

Clearinghouse Rule 22-080

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

PROPOSED ORDER

The Wisconsin Department of Agriculture, Trade and Consumer Protection proposes an order *to repeal* ATCP 21.01 (15), ATCP 21.13 (3), ATCP 29.11 (1) (d), ATCP 29.11 (2) (a), ATCP 29.11 (2) (b), ATCP 29.11 (2) (c), ATCP 29.11 (3) (a), ATCP 29.11 (3) (b), ATCP 29.11 (3) (c), ATCP 29.11 (3m), ATCP 29.11 (6) (b); *to amend* ATCP 21.01 (8), ATCP 21.10, (title), ATCP 21.10 (1) (a) and (b), ATCP 21.10 (2) (a) and (b), ATCP 21.10 (3), ATCP 21.13 (2) (c), ATCP 29.10 (3) (c), ATCP 29.11 (2), ATCP 29.11 (3), ATCP 29.11 (5), ATCP 29.11 (6) (c), ATCP 29.11 (6) (d), ATCP 29.15 (4) (b), ATCP 29.20 (6) (b), ATCP 29.25 (5) (a), ATCP 35.04 (5) (b), ATCP 35.06 (3) (c), ATCP 35.20 (3), ATCP 35.22 (1) (a), ATCP 35.22 (1) (b), ATCP 35.22 (1) (c), ATCP 35.22 (2) (a), ATCP 35.22 (c), and ATCP 35.22 (2) (d); *to create* ATCP 29.20 (6) (c), *relating to* the removal of obsolete language and resolve statutory conflicts.

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

Statutes Interpreted: ss. 93.07 (12), 93.07 (13), 94.01, 94.68 (2), 94.681, 94.685 (3), 94.703 (3), 94.704 (3), 94.73 (6), and 94.76, Stats.

Statutory Authority: ss. 93.07 (1), 93.07 (12), 93.07 (13), 94.01, 94.68 (2), 94.681, 94.685 (3), 94.70, 94.703 (3), 94.704 (3), 94.73 (11), 94.76, 227.10 (3) and 227.11 (2) (a), Stats.

Explanation of Agency Authority

The Department of Agriculture, Trade and Consumer Protection (department) has broad general authority, under s. 93.07 (1), Stats., to interpret laws under its jurisdiction. The department also has broad general authority, under ss. 93.07 (12) and (13), 94.01 (1), and 94.76 (1) Stats., to conduct surveys and inspections for the detection and control of injurious pests; and to make, modify, and enforce reasonable rules, including adoption of control measures necessary to prevent, suppress or control the introduction, establishment and spread of injurious pests.

The department has broad authority under s. 94.70, Stats., to regulate the sale and/or distribution of pesticides within the state, and authority under, ss. 94.68 and 94.681, Stats., to process license applications and issue licenses to pesticide manufacturers and labelers, and to collect fees and surcharges for their products. The department also has authority under s. 94.685, Stats., regarding the licensing of, and

collection of fees from, dealers and distributors of restricted-use pesticides. Authority for licensing of commercial pesticide application businesses, and licensing of individual commercial pesticide applicators, is given under ss. 94.703 and s. 94.704, Stats., respectively. Additional authority is specified in Wisconsin Statute sections 25.468.

The department has authority under s. 227.10 (3), Stats. regarding prohibiting discrimination to revise gender-specific language.

The department has broad authority under s. 94.73 (11), Stats., to promulgate rules to implement the Agricultural Chemical Cleanup Program (ACCP), and specifically under s. 94.73 (6), Stats., to specify amounts and formulas for reimbursements requested through the ACCP.

The department is proposing to adopt these rules, under authority of s. 227.11 (2) (a) (intro.), Stats., by the permanent rulemaking process.

Related Statutes and Rules

Chapter ATCP 21, Plant Inspection and Pest Control; ch. ATCP 29, Pesticide Use and Control; ch. ATCP 35, Agricultural Chemical Cleanup Program

Plain Language Analysis

This rule is promulgated under s. 94.76 (1), Stats., which allows the department to issue such rules or orders or adopt such control measures which in its judgment may be necessary to prevent, suppress or control the introduction, spread or dissemination of honeybee diseases and pests in this state.

This proposed rule makes adjustments to gendered references in ch. ATCP 35.

This proposed rule resolves obsolete language and the conflicts with Wisconsin statutes.

The department identified portions of s. ATCP 21.10 as obsolete to the extent these portions use an obsolete common name for the live insect, *Lymantria dispar*, or “spongy moth,” and this proposed rule corrects this where used.

The department identified portions of s. ATCP 21.13 as reportable as obsolete. Specifically, ATCP subsections 21.13 (2) (c) 1. -2., refer to outdated methods to certify that honeybees are European honeybees. Section ATCP 21.13 (3) is outdated because it requires a Varroa mite certification that hives are free of this pest.

The department identified administrative code language in chs. ATCP 29 and ATCP 35 as obsolete or conflicting in our report filed with the Joint Committee for Review of Administrative Rules pursuant to s. 227.29, Stats. Section ATCP 29.10 (3) (c) 2. is unnecessary as it requires pesticide manufacturers and labelers applying for a license to include with an application a report that states the gross revenue of each pesticide product used in this state. 2017 Wisconsin Act 59 section 1260 removed this requirement from s. 94.68 (2) (bm), Stats. Sections ATCP 29.11, ATCP 29.15 (4), ATCP 29.20 (6), and ATCP 29.25 (5) conflict with ss. 94.681, 94.685 (3) (a) 2., 94.703 (3) (a) 2., and 94.704 (3) (a) 2., Stats., due to changes in license fees by 2017 Wisconsin Act 59 section 1285, 1289, 1290, and 1292, respectively. Section ATCP 35.22 conflicts with s. 94.73 (6) (b), (c), Stats., as 2017 Wisconsin Act 59 section 1302 increased the maximum eligible reimbursement costs for eligible sites under the Agricultural Chemical Cleanup Program.

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

The department is unaware of any existing or proposed federal language that would affect the proposed rules technical changes.

***Summary of Comments Received during Preliminary Comment Period
and at Public Hearing on Statement of Scope***

The Joint Committee for Review of Administrative Rules did not request a preliminary hearing on the scope; thus, the department did not hold a preliminary hearing on the scope.

Comparison with Rules in Adjacent States

Illinois: The proposed rule's technical changes are not applicable to Illinois rules or statutes.

Iowa: The proposed rule's technical changes are not applicable to Iowa rules or statutes.

Michigan: The proposed rule's technical changes are not applicable to Michigan rules or statutes.

Minnesota: The proposed rule's technical changes are not applicable to Minnesota rules or statutes.

Summary of Factual Data and Analytical Methodologies

The department identified portions of s. ATCP 21.13 are reportable as obsolete. The department identified administrative code language in chs. ATCP 29 and ATCP 35 as obsolete or conflicting in our report filed with the Joint Committee for Review of Administrative Rules pursuant to s. 227.29, Stats. This proposed rule modifies provisions in the rule to align with statute.

Analysis and Supporting Documents used to Determine Effect on Small Business or in Preparation of an Economic Impact Analysis

The proposed rule will be posted on the department's website for economic comments for 14 days and comments received will be incorporated into the final draft. This proposed order aligns chs. ATCP 21, ATCP 29, and ATCP 35 with ss. 93.07 (12), 93.07 (13), 94.01, 94.68 (2), 94.681, 94.685 (3), 94.703 (3), 94.704 (3), 94.73 (6), and 94.76, Stats., and therefore, does not have an effect on small businesses.

Fiscal Estimate and Economic Impact Analysis

The Fiscal Estimate and Economic Impact Analysis is attached.

Effect on Small Business

The Department's Regulatory Review Coordinator may be contacted by:

Email at Bradford.Steine1@wisconsin.gov

Telephone at (608) 224-5024

The Regulatory Flexibility Analysis is attached.

Department Contact Person

Jill Hoskins
Division of Agricultural Resource Management
Department of Agriculture, Trade and Consumer Protection

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Jill.Hoskins@Wisconsin.gov

Place Where Comments are to Be Submitted and Deadline for Submission:

Comments must be received on or before December 27, 2022 to be included in the record of rule-making proceedings. Submit comments:

By mail to:

Jill Hoskins
Division of Agricultural Resource Management
Department of Agriculture, Trade and Consumer Protection
P.O. Box 8911
Madison, WI 53708-8911

By e mail to: Jill.Hoskins@Wisconsin.gov

RULE TEXT

- 1 SECTION 1. ATCP 21.01 (8) is amended to read:
- 2 ATCP 21.02 (8) "~~Gypsy~~Spongy moth" means the live insect, *Lymantria dispar*, family Lymantriidae, in
- 3 any life stage, including the egg, larva, pupa, or adult stage.
- 4 SECTION 2. ATCP 21.01 (15) is repealed.
- 5 SECTION 3. ATCP 21.10, (title), is amended to read:
- 6 ATCP 21.10 (title) ~~Gypsy~~Spongy moth; import controls and quarantine.
- 7 SECTION 4. ATCP 21.10 (1) (a) and (b) is amended to read:
- 8 ATCP 21.10 (1)(a) Except as provided under sub. (3), no person may import into this state any trees, woody
- 9 shrubs, cut Christmas trees, logs, pulpwood, slabwood, firewood, or wood chips that originate from a
- 10 ~~gypsyspongy~~gypsyspongy moth regulated area designated by the United States department of agriculture under 7 CFR
- 11 301.45-2a.
- 12 (b) Except as provided under sub. (3), no person may move any trees, woody shrubs, cut Christmas trees,
- 13 logs, pulpwood, slabwood, firewood, or wood chips out of any area in this state which the United States
- 14 department of agriculture has designated as a ~~gypsyspongy~~gypsyspongy moth regulated area under 7 CFR 301.45-2a.
- 15 SECTION 5. ATCP 21.10 (2) (a) and (b) is amended to read:

16 ATCP 21.10 (2) (a) Transport into this state, for delivery in this state, any outdoor household item that has
17 been used in a gypsyspongy moth regulated area designated by the United States department of agriculture
18 under 7 CFR 301.45-2a.

19 (b) Transport, out of an area in this state which the United States department of agriculture has designated
20 as a gypsyspongy moth regulated area under 7 CFR 301.45-2a, any outdoor household item that has been
21 used in that area.

22 SECTION 6. ATCP 21.10 (3) is amended to read:

23 ATCP 21.10 (3) Inspected and certified items. Subsections (1) and (2) do not apply to items that are
24 inspected and certified by a pest control official in the state or province of origin, provided that the items
25 are accompanied by a written certificate issued by the pest control official who inspected those items. The
26 certificate shall identify the date of inspection and the items inspected. In the certificate, the pest control
27 official shall certify at least one of the following:

28 (a) That the inspected items originate from non-infested premises and have not been exposed to
29 gypsyspongy moth infestation.

30 (b) That the inspected items were found, at the time of inspection, to be free of gypsyspongy moth
31 infestation.

32 (c) That the inspected items have been effectively treated to destroy the gypsyspongy moth. The certificate
33 shall specify the method and date of treatment.

34 **Note:** Effective treatment methods include the methods described in the “Gypsy Moth Program Manual”
35 published by the United States department of agriculture, animal and plant health inspection service
36 (USDA-APHIS). A copy of the manual may be ~~inspected at the department, or may be~~ obtained from
37 USDA-APHIS or viewed online at: [https://www.aphis.usda.gov/aphis/ourfocus/planthealth/complete-list-](https://www.aphis.usda.gov/aphis/ourfocus/planthealth/complete-list-of-electronic-manuals/ct_online_manuals)
38 [of-electronic-manuals/ct_online_manuals](https://www.aphis.usda.gov/aphis/ourfocus/planthealth/complete-list-of-electronic-manuals/ct_online_manuals).

39 (d) That the inspected items are produced, processed, stored, handled, or used under conditions, described
40 in the certificate, that effectively preclude the transmission of any gypsyspongy moth infestation.

41 SECTION 7. ATCP 21.13 (2) (c) is amended to read:

42 ATCP 21.13 (2) (c) A pest control official may use any of the following methods to certify that honeybees
43 are European honeybees:

44 ~~1. The Fast Africanized Bee Identification System published by the United States department of agriculture,
45 agricultural research service.~~

46 ~~**Note:** Copies of the Fast Africanized Bee Identification Systems (FABIS) are on file with the department
47 and the legislative reference bureau. Copies are available at cost from the department.~~

48 2.1. The Morphometric Method for Identification of Africanized and European Honey Bees Using Large
49 Reference Populations.

50 **Note:** The Morphometric Method for Identification of Africanized and European Honey Bees Using Large
51 Reference Populations is described in Rinderer et al., "Morphometric identification of Africanized and
52 European honey bees using large reference populations," Apidologie (1993) 24, 569-585. Copies of this
53 article are on file with the department and the legislative reference bureau. Copies are available at cost from
54 the department.

55 3.2. Any other method approved by the department.

56 SECTION 8. ATCP 21.13 (3) is repealed.

57 SECTION 9. ATCP 29.10 (3) (c) is amended to read:

58 ATCP 29.10 (3) (c) A report that ~~does both of the following:~~

59 ~~1. Identifies each pesticide product that the applicant sells or distributes.~~

60 ~~2. States the gross revenue which the applicant derived from the sale or distribution of each pesticide
61 product, for use in this state, during the preceding year as defined under s. ATCP 29.11 (1) (d). The
62 department may not disclose sales revenue information obtained under this subdivision.~~

63 SECTION 10. ATCP 29.11 (1) (d) is repealed.

64 SECTION 11. ATCP 29.11 (2) is amended to read:

65 ATCP 29.11 (2) Annual license fee. An applicant for a license under s. ATCP 29.10 shall pay an annual
66 license fee for each pesticide product that the applicant sells or distributes for use in this state during the
67 license year. Except as provided in subs. (5) to (7), the fee for each pesticide product is \$500.~~as follows:~~

68 SECTION 12. ATCP 29.11 (2) (a), (b) and (c) are repealed.

69 SECTION 13. ATCP 29.11 (3) is amended to read:

70 ATCP 29.11 (3) Nonhousehold pesticides; cleanup surcharge. An applicant for a license under s. ATCP
71 29.10 shall pay an agricultural chemical cleanup surcharge for each nonhousehold pesticide product that
72 the applicant sells or distributes. Except as provided in sub. (6) or (7), the amount of the surcharge is \$30, as
73 ~~follows:~~

74 SECTION 14. ATCP 29.11 (3) (a), (b), (c) and (3m) are repealed.

75 SECTION 15. ATCP 29.11 (5) is amended to read:

76 ATCP 29.11 (5) Unreported pesticide; increased license fee. If a person sells or distributes a pesticide
77 product without having filed a report for that product under s. ATCP 29.10 (3) (c) or (4), the license fee for
78 that product is twice the amount determined under sub. (2), except that if the pesticide product is exempt
79 from federal registration under 40 CFR 152.25, the license fee for that product is \$250.

80 SECTION 16. ATCP 29.11 (6) (b) is repealed.

81 SECTION 17. ATCP 29.11 (6) (c) is amended to read:

82 ATCP 29.11 (6) (c) By ~~March 31 of the year following~~ December 31 of the year in which the person stopped
83 selling the pesticide product for use in this state, pay a final license fee of \$500 for the pesticide product,
84 ~~calculated under sub. (2) based on sales of that product during the period specified in par. (b).~~

85 SECTION 18. ATCP 29.11 (6) (d) is amended to read:

86 ATCP 29.11 (6) (d) If the product is a nonhousehold pesticide, pay a final agricultural chemical cleanup
87 surcharge of \$30 ~~calculated under sub. (3) based on sales of that product during the period specified in par.~~
88 ~~(b).~~

89 SECTION 19. ATCP 29.15 (4) (b) is amended to read:

90 ATCP 29.15 (4) (b) An agricultural chemical cleanup surcharge of ~~\$22.40~~ 20, except as provided in s. 94.73
91 (15), Stats.

92 SECTION 20. ATCP 29.20 (6) (b) is amended to read:

93 ATCP 29.20 (6) (b) ~~Beginning with the license year that begins on January 1, 2015, an agricultural chemical~~
94 ~~cleanup surcharge of \$30.40~~An agricultural chemical cleanup surcharge of \$20, except as provided in sub.
95 (c). or s. 94.73 (15), Stats.

96 SECTION 21. ATCP 29.20 (6) (c) is created to read:

97 ATCP 29.20 (6) (c) If the applicant manufactures or distributes bulk pesticides in this state, an additional
98 agricultural chemical cleanup surcharge of \$25, except as provided in s. 94.73 (15), Stats.

99 SECTION 22. ATCP 29.25 (5) (a) is amended to read:

100 ATCP 29.25 (5) (a) Except as provided under par. (b), an applicant for an annual license under sub. (1)
101 shall pay the following annual license fee and surcharge:

102 1. A license fee of \$40.

103 ~~Note: Section 1943, 1999 Wis. Act 9, added January 1, 2001 and January 1, 2002 to this requirement.~~

104 2. An agricultural chemical cleanup surcharge of ~~\$11.20~~10, except as provided in s. 94.73 (15), Stats.

105 SECTION 23. ATCP 35.04 (5) (b) is amended to read:

106 ATCP 35.04 (5) (b) Installation of an engineered barrier to limit infiltration of existing contamination,
107 provided that the responsible person agrees in writing to maintain the barrier at ~~his or her~~their expense until
108 the contamination is removed or fully degraded.

109 SECTION 24. ATCP 35.06 (3) (c) is amended to read:

110 ATCP 35.06 (3) (c) If any person has reason to believe that ~~he or she~~they ~~has~~have received any
111 reimbursement for which ~~he or she~~they ~~is~~are ineligible under this subsection, that person shall immediately
112 notify the department and shall refund with the notification the full amount of any reimbursement for which
113 the responsible person is ineligible.

114 SECTION 25. ATCP 35.20 (3) is amended to read:

115 ATCP 35.20 (3) Joint application. The department shall deny a reimbursement application unless every
116 responsible person successfully notified under sub. (2) includes ~~his or her~~their full claim for reimbursement
117 as part of the same joint application, or waives any claim for reimbursement related to discharges to date at
118 that discharge site. If a notified person fails to submit an application within 30 days after receiving notice,

119 or fails to provide documentation under s. ATCP 35.06 (1) within 60 days after receiving notice, that failure
120 constitutes a waiver of that person's claim with respect to that application.

121 SECTION 26. ATCP 35.22 (1) (a) is amended to read:

122 ATCP 35.22 (1)(a) Except as provided in subs. (2) through (6), the department shall reimburse a responsible
123 person for each discharge site an amount equal to 75% of the eligible corrective action costs that are greater
124 than \$3,000 and less than \$400,000 for costs incurred before July 1, 2017, or that are greater than \$3000
125 and less than \$650,000 for costs incurred on or after July 1 2017. To this amount, the department shall add
126 interest costs under s. ATCP 35.25.

127 SECTION 27. ATCP 35.22 (1) (b) is amended to read:

128 ATCP 35.22 (1) (b) If no more than \$3,000 of the eligible corrective action costs under par. (a) were
129 incurred prior to January 1, 2004, the total amount paid under par. (a) may not exceed ~~\$297,750~~485,250.

130 SECTION 28. ATCP 35.22 (1) (c) is amended to read:

131 ATCP 35.22 (1) (c) If more than \$3,000 of the eligible corrective action costs under par. (a) were incurred
132 prior to January 1, 2004, the total amount paid under par. (a) may not exceed ~~\$317,600~~505,100 or the sum
133 of the following, whichever amount is less:

134 1. Eighty percent of the eligible corrective action costs incurred up to \$400,000 prior to January 1, 2004
135 that exceed \$3,000.

136 2. Seventy-five percent of the difference between ~~\$400,000~~650,000 and the eligible corrective action costs
137 incurred prior to January 1, 2004.

138 SECTION 29. ATCP 35.22 (2) (a) is amended to read:

139 ATCP 35.22 (2)(a) Except as provided in subs. (3) through (6), the department shall reimburse a responsible
140 person for each discharge site an amount equal to 75% of the eligible corrective action costs that are greater
141 than \$7,500 and less than \$400,000 for costs incurred before July 1, 2017, or that are greater than \$7,500
142 and less than \$650,000 for costs incurred on or after July 1, 2017, if any of the following apply at the time
143 the discharge occurs or is discovered:

144 1. The responsible person is required to be licensed under ss. 94.67 to 94.71, Stats.

145 2. The responsible person employs more than 25 persons.

146 3. The responsible person has gross annual sales of more than \$2,500,000.

147 SECTION 30. ATCP 35.22 (2) (c) is amended to read:

148 ATCP 35.22 (2) (c) If no more than \$7,500 of the eligible corrective action costs under par. (a) were incurred
149 prior to January 1, 2004, the total amount paid under pars. (a) and (b) may not exceed ~~\$294,375~~481,875.

150 SECTION 31. ATCP 35.22 (2) (d) is amended to read:

151 ATCP 35.22 (2) (d) If more than \$7,500 of the eligible corrective action costs under par. (a) were incurred
152 prior to January 1, 2004, the total amount paid under pars. (a) and (b) may not exceed ~~\$314,000~~501,500 or
153 the sum of the following, whichever amount is less:

154 1. Eighty percent of the eligible corrective action costs incurred up to \$400,000 prior to January 1, 2004
155 that exceed \$7,500.

156 2. Seventy-five percent of the difference between ~~\$400,000~~650,000 and the eligible corrective action costs
157 incurred prior to January 1, 2004.

158 SECTION 32. EFFECTIVE DATE. The rules adopted in this order shall take effect on the first day of the
159 month following publication in the Wisconsin Administrative Register, pursuant to s. 227.22 (2) (intro.),
160 Stats.

161

(END OF RULE TEXT)

Dated this _____ day of _____, 2022

WISCONSIN DEPARTMENT OF AGRICULTURE,
TRADE AND CONSUMER PROTECTION

By: Randy Romanski, Secretary