, Stats. DATCP may adopt marketing orders for Wisconsin agricultural commodities, with the approval of affected commodity producers. DATCP has adopted marketing orders for cherries, cranberries, corn, milk, mint, soybeans, ginseng and potatoes.

Each marketing order, including the potato marketing order, provides for assessments on commodity producers. Affected producers elect a marketing board that establishes assessment levels within limits specified by the marketing order, and spends assessment revenues for purposes identified in the marketing order. The current potato industry board (potato marketing board) includes 10 members elected from 5 geographic districts for staggered 3-year terms. DATCP monitors marketing board activities for compliance with applicable law, including the marketing order.

Under the current potato marketing order, the potato industry board is authorized to collect potato marketing assessments of up to 6 cents per hundredweight. The board has implemented an actual assessment rate of 5 cents per hundredweight – one cent per hundredweight below the maximum assessment currently allowed. Assessments may be used to finance market development, research and education, subject to the terms of the marketing order.

DATCP has adopted general rules under ch. ATCP 140, Wis. Adm. Code, to govern the operation of marketing orders and marketing boards. DATCP must adopt marketing orders as rules. Affected producers must approve (by referendum) the adoption, amendment or repeal of a marketing order.

Rule Content

This rule modifies the current potato marketing order (ATCP 149) to do all of the following:

- Increase the maximum assessment that the potato industry board is authorized to charge to producers. This rule changes the maximum assessment rate from 6 cents to 10 cents per hundredweight on potatoes sold into commercial channels.

- Change the election and membership of the potato industry board. This rule reduces the number of election districts from 5 to 3, and reduces the number of board members from 10 to 9. Eight of the 9 members of the modified board will be elected by producers from districts identified in this rule, and one board member will be chosen by all potato producers in a statewide “at large” election. Under this rule, all board members will be elected for 3-year terms.
- Provide for a gradual changeover to the new board membership. Current board members will continue to hold office until their current terms expire.

Under this rule, potato industry board election districts will be as follows:

- **District 1** will be represented by 3 board members and will include Ashland, Barron, Bayfield, Brown, Burnett, Chippewa, Clark, Door, Douglas, Dunn, Eau Claire, Florence, Forest, Iron, Kewaunee, Langlade, Lincoln, Marinette, Menominee, Oconto, Oneida, Pepin, Pierce, Polk, Price, Rusk, Sawyer, St. Croix, Taylor, Vilas, and Washburn counties.
- **District 2** will be represented by 3 board members and will include Marathon, Outagamie, Portage, Shawano, Waupaca and Waushara counties.
- **District 3** will be represented by 2 board members and will include Adams, Buffalo, Calumet, Columbia, Crawford, Dane, Dodge, Fond du Lac, Grant, Green, Green Lake, Iowa, Jackson, Jefferson, Juneau, Kenosha, LaCrosse, Lafayette, Manitowoc, Marquette, Milwaukee, Monroe, Ozaukee, Racine, Richland, Rock, Sauk, Sheboygan, Trempealeau, Vernon, Walworth, Washington, Waukesha, Winnebago and Wood counties.

The changes to the current election districts, and the election of one “at large” representative, will address changes in the geographic distribution of potato production in the state. The increase in the maximum authorized marketing order assessment will facilitate additional funding for market development and research, including University of Wisconsin research related to new potato varieties and pesticide and chemical management.

Fiscal Impact

This rule will have no significant fiscal impact on DATCP or local government. A complete *fiscal estimate* is attached.

Business Impact

The current potato marketing order is designed to improve the production and marketing of potatoes in this state, for the benefit of potato producers. This rule, initiated at the request of potato producers, is intended to improve the current potato marketing order.

This rule must be approved in a referendum of affected producers before it can take effect. Many of the affected producers are “small businesses.”

This rule will change the composition and election of the current potato industry board. The changes reflect changes in the geographic distribution of the Wisconsin potato industry. The changes will have little, if any, impact on affected producers.

This rule also authorizes the potato industry board to increase the current potato marketing assessment from a maximum of 6 cents per hundredweight to a maximum of 10 cents per hundredweight of potatoes sold in commercial channels. The board may not increase the actual assessment rate by more than one cent per year.

While the authorized increase may eventually add expense for producers, the added expense will be small. Wisconsin has over 150 farms that produce nearly 23 million hundredweight of potatoes annually. The current marketing assessment is 5 cents per hundredweight. With potatoes currently selling at nearly \$25 per hundredweight, the current assessment represents only 2/10ths of 1% of the current market value of potatoes. Even if the potato industry board were to increase the assessment (over a period of at least 5 years) to the maximum 10 cents per hundredweight allowed by this rule, the assessment would still amount to only 4/10 of 1% of potato market value. A complete *business impact analysis* is attached.

Federal Regulation

The United States department of agriculture (USDA) administers an agricultural marketing order program, under which USDA has broad authority to regulate prices and production, as well as to charge assessments for market development, promotion, research and education. USDA has adopted marketing orders for some of the same commodities covered by Wisconsin marketing orders (including potatoes). However, the state marketing orders do not directly duplicate or conflict with the federal marketing orders.

Surrounding State Regulation

Michigan and Minnesota have marketing assessments for potatoes produced within those states. Minnesota’s current assessment is 3 cents per hundredweight and Michigan’s assessment is 5 cents per hundredweight (the same as Wisconsin’s current assessment).

Factual Data and Analytical Methods

DATCP keeps an updated list of potato producers for the purpose of determining eligible voters in marketing order referenda and marketing board elections. Changes in that list reflect significant changes in the geographic distribution of potato producers in the state. DATCP has worked with affected producers and the potato marketing board to obtain information related to assessment revenues and revenue needs.

Agency Contact Person

Questions and comments on this rule may be directed to Noel Favia, Wisconsin department of agriculture, trade and consumer protection, PO Box 8911, Madison, WI 53708-8911, Tel: 608-224-5140, e-mail noel.favia@datcp.state.wi.us.

DATCP will publish a hearing notice and hold public hearings on this rule. Written hearing comments may be sent by mail or e-mail to the above address. Written comments will be included in the formal hearing record if received within 14 days after the last public hearing on this rule.

1 **SECTION 1.** ATCP 149.03(1)(intro.) is amended to read:

2 ATCP 149.03(1)(intro.) The state shall be divided into ~~5~~ 3 districts for purposes
3 of electing producers to the potato industry board and one producer shall be elected at
4 large. The following counties shall ~~initially~~ constitute the respective districts:

5 **SECTION 2.** ATCP 149.03(1)(a) to (c) are repealed and recreated to read:

6 ATCP 149.03(1)(a) *District 1.* Ashland, Barron, Bayfield, Brown, Burnett,
7 Chippewa, Clark, Door, Douglas, Dunn, Eau Claire, Florence, Forest, Iron, Kewaunee,
8 Langlade, Lincoln, Marinette, Menominee, Oconto, Oneida, Pepin, Pierce, Polk, Price,
9 Rusk, Sawyer, St. Croix, Taylor, Vilas, and Washburn counties.

10 (b) District 2. Marathon, Outagamie, Portage, Shawano, Waupaca and Waushara
11 counties.

12 (c) *District 3.* Adams, Buffalo, Calumet, Columbia, Crawford, Dane, Dodge,
13 Fond du Lac, Grant, Green, Green Lake, Iowa, Jackson, Jefferson, Juneau, Kenosha,
14 LaCrosse, Lafayette, Manitowoc, Marquette, Milwaukee, Monroe, Ozaukee, Racine,

1 Richland, Rock, Sauk, Sheboygan, Trempealeau, Vernon, Walworth, Washington,
2 Waukesha, Winnebago and Wood counties.

3 **SECTION 3.** ATCP 149.03(1)(d) and (e) are repealed.

4 **SECTION 4.** ATCP 149.03(2) is repealed and recreated to read:

5 ATCP 149.03(2) Not sooner than *[legislative reference bureau inserts a date*
6 *that is 3 years after the effective date of this rule]*, the potato industry board with the
7 approval of the secretary may reapportion the districts under sub. (1) to assure fair
8 representation to affected producers. The potato industry board may reapportion districts
9 no more than once in the 3-year period beginning on *[legislative reference bureau*
10 *inserts a date that is 3 years after the effective date of this rule]*, and no more than once
11 in any subsequent 3-year period beginning on the day after the termination of the last
12 preceding 3-year period under this subsection. No reapportionment under this subsection
13 may remove a potato industry board member from office during the member's term.

14 **SECTION 5.** ATCP 149.04(1) and (2) are amended to read:

15 ATCP 149.04(1) MEMBERSHIP. A potato industry board consisting of ~~40~~ 9
16 affected producers, ~~one each from districts 1 and 5, 2 from district 2 and 3 each from~~
17 ~~districts 3 and 4~~ 1 and 2, 2 from district 3 and 1 at large, is established to administer this
18 order. Board members shall reside in the district they are elected to represent, except that
19 the member elected at large may reside anywhere in the state. Board members shall be
20 nominated and elected as prescribed in s. 96.10 (1), Stats., and s. ATCP 140.20.

21 (2) TERM OF OFFICE. ~~For the initial election of marketing board members, the~~
22 ~~terms of office shall be as follows: district 1: 1 one year term; district 2: 1 one year term~~
23 ~~and 1 three year term; district 3 and district 4: 1 one year term, 1 two year term and 1~~

1 ~~three year term in each district; and district 5: 1 three year term. In each district the~~
2 ~~person receiving the highest number of votes shall receive the longest term of office, in~~
3 ~~order, until all positions are filled. All subsequent elections to the potato industry board~~
4 ~~shall be for 3-year terms and may begin with the start of the fiscal year of the potato~~
5 ~~industry board.~~

6 **SECTION 6.** ATCP 149.06(1) is amended to read:

7 ATCP 149.06(1) For potato sales made during the first year for which this order
8 is in effect, each affected producer shall be liable for an assessment of 3 cents (\$0.03) per
9 hundredweight on all potatoes sold into commercial channels. Thereafter, the potato
10 industry board shall annually determine the rate of assessment to be levied and collected.
11 The assessment may be increased by not more than one cent (\$0.01) per hundredweight
12 per year, but in no event shall the total assessment exceed ~~6 cents (\$0.06)~~ 10 cents
13 (\$0.10) per hundredweight on potatoes sold into commercial channels. Hundredweights
14 shall be determined on the basis of inspection certificates, scale tickets, invoices, bills of
15 lading, manifests, settlement sheets or other sales or shipping documents, or any
16 combination of these. Potatoes on which an assessment has been paid shall not be
17 reassessed upon subsequent sale.

18 **SECTION 7. INITIAL APPLICABILITY. (1)** Potato industry board members
19 holding office on the effective date of this rule shall continue to serve until their terms of
20 office expire. As those terms of office expire, the potato industry board shall hold
21 elections for new board members according to s. ATCP 140.04(3) and this section.

22 **(2)** In the first election held after the effective date of this rule, one board
23 member shall be elected from district 1 as created by this rule, one board member shall be

1 elected from district 2 as created by this rule, and one board member shall be elected
2 from district 3 as created by this rule.

3 (3) In the second election held after the effective date of this rule, one board
4 member shall be elected from district 1 as created by this rule, one board member shall be
5 elected from district 2 as created by this rule, and one board member shall be elected
6 from district 3 as created by this rule.

7 (4) In the third election held after the effective date of this rule, one board
8 member shall be elected from district 1 as created by this rule, one board member shall be
9 elected from district 2 as created by this rule, and one board member shall be elected at
10 large.

11 **SECTION 8. EFFECTIVE DATE.** The rules contained in this order shall take effect
12 on the first day of the month following publication in the Wisconsin administrative
13 register, as 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