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Clearinghouse Rule 10-122

DATCP Docket No. 09-R-05
Rules Clearinghouse No. _____

Proposed Hearing Draft
October 13, 2010

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

3 The Wisconsin department of agriculture, trade and consumer protection proposes the following
4 order *amend* the prefatory note to ch. ATCP 35, ATCP 35.06(1)(g)(note), 35.06(3)(b)(note),
5 35.06(4), 35.08(5)(title), (a), (b), (note), (c) and (6)(a), 35.10 (8), 35.14(19), 35.16(4)(b),
6 35.20(3), 90.05(2)(a)(note), 91.01(4), 92.02(1), 92.06(1)(a), (b) and (2), and 92.22(1)(b); and to
7 *repeal* ATCP 30.39 and subch. III of ch. ATCP 161.

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

This rule makes minor technical changes to a number of current rules administered by the department of agriculture, trade and consumer protection (“DATCP”).

Statutes Interpreted

Statutes Interpreted: ss. 94.69, 94.73, 98.03, 98.06, 98.07, 100.20 and ch. 160, Stats.

Statutory Authority

Statutory Authority: ss. 93.07(1), 94.69(1)(i), 94.73(11), 98.03(2), 98.07(4), 100.20(2), 160.19(2) and 160.21(1), Stats.

Explanation of Statutory Authority

DATCP has general authority, under s. 93.07(1), Stats., to adopt rules to interpret laws under its jurisdiction. It also has specific rulemaking authority related to various matters addressed by this rule (see above). This rule makes minor changes to a number of different rules administered by DATCP. The changes are adopted under essentially the same authority used to adopt the original rules.

Related Rules or Statutes

This rule is not substantially affected by other statutes or rules, other than those identified in this rule.

Plain Language Analysis

This rule makes minor or technical changes to a number of current DATCP rules. This rule does all of the following:

Atrazine Rules

This rule repeals an obsolete rule provision requiring DATCP to make a report on its atrazine pesticide rules (subch. VIII of ch. ATCP 30, Wis. Adm. Code) by April 1, 1996. DATCP made a timely report in response to that (now obsolete) reporting requirement. This rule makes no substantive change to the current atrazine rules, which are designed to protect groundwater from atrazine contamination. DATCP annually reviews and updates its atrazine rules, based on the most recent groundwater survey and test data.

Agricultural Chemical Cleanup Program

This rule makes minor technical wording changes to current rules related to the agricultural chemical cleanup program (ch. ATCP 35, Wis. Adm. Code). This rule makes no substantive change to the current rules.

Payment to Ethanol Producers

This rule repeals obsolete rules related to DATCP payments to ethanol producers (subch. III of ch. ATCP 161, Wis. Adm. Code), because the ethanol producer payment program has been eliminated. Section 93.75, Stats., which created the program, was repealed by 2007 Wis. Act 20.

Weights and Measures

This rule updates technical standards incorporated by reference in current rules related to fair packaging and labeling (ch. ATCP 90, Wis. Adm. Code), methods of sale of commodities (ch. ATCP 91, Wis. Adm. Code), and fair weights and measures (ch. ATCP 92, Wis. Adm. Code). The technical standards are published by the National Institute of Standards and Technology (NIST). This rule incorporates the latest published editions of the relevant NIST standards, which include routine technical updates to the previously-cited editions.

Other Minor Edits

This rule corrects typographical errors and makes other non-substantive edits to current rules, as needed.

Fiscal Impact

This rule will have no significant fiscal impact on DATCP or local units of government. This rule will not have a substantial impact on DATCP administrative or operating costs (see fiscal estimate attached).

Business Impact

This rule will not have any significant impact on small business or other business. This rule makes minor technical “housekeeping” changes that will not have a significant impact on business standards, costs or operations.

Environmental Impact

This “housekeeping” rule will have no significant environmental impact.

Federal and Surrounding State Programs

Federal Programs

This rule updates references to weights and measures technical standards published by the National Institute of Standards and Technology (NIST). By incorporating the latest NIST standards, this rule keeps Wisconsin standards consistent with applicable national standards.

Surrounding States

This rule does not have a significant impact on programs in this state or other states, or create any significant disparity between this state and other states. The updated national weights and measures standards (NIST standards) incorporated by this rule are the same standards used in other states.

Standards Incorporated by Reference

This rule updates references to certain weights and measures technical standards (NIST standards) that are incorporated by reference in current rules. Updated technical standards include standards found in NIST Handbooks 44, 130 and 133 (2011 editions).

Pursuant to s. 227.21, Stats., DATCP has requested permission from the Department of Justice to incorporate the updated technical standards by reference in this rule. Copies of the updated standards will be kept on file with DATCP and the Legislative Reference Bureau.

Data and Analytical Methodologies

This rule does not depend on any complex analysis of data. This rule merely makes minor or technical changes to current rules.

Agency Contact for Submitting Comments

Questions or comments related to this rule may be sent to the following address:

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Department of Agriculture, Trade and Consumer Protection
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Madison, WI 53718
Telephone: (608) 224-5023
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1 **SECTION 1.** ATCP 30.39 is repealed.

2 **SECTION 2.** The prefatory note to chapter ATCP 35 is amended to read:

3 **NOTE:** This chapter codifies the agricultural chemical cleanup program created under s.
4 94.73, Stats., Persons seeking information about the program, or wishing to file a
5 ~~claim~~ an application for reimbursement of cleanup costs, may contact the
6 agricultural cleanup program in the division of agricultural cleanup program in the
7 division of agricultural resource management, Wisconsin department of agriculture,
8 trade and consumer protection, P.O. Box No. 8911, Madison, Wisconsin, 53708-
9 8911.

10
11 **SECTION 3.** ATCP 35.06(1)(g)(note) is amended to read:

12 **NOTE:** Under s. ATCP 35.08(5)(b), if any person applies for reimbursement of an
13 ineligible cost, the department may deduct twice the amount of that cost from that
14 person's reimbursement ~~claim~~ application if the responsible person knew or should
15 have known that the cost was not eligible. If a responsible person is not certain
16 whether a corrective action cost is eligible for reimbursement under this chapter, the
17 responsible person may contact the department for a preliminary opinion under s.
18 ATCP 35.08(1).

19
20 **SECTION 4.** ATCP 35.06(3)(b)(note) is amended to read:

21 **NOTE:** Persons filing fraudulent ~~claims~~ applications may also be subject to criminal
22 prosecution.

23
24 **SECTION 5.** ATCP 35.06(4) is amended to read:

25 ATCP 35.06(4) FAILURE TO SEEK REIMBURSEMENT IN PRIOR APPLICATION. A responsible
26 person may not apply for reimbursement of an eligible corrective action cost which the
27 responsible person paid during or before the period for which a prior reimbursement ~~claim~~

1 application has been submitted for that discharge under this chapter at the time of any prior
2 reimbursement application for that discharge site.

3 **SECTION 6.** ATCP 35.08 (5)(title), (a), (b), (b)(note), (c) and (6)(a) are amended to read:

4 ATCP 35.08(5) INELIGIBLE ~~CLAIMS~~ COSTS REJECTED. (a) The department shall
5 disapprove any portion of a reimbursement ~~claim~~ application which the department finds to be
6 ineligible for reimbursement under this chapter, and shall deduct any costs which the department
7 finds to be ineligible for reimbursement.

8 (b) If the department finds that any portion of an applicant's reimbursement ~~claim~~
9 application is ineligible, and that the applicant knew or should have known that it was ineligible,
10 the department shall deduct twice the amount of the ineligible ~~claim~~ cost from the applicant's
11 total ~~claim~~ application. Deductions under this paragraph may not exceed the total amount of the
12 applicant's ~~claim~~ application. Before making a deduction under this paragraph, the department
13 may consult with the agricultural chemical cleanup council appointed under s. ATCP 35.34.

14 **NOTE:** The department will invoke sub. (5)(b) in cases where a ~~claim~~ cost is clearly
15 ineligible, either because it is clearly prohibited under s. ATCP 35.14 or because
16 there is no plausible basis for ~~claiming~~ applying for reimbursement under this
17 chapter. In order to protect themselves against a double deduction under sub.
18 (5)(b), applicants may discuss questionable items with the department before
19 submitting a ~~claim~~ an application.

20
21 (c) If, after consulting with the agricultural cleanup council, the department determines
22 that the cost ~~claimed~~ submitted for any goods or services is clearly unreasonable in relation to
23 current market cost for those goods or services, the department may deny reimbursement of the
24 excessive cost, and may reimburse a lesser cost which the department considers reasonable. In
25 determining whether a cost is unreasonable, the department may consider the nature of the goods
26 or services, the geographic location of the discharge site, the need for the goods or services, the

1 availability of alternative goods or services, and other factors that may reasonably affect the
2 costs of the goods or services.

3 (6)(a) The department, after consulting with the agricultural chemical cleanup council,
4 may reduce the reimbursement rate for a corrective action related to a discharge discovered after
5 November 1, 2004 if the department has received or paid a reimbursement ~~claim~~ application
6 related to a prior discharge at the same discharge site.

7 **SECTION 7.** ATCP 35.10(8) is amended to read:

8 ATCP 35.10(8) The responsible person's application for reimbursement includes ~~a claim~~
9 an application or waiver, under s. ATCP 35.20(3), from each of the responsible persons
10 identified under s. ATCP 35.20(2).

11 **SECTION 8.** ATCP 35.14(19) is amended to read:

12 ATCP 35.14(19) Costs to investigate or repair environmental contamination involving
13 substances that are not agricultural chemical. If a corrective action under this chapter is
14 combined with the investigation or repair of environmental contamination involving substances
15 that are not agricultural chemicals, the department may reimburse a portion of the combined
16 project costs based on a reasonable cost allocation formula approved by the department. If for
17 any combination project, a responsible person also submits a reimbursement ~~claim~~ application to
18 another governmental agency, the cost allocation formula shall be approved by the department
19 and that other agency.

20 **SECTION 9.** ATCP 35.16(4)(b) is amended to read:

21 ATCP 35.16(4)(b) A responsible person may select any contract service provider, but
22 may not ~~claim~~ apply for reimbursement of any corrective action costs that exceed the low bid for
23 any of the following contract services:

1 **SECTION 10.** ATCP 35.20(3) is amended to read:

2 ATCP 35.20 (3) JOINT APPLICATION. The department shall deny a reimbursement
3 application unless every responsible person successfully notified under sub. (2) includes his or
4 her full claim for reimbursement as part of the same joint application, or waives any claim for
5 reimbursement related to discharges to date at that discharge site. If a notified person fails to
6 submit ~~a claim~~ an application within 30 days after receiving notice, or fails to provide
7 documentation under s. ATCP 35.06 (1) within 60 days after receiving notice, that failure
8 constitutes a wavier of that person's claim with respect to that application.

9 **SECTION 11.** ATCP 90.05(2)(a)(note) is amended to read:

10 **NOTE:** For example, a liquid measure may be expressed in any of the following ways:

11 Contents: 1 gal, 2 qt.

12 Contents: 1.5 gal

13 Contents: 6 qt

14 Contents: 1 qt, 1 pt

15 Contents: 1.25 qt

16 Contents: 1 pt, 8 oz

17 Contents: 1 1/2 pt

18 Contents: 1.5 pt

19 Contents: 8 fl oz

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21 **SECTION 12.** ATCP 91.01(4) is amended to read:

1 ATCP 91.01(4) “NIST Handbook 130” means *NIST Handbook 130* (~~2009~~ 2011 edition)
2 published by the national institute of standards and technology, United States department of
3 commerce.

4 **SECTION 13.** ATCP 92.02(1) is amended to read:

5 ATCP 92.02(1) Except as provided in this chapter, weighing and measuring devices
6 shall comply with applicable specifications, tolerances and other technical requirements set forth
7 in the national institute of standards and technology handbook 44 (specifications, tolerances and
8 other technical requirements for weighing and measuring devices), ~~2009~~ 2011 edition.

9 **SECTION 14.** ATCP 92.06 (1)(a), (b) and (2) are amended to read:

10 ATCP 92.06(1)(a) The national institute of standards and technology handbook 44
11 (specifications, tolerances, and other technical requirements for weighing and measuring
12 devices), ~~2009~~ 2011 edition.

13 (b) The national institute of standards and technology handbook 133 (checking the net
14 contents of packaged goods), ~~2005~~ 2011 edition.

15 (2) PRICE VERIFICATION SYSTEMS. Inspections of price verification systems shall comply
16 with section 7 “test procedures” from the chapter titled “examination procedure for price
17 verification,” national institute of standards and technology handbook 130 (uniform laws and
18 regulation in the areas of legal metrology and engine fuel quality), ~~2009~~ 2011 edition.

19 **SECTION 15.** ATCP 92.22(1)(b) and (note) are amended to read:

20 ATCP 92.22(1)(b) Comply with applicable requirements contained in the national
21 institute of standards and technology handbook 44 (specifications, tolerances, and other technical
22 requirements for weighting and measuring devices), ~~2009~~ 2011 edition.

23 **NOTE:** The national institute of standards and technology handbook 44, ~~2009~~ 2011
24 edition, is on file with the department and the legislative reference bureau. You

1 may purchase copies of this handbook from the U.S. Government Printing Office,
2 Superintendent of Document Sales, P.O. Box 371954, Pittsburgh, PA 15250-
3 7954.

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5 **SECTION 16.** Subchapter III of chapter ATCP 161 is repealed.

6 **SECTION 17. EFFECTIVE DATE:** This rule takes effect on the first day of the month
7 following publication in the Wisconsin administrative register, as provided in s. 227.22 (2)
8 (intro.), Stats.

Dated this _____ day of _____, 20____.

STATE OF WISCONSIN
DEPARTMENT OF AGRICULTURE,
TRADE AND CONSUMER PROTECTION

Randy Romanski, Secretary