

The statement of scope for this emergency rule, SS 124-17, was approved by the Governor on November 30, 2017, published in Register No. 744A1 on December 4, 2017, and approved by the Department of Agriculture, Trade and Consumer Protection Board on December 21, 2017.

This emergency rule was approved by the Governor on January 17, 2018.

DATCP Docket No. 18-R-01
January 23, 2018

**WISCONSIN DEPARTMENT OF AGRICULTURE,
TRADE AND CONSUMER PROTECTION**

EMERGENCY RULE

The Wisconsin department of agriculture, trade and consumer protection hereby adopts the following emergency rule *to amend* ss. ATCP 99.126 (2), ATCP 100.135, and ATCP 101.245; and *to repeal and recreate* s. ATCP 99.126 (3) *relating to* grain dealers and grain warehouse keepers; milk contractors; and vegetable contractors.

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

This emergency rule modifies sections of Wis. Admin. Code s. ATCP 101 to increase vegetable contractor assessments, as required by statute, to address the portion of the Agricultural Producer Security Fund (Fund) that is currently below its minimum threshold. This emergency rule also amends sections of s. ATCP 99, Wis. Admin. Code, to address the portion of the Fund that is currently above its maximum threshold; and s. ATCP 100, Wis. Admin. Code, to address assessment inequities, based on findings from a recent actuarial study of the Fund and discussions with the Agricultural Producer Security Council (Council).

Statutes Interpreted

Statutes Interpreted: ss. 25.463, 126.15 (1) and (6), 126.46 (1), and 126.88 (2) (a), Stats.

Statutory Authority

Statutory Authority: ss. 25.463 and 126.81 (1) (a), Stats.

Explanation of Statutory Authority

Wis. Stat. s. 25.463 creates the Wisconsin Agricultural Producer Security Fund.

Wis. Stat. s. 126.15 allows DATCP to establish by rule annual fund assessments for grain dealers. Wis. Stat. s. 126.30 allows DATCP to establish by rule annual fund assessments for grain warehouse keepers. Wis. Stat. s. 126.46 (1) directs DATCP to establish by rule annual fund assessments for milk contractors. Wis. Stat. s. 126.60 allows DATCP to establish by rule annual fund assessments for vegetable contractors.

Wis. Stat. s. 126.81 (1) (a) allows DATCP to promulgate rules to interpret and implement Wis. Stat. ch. 126.

Wis. Stat. s. 126.88 (1) directs DATCP to promulgate a rule modifying assessments when the fund balance or a portion of the fund balance falls outside the specified minimum and maximum amounts.

Wis. Stat. s. 126.88 (2) (a) directs DATCP to promulgate a rule modifying assessments when the fund balance or a portion of the fund balance falls below the minimum amounts required under s. 126.88 (1) (a) through (e), Stats.

Wis. Stat. s. 126.88 (2) (b) allows DATCP to promulgate an emergency rule without demonstrating that the emergency rule is necessary for the preservation of the public peace, health, safety, or welfare under ch. 227.24, Stats.

Wis. Stat. s. 126.88 (2) (b) also allows a rule promulgated under this paragraph to remain in effect for not more than 24 months.

Related Statutes and Rules

Wis. Stat. s. 15.137 (1) defines the membership of the Council, who advise the Department on the Fund and other producer security matters.

Plain Language Analysis

Background

The Fund, established by Wis. Stat. s. 25.463, is a public trust administered by the Department. Milk contractors, grain dealers, grain warehouse keepers, and vegetable contractors (collectively known as contractors) must purchase a license to obtain milk, grain, and vegetables, respectively, from producers, and most contractors are required to contribute to the Fund annually. Funds are used to settle claims by producers in the event that a contractor defaults on a payment. Funds from each industry are accounted for separately and then deposited into the overall fund. Wis. Stat. Chapter 126 establishes detailed fund assessment requirements, except that it requires the Department to establish milk contractor fund assessments by rule. Wis. Stat. s. 126.88 (1) sets minimum and maximum fund balances for each industry, as well as a minimum and maximum balance requirement for the overall fund.

In 2014, a default by a contributing vegetable contractor caused the Fund to pay vegetable producers more than \$6 million. The resultant impact of this default is that the Fund balance attributed to vegetable contractors fell well below the minimum statutory threshold of \$800,000. The following year, a \$1 million default in the milk industry further drew down the Fund balance. As a result, the Department and the Council identified the need to evaluate the entire agricultural producer security program. An actuarial

study was conducted to, in part, examine the overall sustainability of the Fund and analyze the equitability of assessments contributed by each industry relative to anticipated losses. The Department adopted a number of interim emergency rules as stopgap measures while it awaited the results of an actuarial study to consider possible permanent rule changes. In December 2015, DATCP received the results from an actuarial study and began developing recommendations for changes to the agricultural producer security program.

Those recommended changes led to permanent rulemaking to adjust assessments paid into the Fund by the milk, grain, and vegetable industries. The Council and the DATCP Board approved the final draft of the permanent rule in August and September of 2017, respectively. Modifications to fund assessments must be in place prior to the start of a license year: February 1, 2018 for vegetable contractors, May 1, 2018 for milk contractors, and September 1, 2018 for grain dealers. This emergency rule was necessitated due to the uncertainty of the effective date of the permanent rule.

Wis. Stat. s. 126.88 requires the department to modify assessments when the Fund or the fund balance for any industry is outside the respective minimum or maximum required balance. This emergency rule modifies current language to meet the statutory obligation of the Fund balance attributable to vegetable contractors (below the statutory minimum) and grain dealers (above the statutory maximum). Without this emergency rule, the Fund will fail to meet its statutory obligations as dictated by Wis. Stat. Chapter 126.

Wis. Stat. Chapter 126 establishes a maximum balance for grain dealers. As of May 31, 2017, the grain dealer balance has reached the statutory maximum balance of \$6 million and the Department is required to initiate rulemaking to reduce grain dealer assessments.

Additionally, the actuarial study indicated that, while the overall Fund was sustainable long-term, adjustments may be needed to assessments or individual Fund balance thresholds to provide more equity across all industry segments.

Rule Content

The department adopted this emergency rule to amend Agricultural Producer Security Fund assessment amounts required for contributing grain, milk and vegetable contractors. Specifically, this emergency rule:

- Creates an automatic reduction in the Fund assessments paid by grain dealers when the grain dealer portion of the Fund exceeds the statutory maximum of \$6 million.
- Reduces assessments paid by milk contractors by 20 percent by using a multiplier.
- Increases vegetable contractors fund assessments to account for the negative balance of that portion of the Fund, by adding an assessment of 0.2% multiplied by contract obligations, net of waiver, with a \$50,000 cap.

Fiscal Impact

Producer Security Fund; Assessment Revenues

This emergency rule will reduce the milk contractor and grain dealer portions of the Fund balance because both industries will begin paying less in assessments annually. It also increases fund assessments for contributing vegetable contractors in order to meet the statutory requirement to maintain a minimum fund balance.

The following table shows *projected* assessment revenues:

Total Projected Fund Assessment Revenues*			
	<i>Without this emergency rule</i>	<i>With this emergency rule</i>	Difference
Grain Dealers	\$ 974,000	\$ 256,000	\$ (718,000)
Grain Warehouse Keepers	38,000	38,000	0
Milk Contractors	771,000	621,000	(150,000)
Vegetable Contractors	95,000	327,000	232,000
TOTAL	\$ 1,878,000	\$ 1,242,000	\$ (636,000)

* Projections assume constant procurement volumes, commodity price levels and contractor financial strength.

Under this emergency rule, the fund balance amount attributable to vegetable contractor will begin to build towards the required statutory minimum of \$800,000.

	Minimum Statutory	Actual Balance as of June 30,	Maximum Statutory
Grain Dealers	\$ 1,000,000	\$ 6,140,594.71	\$ 6,000,000
Grain Warehouse	\$ 200,000	\$ 134,966.89	\$ 1,000,000
Milk Contractors	\$ 3,000,000	\$ 6,176,076.50	\$ 12,000,000
Vegetable Contractors	\$ 800,000	(\$ 4,501,749.98)	\$ 3,000,000
Entire Fund	\$ 5,000,000	\$ 7,949,888.12	\$ 22,000,000

Business Impact

This emergency rule will have a positive impact on grain dealers by automatically reducing assessments whenever the grain dealer portion of the Fund balance exceeds its statutory maximum. The rule also reduces deferred payment contract assessments whenever the grain dealer portion of the Fund balance exceeds its statutory maximum.

This emergency rule will have a positive impact on milk contractors by reducing their assessments by 20 percent. The Fund will continue to grow but at a slower pace thus ensuring that they pay a fairer share of the cost of the program.

This emergency rule will increase vegetable contractor fund assessments by 0.2% of their contract obligations to producers. By spreading the increase to achieve the statutory minimum over 18 years, this should have minimal impacts on the vegetable contractors.

Federal and Surrounding State Programs

Federal Programs

ATCP 99 - Grain

The United States Warehouse Act is a voluntary regulatory program administered by Farm Service Agency (FSA), a unit within USDA. Under the Act, warehouse keepers who obtain a warehouse license must comply with several FSA regulations. Generally, the warehouse keeper must maintain enough grain

in inventory to cover 100% of depositor obligations at all times. Further, FSA licensed warehouse keepers must submit financial statements, submit to inspections by USDA auditors, and post surety bonds. In the event a warehouse defaults, FSA can convert the bonds to cash and disperse the proceeds to depositors. The federal grain warehouse license is officially a voluntary program; in practice, it is not completely voluntary. Every state that has significant grain production (including Wisconsin) has some type of state grain warehousing law. These laws require grain warehouse keepers to obtain a license but allow them to choose either a state license or a federal license. Those that choose a federal license are exempt from the state licensing program.

ATCP 100 - Milk

No federal programs currently exist that offer milk producer security from contractor payment defaults.

ATCP 101 - Vegetable

The Perishable Agricultural Commodities Act (PACA) is a federal program that provides some protections for vegetables. This program consists of a priority lien against vegetable-related assets and is applicable to fresh vegetables based on a complex set of variables and circumstances. Wisconsin's vegetable security program applies only to processing vegetables. Wisconsin's program uses an indemnity fund, rather than a priority lien-type program.

There may be some limited overlap between the Wisconsin and federal programs, but that overlap is justified because the scope of federal coverage is not entirely clear. Overlap was reduced by Wisconsin legislation, which permits certain potato buyers covered under the federal program to opt out of most of the state program.

Surrounding States

ATCP 99 - Grain

Like all states with a significant grain industry, Minnesota, Michigan, Illinois, Indiana, and Iowa all require persons who buy grain from producers to obtain a grain dealer license, and all persons who store grain for others are required to obtain either a state or federal grain warehouse license. Licensees must file financial statements with the state, and the warehouses must maintain 100% of depositor-owned grain in inventory at all times.

Minnesota requires grain dealers and grain warehouse keepers to post bonds with the state. Indiana, Illinois, and Iowa all have a state indemnity fund that is made up of grain dealer and warehouse assessments. Michigan (like Wisconsin) has a combination of bonds and indemnity fund contributions.

ATCP 100 - Milk

Minnesota requires any wholesale dealer or food processor who contracts with other Minnesota dealers or farmers of milk, cream, or products made from milk or cream, to be licensed as a Wholesale Produce Dealer. Dealers are required to obtain a surety bond and required to maintain trust assets so that assets are freely available to satisfy outstanding obligations. There is no exemption to this requirement.

Michigan requires producer security for all manufacturing and Grade A dairy plants that are a first receiving point for raw milk that will be processed at that facility. Security can be in one or more of several forms including bond, letter of credit, certificate of deposit, or pre-payment. There is no exemption to this requirement.

Illinois, Indiana, and Iowa do not require dairy producer security.

ATCP 101 - Vegetable

Minnesota requires any wholesale dealer or food processor who contracts with other Minnesota dealers for fresh fruits or vegetables to be licensed as a Wholesale Produce Dealer. Dealers are required to obtain a surety bond and required to maintain trust assets so that assets are freely available to satisfy outstanding obligations.

Illinois, Iowa, Michigan, and Indiana lack similar programs.

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FINDING OF EMERGENCY

Wis. Stat. s. 126.88 (2) (b) obviates the need for an “emergency” finding, as would normally be required under s. 227.24 (1) (a) and (3), Stats. Nonetheless, in this instance, this emergency rule is required for several reasons:

- **Corrective Rule Mandated by Statute.** Wis. Stat. s. 126.88 (2) (a) mandates the department to promulgate a corrective rule when a portion of the Fund falls below the minimum balance required by statute.
- **Vegetable Contractors.** The permanent rule changes, already approved by the DATCP Board, are unlikely to be in effect by February 1, 2018, the annual licensing assessment date for vegetable contractors.
- **Grain Dealers.** DATCP is required to take action to ensure the grain dealer portion of the Fund balance stays within statutory thresholds. Without this emergency rule, the grain dealer balance will continue to grow beyond its \$6 million statutory maximum. An emergency rule effective date of August 31, 2018 is necessary since the next license year (assessment period) for grain dealers begins September 1, 2018. While Wis. Stat. s. 126.88 (2) (b) lifts the department’s obligation to affirmatively evidence an “emergency” finding, here, an emergency rule is necessary to limit the growth of the Agriculture Producer Security Fund (Fund) balance attributable to grain dealers. Current law requires DATCP to modify fund assessments through rulemaking if fund balances are below or above certain thresholds. For grain dealers, the maximum balance threshold is \$6 million. The balance attributed to grain dealers currently exceeds this maximum.
- **Milk Contractors.** Without this emergency rule, licensed milk contractors will continue to pay more than their equitable share into the Fund. An emergency rule which implements the provisions of the permanent rule with an effective date of April 30, 2018 is necessary since the next license year (assessment period) begins May 1, 2018. This emergency rule is necessary to provide assessment relief to milk contractors contributing to the Agricultural Producer Security Fund (Fund).

EMERGENCY RULE

SECTION 1. ATCP 99.126 (2) is amended to read:

(2) BASIC ASSESSMENT.

(a) A contributing grain dealer who reports less than \$500,000 in grain payments under s. 126.11 (9) (a), Stats., shall pay a basic assessment equal to the greater of the following amounts:

1. \$100.

2. If the fund balance attributable to grain dealers is less than \$6 million on May 31 of the last preceding license year, then ~~The~~ the sum of the amounts calculated under s. 126.15 (1) (a) and (b), Stats.

(b) A contributing grain dealer who reports at least \$500,000 but less than \$3 million in grain payments under s. 126.11 (9) (a), Stats., shall pay a basic assessment equal to the greater of the following amounts:

1. \$200.

2. If the fund balance attributable to grain dealers is less than \$6 million on May 31 of the last preceding license year, then ~~The~~ the sum of the amounts calculated under s. 126.15 (1) (a) and (b), Stats.

(c) A contributing grain dealer who reports at least \$3 million in grain payments under s. 126.11 (9) (a), Stats., shall pay a basic assessment equal to the greater of the following amounts:

1. \$500.

2. If the fund balance attributable to grain dealers is less than \$6 million on May 31 of the last preceding license year, then ~~The~~ the sum of the amounts calculated under s. 126.15 (1) (a) and (b), Stats.

SECTION 2. ATCP 99.126 (3) is repealed and recreated:

(3) DEFERRED PAYMENT ASSESSMENT. A contributing grain dealer shall pay a deferred payment assessment equal to the amount the grain dealer reports under s.126.11 (9) (b), Stats., in the grain dealer's license application for that license year multiplied by rates determined as follows:

(a) If the fund balance attributable to grain dealers is greater than \$6 million on May 31, the rate is 0.000875 for deferred payment contracts entered into anytime during the following license year.

(b) If the fund balance attributable to grain dealers is not more than \$6 million on May 31, the rate is 0.0035 for deferred payment contracts entered into anytime during the following license year.

SECTION 3. ATCP 100.135 is amended to read:

ATCP 100.135 **Contributing milk contractors; fund assessments.** (1) General. A contributing milk contractor shall pay an annual fund assessment for each license year. The annual fund assessment shall be calculated under this section, rather than under s. 126.46, Stats. Except as provided in sub. (6) or (10), or s. ATCP 100.13, the annual fund assessment amount is the minimum assessment amount listed in sub. (9) or the sum of the following multiplied by 0.8, whichever is greater:

SECTION 4. ATCP 101.245 (2) is amended to read:

(2) ASSESSMENT AMOUNT.

(a) A contributing vegetable contractor that reports less than \$500,000 in contract obligations under s. 126.56 (9) (am), Stats., shall pay a fund assessment equal to the greater of the following amounts:

1. \$100.

2. The sum of the amounts calculated under s. 126.60 (1) (a) and (b), Stats. If all of the contract obligations reported by the vegetable contractor under s. 126.56 (9) (am), Stats., were made under written contracts where payments were required no more than 30 days after taking custody or control of the vegetables, then further divide this amount by 2.

(b) A contributing vegetable contractor that reports at least \$500,000 but less than \$4 million in contract obligations under s. 126.56 (9) (am), Stats., shall pay a fund assessment equal to the greater of the following amounts:

1. \$200.

2. The sum of the amounts calculated under s. 126.60 (1) (a) and (b), Stats. If all of the contract obligations reported by the vegetable contractor under s. 126.56 (9) (am), Stats., were made under written contracts where payments were required no more than 30 days after taking custody or control of the vegetables, then further divide this amount by 2.

(c) A contributing vegetable contractor who reports \$4 million or more in contract obligations under s. 126.56 (9) (am), Stats., shall pay an fund assessment equal to the greater of following amounts:

1. \$500.

2. The sum of the amounts calculated under s. 126.60 (1) (a) and (b), Stats. If all of the contract obligations reported by the vegetable contractor under s. 126.56 (9) (am), Stats., were made under written contracts where payments were required no more than 30 days after taking custody or control of the vegetables, then further divide this amount by 2.

(d) If the fund balance attributable to vegetable contractors is less than \$800,000 on November 30 of the preceding license year, a contributing vegetable contractor shall pay the sum of the amount calculated under either (a), (b), or (c) and the lesser of:

1. \$50,000. If all of the contract obligations reported by the vegetable contractor under s. 126.56 (9) (am), Stats., were made under written contracts where payments were required no more than 30 days after taking custody or control of the vegetables, then this amount is \$25,000.
2. The amount of contract obligations under s. 126.56 (9) (am), Stats., multiplied by 0.002. If all of the contract obligations reported by the vegetable contractor under s. 126.56 (9) (am), Stats., were made under written contracts where payments were required no more than 30 days after taking custody or control of the vegetables, then divide this amount by 2.

SECTION 5. EFFECTIVE DATE: This emergency rule takes effect on February 1, 2018, and remains in effect for two years. The department implements this emergency rule as provided in s. 126.88 (2)(b), Stats.

Dated this _____ day of _____, 2018.

WISCONSIN DEPARTMENT OF AGRICULTURE,
TRADE AND CONSUMER PROTECTION

By: _____
Sheila Harsdorf
Secretary