

Report From Agency

DATCP Docket No. 15-R-07
Rules Clearinghouse No. 15-094

Final Draft
March 4, 2016

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

1 The Wisconsin department of agriculture, trade and consumer protection hereby proposes the
2 following rule *to repeal* ATCP 82.02 (1) and ATCP 82.02 (4); *to amend* ATCP 82.02 (title),
3 (intro.,), (d),and (e), ATCP 82.02 (3), ATCP 82.02 (5), ATCP 82.02 (6) , and ATCP 82.02 (7)
4 (d) (intro.); and *to create* ATCP 82.02 (1m); and *to repeal and re-create* ATCP 82.02 (7);
5 *relating to* bulk milk tanker permitting regulations, and affecting small business.

Statutes Interpreted

Statute Interpreted: s. 97.21, Stats. (Milk haulers and milk distributors).

Statutory Authority

Statutory Authority: ss. 93.07 (1), 97.09 (4), and 97.21 (6), Stats.

Explanation of Statutory Authority

The Department has broad general authority, under s. 93.07 (1), Stats., to adopt rules to implement programs under its jurisdiction. The Department also has general authority under s. 97.09 (4), Stats., to adopt rules specifying standards to protect the public from the sale of adulterated or misbranded foods. The Department has specific authority to promulgate rules related to milk haulers in s. 97.21(6), Stats., which allows the Department to establish rules related to the following: fees and regulations for bulk milk tanker operators and milk distributors; standards for the construction, maintenance and sanitary operation of bulk milk tankers, milk distribution vehicles and milk distribution facilities; the design, installation, cleaning and maintenance of equipment and utensils; personnel sanitation; storage and handling of milk and fluid milk products; identification of bulk milk tankers and milk distribution vehicles; and record keeping.

Related Statutes and Rules

Wisconsin's milk haulers are governed by ch. 97, Stats. (Food Regulation). Milk haulers and milk distributors are regulated under s. 97.21, Stats., (Milk haulers and milk distributors). Chapter 82, Wis. Adm. Code, interprets ch. 97, Stats., as it relates to milk haulers and milk distributors.

Plain Language Analysis

In the past, Wisconsin required the owner of a bulk milk tanker used to transport Grade "A" milk and milk products to hold both a bulk milk tanker license and a Grade "A" permit for that tanker. The Department charged a licensing fee of \$45 and issued a Grade "A" permit as an endorsement on the license. 2015 Act 55 revised s. 97.21, Stats., eliminating bulk milk tanker licensing and license fee requirements and aligned Wisconsin with most other states by removing the requirement that bulk milk tanker operators hold both a bulk milk tanker license and a Grade "A" permit. The proposed rule continues the alignment of Wisconsin with other states by maintaining the requirement that a Grade "A" permit cannot be issued to a bulk milk tanker unless that tanker has passed an inspection by the Department or a Wisconsin certified industry inspector within the preceding 24 months. Reciprocity of the Grade "A" bulk milk tanker permit is required by the US Food and Drug Administration's Pasteurized Milk Ordinance (PMO), a cooperative agreement that governs the interstate shipment of Grade "A" milk and milk products and is the basis of each state's Grade "A" milk requirements. The Department proposes to incorporate these revisions into ATCP 82 to reflect these recent statutory and PMO changes and remain consistent with the PMO.

The rule also adopts a modest increase in the bulk milk tanker reinspection fee, so that it covers Department costs. Reinspections are conducted by the Department to verify that appropriate corrective actions have been taken, after an initial inspection indicates a bulk milk tanker does not meet one or more regulatory requirements. In 2014, only 13 tankers required reinspection. The proposed rule increases the reinspection fee from \$45 to \$60.

Summary of, and Comparison with Existing or Proposed Federal Statutes and Regulations

The PMO establishes minimum standards for regulation of Grade "A" milk and milk products. States must set regulatory standards equivalent to, or more stringent than, those in the PMO to be allowed to ship Grade "A" milk and milk products in interstate commerce.

Comparison with Rules in Adjacent States

Michigan, Minnesota, Iowa, and Illinois base their dairy regulations on the PMO. The proposed rule will align Wisconsin's regulations with the PMO and these neighboring states for licensing and permitting of Grade "A" tankers. Each of these states inspects bulk milk tankers, and issues

a Grade “A” permit after inspection. Some states charge a fee associated with these Grade “A” inspections.

In 2015, the National Conference for Interstate Milk Shipments, with FDA concurrence, changed the mandatory bulk milk tanker inspection frequency in the PMO from at least once every 12 months to at least once every 24 months with an inspection conducted on any date in the 24th month since the previous inspection being accepted as compliant. By maintaining consistency with the PMO, Wisconsin’s rule will be consistent with requirements in Michigan, Minnesota, Iowa, and Illinois.

Summary of Factual Data and Analytical Methodologies

Proposed rule changes were developed in response to recent statutory changes after a review of PMO requirements and a review of practices in neighboring states.

Analysis and Supporting Documents used to Determine Effect on Small Business

The PMO makes no distinction between large and small businesses in establishing requirements for collection, sampling and transport of Grade “A” milk and milk products.

Effect on Small Business

By eliminating licensing fees, the proposed rule changes will benefit those dairy producers, dairy plants, and companies that operate bulk milk tankers, many of which are small businesses. The proposed rule includes a modest increase in the reinspection fee from \$45 to \$60, to cover the current cost of reinspection. This fee would only be charged if the Department finds a regulatory violation necessitating corrective action and a reinspection. In 2014, only 13 owners of bulk milk tankers were charged a reinspection fee. All Grade “A” dairy businesses, whether large or small, must meet regulations that are substantially in compliance with the FDA’s PMO in order to collect, sample, and transport Grade “A” dairy products. The PMO allows for no special accommodations for small businesses.

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1 **SECTION 1.** ATCP 82.02 (title) is amended to read:

2 ATCP 82.02 (title) **Bulk milk tanker; license; grade A permit.**

3 **SECTION 2.** ATCP 82.02 (1) is repealed.

4 **SECTION 3.** ATCP 82.02 (1m) is created to read:

5 **(1m) PERMIT REQUIRED.** No person may operate a bulk milk tanker to transport milk or
6 fluid milk products for sale or use as grade A milk or grade A dairy products unless—the
7 department, or an equivalent regulatory agency in another state, has issued a valid grade A
8 permit for that bulk milk tanker and the information required under sub. (7) (d) is displayed on
9 the bulk milk tanker as required under sub. (7) (e). A grade A permit is not transferable between
10 bulk milk tankers.

11 **SECTION 4.** ATCP 82.02 (2) (title) is amended to read: ~~LICENSE APPLICATION~~ PERMIT
12 APPLICATION

13 **SECTION 5.** ATCP 82.02 (2) (intro.) is amended to read:

14 **(2)** An application for a ~~license~~ grade A permit under sub. ~~(4)~~ (1m) shall be made on a
15 form provided by the department. An application shall include all of the following:

16 **SECTION 6.** ATCP 82.02 (2) (d) is amended to read: ATCP 82.02 (2) (d) Any other
17 information which the department reasonably requires for identifying and ~~licensing~~ permitting of
18 the bulk milk tanker.

19 **SECTION 7.** ATCP 82.02 (2) (e) is amended to read:

1 ATCP 82.02 (2) (e) All applicable fees and surcharges required under subs. ~~(4) to (5)~~
2 and (6).

3 **SECTION 8.** ATCP 82.02 (3) is amended to read:

4 **(3) ACTION ON ~~LICENSE~~ PERMIT APPLICATION.** (a) The department shall grant or deny a
5 ~~license~~ permit application under sub. (2) within ~~40~~ 30 days after the department receives a
6 completed application.

7 (b) The department shall not issue or renew a ~~license~~ permit until the applicant has paid
8 all applicable fees and surcharges, set forth in a statement from the department, that are due and
9 payable by the applicant under this section. The department shall refund a fee paid under protest
10 if, upon review, the department determines that the fee is not due and payable.

11 **SECTION 9.** ATCP 82.02 (4) is repealed.

12 **SECTION 10.** ATCP 82.02 (5) is amended to read

13 **(5) REINSPECTION FEE.** (a) If the department reinspects a bulk milk tanker because the
14 department finds a violation of ch. 97, Stats., or this chapter, the department shall charge the bulk
15 milk tanker operator a reinspection fee. The reinspection fee is payable when the reinspection is
16 completed, and is due upon written demand from the department. The department may issue a
17 demand for payment when it issues a ~~license~~ permit renewal application to the bulk milk tanker
18 operator, or at any other time after the fee becomes effective.

19 (b) The reinspection fee under par. (a) is ~~\$45~~ \$60.

20 **SECTION 11.** ATCP 82.02 (6) is amended to read:

21 **(6) SURCHARGE FOR OPERATING WITHOUT A ~~LICENSE~~ PERMIT.** (a) An applicant for a bulk
22 milk tanker ~~license-fee~~ permit shall pay a ~~license-permit~~ surcharge of \$100 if the department
23 determines that, within 365 days prior to submitting the ~~license~~ permit application, the applicant

1 operated a bulk milk tanker without a ~~license~~ or grade A permit in violation of sub. ~~(1)~~ (1m) or
2 (7).

3 (b) In addition to paying the ~~license fee~~ permit surcharge under par. (a), an applicant who
4 violated sub. ~~(1)~~ (1m).or (7). shall pay all fees, set forth in a statement from the department, that
5 are due and payable for the ~~license~~ permit year in which the applicant violated sub. ~~(1)~~ (1m) or
6 (7).

7 (c) Payment of the ~~license~~ permit surcharge and past fees under pars. (a) and (b) does not
8 relieve the applicant of any other civil or criminal liability which results from a violation of sub.
9 ~~(1)~~ (1m) or (7), but does not constitute evidence of any violation of law.

10 **SECTION 12.** ATCP 82.02 (7) is repealed and re-created to read:

11 **(7) GRADE A PERMIT DISPLAY.** (a) An application for a grade A permit shall include proof
12 that the bulk milk tanker has passed an inspection by the department or by a certified industry
13 inspector under sub. ATCP 82.02 (8) within the 24 months before the last day of the month in
14 which the application was made.

15 (b) The holder of a grade A permit under sub. (1m) shall display all of the following
16 information, in the manner required under par. (c), on both sides of the bulk milk tanker to which
17 the permit applies:

18 1. The grade A permit identification number.

19 2. Identification of the state that issued the grade A permit. The state identification may
20 be expressed as the full state name, the official two letter postal code abbreviation for the state,
21 or the national uniform code issued for that state by the National Institute of Standards and
22 Technology, U.S. Department of Commerce, Bureau of the Census, and available online
23 at <http://www.itl.nist.gov/fipspubs/>.

1 **Note:** For example, permits issued by the department may display the full state name,
2 "Wisconsin," the two letter postal code state abbreviation "WI," or the national uniform code
3 "55."

4 (c) The information display, under par. (b), shall be permanently attached to the bulk
5 milk tanker. The color of the letters and numbers shall be in sharp contrast to the background on
6 which the letters and numbers are displayed. Each letter and number comprising the information
7 shall be at least 2 inches in height and readily legible during daylight hours while the bulk milk
8 tanker is stationary. The permit holder shall maintain the display so that it remains fully legible at
9 all times.

10 **SECTION 14. EFFECTIVE DATE AND INITIAL APPLICABILITY.** This rule takes effect on
11 the first day of the month following publication in the Wisconsin administrative register, as
12 provided under s. 227.22(2)(intro.).

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Dated this _____ day of _____, 2016.

WISCONSIN DEPARTMENT OF AGRICULTURE,
TRADE AND CONSUMER PROTECTION

By _____
Ben Brancel, Secretary