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**WISCONSIN DEPARTMENT OF AGRICULTURE,
TRADE AND CONSUMER PROTECTION
DATCP Docket No. 10-R-01**

EMERGENCY RULE

The Wisconsin department of agriculture, trade and consumer protection hereby adopts the following emergency rule *to create* ATCP 70.03(7)(e) and (f) and (notes); *relating to* food processing plant license exemptions for certain home-canners and maple sap processors.

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

The Department of Agriculture, Trade and Consumer Protection (DATCP) administers state food processing plant license requirements under s. 97.29, Stats. This temporary emergency rule exempts the following persons from licensing under s. 97.29, Stats., subject to certain conditions:

- An individual who home-cans acidic, acidified or fermented vegetable or fruit products for retail sale at a community or social event, farmers' market or farm roadside stand, and receives no more than \$5,000 from those sales in any license year. This exemption implements the statutory exemption created by 2009 Wis. Act 101.
- A person who processes maple sap to create maple syrup or concentrated maple sap that the person sells only to other processors for further processing, and who receives no more than \$5,000 from those sales in any license year.

DATCP is adopting this temporary emergency rule pending the adoption of a "permanent" rule to cover the same matters.

- This emergency rule is needed to implement 2009 Act 101, to provide clear guidance to home canners who wish to sell their products to the public, and to protect the public against potentially serious food safety risks.
- This emergency rule is also needed to relieve certain maple sap processors from unnecessary cost and compliance burdens, while ensuring adequate food safety protection.
- A temporary emergency rule is needed now because a "permanent" rule cannot be completed in time for this year's farmers market and maple syrup production seasons.
- This emergency rule will take effect immediately upon publication in the official state newspaper, and will remain in effect for 150 days. The Legislature's Joint Committee for Review of Administrative Rules may extend this emergency rule for up to 120 additional days.

Statutes Interpreted

ss. 97.09(4), 97.29 and 227.24, Stats.

Statutory Authority

ss. 93.07(1), 97.09(4), 97.29(1)(g)8. and (5), and 227.24, Stats.

Explanation of Statutory Authority

- DATCP has broad general authority, under s. 93.07(1), Stats., to interpret laws under its jurisdiction.
- Under s. 97.09(4), Stats., DATCP may establish and enforce standards governing the production, processing, packaging labeling, transportation, storage, handling, display, sale, including retail sale, and distribution of foods that are needed to protect the public from the sale of adulterated or misbranded foods.
- Under s. 97.29(1)(g)8. and (5), Stats., DATCP may spell out food processing plant license requirements and exemptions.
- DATCP is authorized to adopt temporary emergency rules under s. 227.24, Stats., if emergency rules are needed to protect the public health, safety or welfare pending the adoption of "permanent" rules on the same subject.

Related Statutes and Rules

DATCP administers Wisconsin's food safety and labeling laws under ch. 97, Stats., including food processing plant license requirements under s. 97.29, Stats. (as modified by 2009 Wis. Act 101). DATCP has adopted food processing plant licensing rules under ch. ATCP 70, Wis. Adm. Code.

A person who processes food for sale or distribution is generally required to hold a state food processing plant license under s. 97.29, Stats. (there are certain exemptions). Persons who are engaged in dairy or meat processing, or who operate retail food establishments, must be licensed under other statutes. Local food license and zoning regulations may apply in some cases.

2009 Wis. Act 101 exempted, from state licensing under s. 97.29, Stats., persons who home-can acidic, acidified or fermented vegetable or fruit products for retail sale at a community or social events or farmers' markets, provided that the person receives no more than \$5,000 from those sales during the license year. Act 101 does not exempt those persons from other state license requirements that may apply, nor does it exempt them from local licensing or zoning ordinances that may apply.

Plain Language Analysis

Home Canning for Retail Sale

Under this emergency rule, a person who home-cans acidic, acidified or fermented vegetable or fruit products for retail sale at a community or social event, farmers' market or farm roadside stand is exempt from a food processing plant license under s. 97.29, Stats, if all of the following apply:

- The person is an individual, not a legal entity such as a corporation.
- The individual receives no more than \$5,000 during the license year from those sales. If 2 or more individuals home-can acidic, acidified or fermented vegetable or fruit products at the same home address, none of those individuals qualifies for the license exemption unless their combined gross receipts from the sale of those products totals no more than \$5,000.
- The canned products have an equilibrium pH value of 4.6 or lower. The individual must test the first batch of canned product produced according to each separate recipe used by the individual in each license year, to verify that canned products produced according to that recipe meet this pH requirement. The individual must keep, for at least 2 years, a record of each pH test.
- The individual registers annually with DATCP. There is no cost to register, and the registrant is not required to obtain a registration certificate from DATCP.
- The individual completes a home-canning safety course, or follows a written recipe (including ingredients and canning procedures) that reliably ensures the safety of each home-canned product.
- The individual discloses to potential buyers, by means of a sign or placard, that the canned products "are homemade in a kitchen that has not been subject to state inspection."
- Each canned product is properly labeled to include all of the following:
 - The name and address of the individual who canned the product.
 - The date on which the product was canned.
 - The following statement: "This product was made in a home not subject to state licensing or inspection."
 - A list of ingredients in descending order of prominence (major ingredients must be of vegetable or fruit origin). The list must include the common name of any ingredient that originates from milk, eggs, fish, crustacean shellfish, tree nuts, wheat, peanuts or soybeans.
- The individual keeps a complete written record of every batch of canned product.
 - The batch record must include the name of the product, the product recipe (including procedures and ingredients), the amount of the product batch canned and sold, the canning and sale dates, the sale location, gross sales receipts, the results of any pH test conducted on the product, and the disposition of any product not sold.
 - The individual must keep the record for at least 2 years after the individual sells or otherwise disposes of the product, and must make that record available to DATCP for inspection and copying upon request.

Maple Sap Processed for Sale to Other Processors

Under this rule, a person who processes maple sap to produce maple syrup or concentrated maple sap for sale to another processor for further processing is exempt from licensing under s. 97.29, Stats., if all of the following apply:

- The person receives less than \$5,000 from those sales in a license year.
- The person registers annually with DATCP. There is no cost to register, and the registrant is not required to obtain a registration certificate from DATCP.
- The person keeps a written record of each sale, retains that record for at least 2 years, and makes the record available to DATCP for inspection and copying upon request. The record must include the name and address of the purchaser, the date of sale, the amount of maple syrup or concentrated maple sap sold, and the sale price.

Fiscal Impact

This rule will not have a significant fiscal impact on the state of Wisconsin or on local governments. A complete *fiscal estimate* is attached.

Business Impact

This emergency rule implements 2009 Wis. Act 101, which removes license requirements for certain home-canners who wish to sell their products to the public at community or social events, farmers' markets and farm roadside stands. The food safety standards in this rule will help protect the public from serious food safety hazards (including botulism) that may be associated with improperly home-canned products. The prevention of food safety problems promotes public confidence, and benefits the entire food industry including home-canners.

This emergency rule may encourage some home-canning hobbyists to sell their home-canned products at community or social events, at farmers' markets, or at their own farm roadside stands. That may have an adverse competitive impact on licensed canners who currently supply those sales outlets, although the adverse effect is likely to be minimal. Larger food canning businesses that supply canned food for the mass consumer market will not be significantly affected by this emergency rule.

This rule also exempts certain small maple sap processors from licensing under s. 97.29. The exemption will relieve those processors from unnecessary licensing costs and compliance burdens, while ensuring adequate food safety protection.

A complete *business impact analysis* is attached.

Environmental Impact

This rule will not have any significant environmental impact.

Federal and Surrounding State Programs

Federal Programs

There is no federal law that addresses these issues, or compels DATCP to adopt this emergency rule.

Surrounding State Programs

Minnesota exempts a person from licensing as a food processor if the person produces less than \$5,000 of non-potentially hazardous food or less than \$5,000 of home-canned acidified food. Home-canned acidified foods may only be sold at community or social events or farmers' markets in Minnesota. A point-of-sale placard and the product label must disclose that the product was produced in an unlicensed and uninspected home setting. The product label must also disclose the name and address of the processor and the date the goods were processed. Wisconsin's new law (2009 Act 101) was influenced by Minnesota's law.

Illinois and Michigan have no laws related to home-processed foods. All food processed for sale to the public in Illinois and Michigan must be processed in a licensed facility.

In Iowa, individuals may annually process up to \$20,000 in potentially-hazardous baked goods (including soft pies and bakery products with a custard or cream filling) at a licensed “home food establishment” for sale on the premises (the bakery goods may be consumed elsewhere). Individuals may sell non-potentially hazardous home-baked goods at a farmers’ market, without a license. Canning and processing of low acid or acidified foods must be done in a licensed commercial establishment.

Data and Analytical Methodologies

This emergency rule is not based on any specialized data or analytical methodologies. Portions of this rule (such as pH requirements for home-canned food sold to the public) are based on well-established food science and public health principles.

DATCP Contact

Questions and comments related to this rule may be directed to:

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FINDING OF EMERGENCY

- (1) The department of agriculture, trade and consumer protection (DATCP) administers state food processing plant license requirements under s. 97.29, Stats.
- (2) Recent legislation (2009 Act 101, enacted on February 4, 2010) created a limited exemption from food processing plant license requirements under s. 97.29, Stats., for persons who home-can limited quantities of acidic, acidified or fermented vegetable and fruit products for retail sale at community and social events or at farmers’ markets.
- (3) Home-canned food products, if not properly canned, may pose a risk of serious food safety hazards such as botulism.
- (4) DATCP has received many requests for clarification of the new license exemption under Act 101. In order to facilitate compliance and protect consumers from potentially serious food safety hazards, DATCP must adopt administrative rules to clarify the scope, application and terms of the new license exemption.
- (5) Implementing rules are urgently needed because of the seriousness of the potential food safety hazards, and the seasonal nature of the farmers’ markets and other events at which home-canned products may be sold. The normal rulemaking process takes over a year to complete, and cannot be completed in time for this summer’s farmers’ markets (which begin as early as mid-April or May). Persons who wish to sell home-canned food products must clearly understand the scope of the license exemption, and the food safety standards that must be met in order to qualify.
- (6) This temporary emergency rule clarifies the scope, application and terms of the new license exemption under Act 101, pending the completion of “permanent” rules by the normal rulemaking process. This emergency rule is needed to protect the public health, safety and welfare, and to facilitate fair and orderly implementation of the new license exemption.
- (7) This emergency rule also exempts, from food processing plant license requirements under s. 97.29, Stats., a person who collects and processes relatively small quantities of maple sap to produce maple syrup or concentrated maple sap for sale to other processors for further processing. These small-scale processing activities pose minimal food safety risks, and the current license requirement imposes an unnecessary cost and compliance burden. An emergency rule is needed to relieve these cost and compliance burdens for the maple sap collection and processing season that typically begins in March. This emergency rule creates a temporary license exemption, pending the completion of “permanent” rules by the normal rulemaking process. This emergency rule clearly defines the scope, application and terms of the exemption, in order to protect public health, safety and welfare.

EMERGENCY RULE

SECTION 1. ATCP 70.03(7)(e) and (f) and (notes) are created to read:

ATCP 70.03(7)(e) The processing of maple sap to produce maple syrup or concentrated maple sap if all of the following apply:

1. The processor sells the maple syrup or concentrated maple sap only to other processors for further processing.
2. The processor's combined gross receipts from all sales under subd. 1. during the license year total less than \$5,000.
3. The processor keeps a written record of every sale under subd. 1., retains that record for at least 2 years, and makes the record available for inspection and copying by the department upon request. The record shall include the name and address of the purchasing processor, the date of sale, the amount of maple syrup or concentrated maple sap sold, and the sale price.
4. The processor registers with the department before engaging in any processing activities under this paragraph in any license year ending March 31. A registration expires at the end of the license year. A processor shall register in writing on a form provided by the department, or shall register online at <http://www.datcp.state.wi.us/core/food/food.jsp>. The registration shall include information reasonably required by the department, including the registrant's name and address and information related to the nature, location and scope of the registrant's processing activities and product sales. There is no fee to register, and the registrant is not required to hold a registration certificate from the department.

(f) An individual canning a vegetable or fruit product at that individual's home in this state, for retail sale to consumers who take delivery in this state, if all of the following apply:

1. The individual sells and personally delivers the canned product to purchasers at a community or social event or farmers' market, or at a roadside stand operated on the farm where the individual resides.
2. The canned product has an equilibrium pH value of 4.6 or lower. The individual shall test the first batch of product canned according to each separate recipe used by the individual under this paragraph during each license year, to verify that products canned according to that recipe meet this pH requirement. Each pH test shall be conducted with a pH meter that is properly calibrated for that day's use, except that the test may be conducted with short-range pH paper if the product type normally has a pH of 4.0 or lower and if the range of the pH paper includes a pH of 4.6.
3. The individual's gross receipts from all retail sales of canned products under this paragraph during the license year are less than \$5,000. If 2 or more individuals are engaged in canning activities under this paragraph at the same residential address, none of those individuals qualifies for the license exemption under this paragraph unless their combined gross receipts from retail sales of canned products under this paragraph during the license year are less than \$5,000.
4. The individual prominently displays a sign at each place of sale stating: ***"These canned goods are homemade in a kitchen that has not been subject to state inspection."***
5. Each container of the canned product is labeled with all of the following:
 - a. The name and address of the individual who canned the product.
 - b. The date on which the product was canned.
 - c. The following statement: ***"This product was made in a home not subject to state licensing or inspection."***
 - d. A list of ingredients in descending order of prominence. The list shall include the common name of any ingredient that originates from milk, eggs, fish, crustacean shellfish, tree nuts, wheat, peanuts or soybeans.
6. The individual registers with the department before engaging in any home canning activities under this paragraph in any license year ending March 31. A registration expires at the end of the license year. The individual shall register in writing on a form provided by the department, or shall register online at <http://www.datcp.state.wi.us/core/food/food.jsp>. The registration shall include information reasonably required by the department, including the registrant's name and address and information related to the nature, location and scope of the registrant's home canning activities and canned product sales. There is no fee to register, and the registrant is not required to hold a registration certificate from the department.
7. The individual has documentation to show that he or she has completed a department-approved acidified food processing course, or has canned the vegetable or fruit product according to a written recipe that reliably ensures the safety of the product.

NOTE: An acidified food processing course provided or approved by the university of Wisconsin-extension is deemed to be a department-approved course under subd. 7. The department may approve other courses upon request. A recipe qualifies under subd. 7. if it is published in the current edition of the *Ball Blue Book* or the *Ball Complete Book of Home Preserving*, or is published by the National Center for Home Food Preservation (www.uga.edu/nchfp) or the

University of Wisconsin (www.foodsafety.wisc.edu/preservation.html). Other written recipes may qualify if the individual can objectively document that the recipe (including food ingredients and canning procedures) reliably ensures the safety of the canned food product.

8. The individual maintains a complete written record of every batch of product canned for sale under this paragraph, including the name of the product, the product recipe including procedures and ingredients, the amount of product canned and sold, the canning date, product sale dates and locations, gross sales receipts, the results of any pH test conducted on product from the batch, and the disposition of any product not sold. The individual shall retain the record for at least 2 years after the individual sells or otherwise disposes of all product from the batch, and shall make that record available to the department for inspection and copying upon request.

NOTE: The department offers a *Home Processing and Canning Fact Sheet* describing the types of home-canned foods that may be canned for sale under par. (f) without a state food processing plant license. You may obtain a free copy of the fact sheet by contacting the department at the following address:

Wisconsin Department Agriculture, Trade and Consumer Protection
Division of Food Safety
PO Box 8911
Madison, WI 53708-8911

The fact sheet is also available at the department's website at
<http://www.datcp.state.wi.us/core/food/food.jsp>.

SECTION 2. EFFECTIVE DATE: This emergency rule takes effect upon publication and remains in effect for 150 days. The department may seek to extend this emergency rule as provided in s. 227.24, Stats.

Dated this _____ day of April, 2010.

WISCONSIN DEPARTMENT OF AGRICULTURE,
TRADE AND CONSUMER PROTECTION

By _____
Rodney J. Nilsestuen, Secretary