

The statement of scope for this emergency rule, SS 046-18, was approved by the Governor on May 1, 2018, published in Register No. 749A1 on May 7, 2018, and approved by the Department of Agriculture, Trade and Consumer Protection Board on May 24, 2018.

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

DATCP Docket No. 18-R-04
July 19, 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* EmR1803, Section 3 s. ATCP 100.135 (1) and ch. ATCP 100.135 (10) (intro.); and *to create* s. ATCP 100.135 (1m); *relating to* milk contractors.

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

This emergency rule modifies EmR1803 and Wis. Admin. Code ch. ATCP 100 to establish an annual assessment rate for milk contractors entering into deferred payment contracts, as required by 2017 Wisconsin Act 155.

Statutes Interpreted

Statutes Interpreted: Wis. Stat. §§ 25.463 and 126.46 (1).

Statutory Authority

Statutory Authority: Wis. Stat. §§ 25.463, 93.07 (1), and 126.81 (2m) (b).

Explanation of Statutory Authority

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

Wis. Stat. § 93.07 (1) directs DATCP to make such regulations as are necessary for the discharge of all the powers and duties of the department.

Wis. Stat. § 126.46 (1) states that milk producers shall pay an annual assessment, including an assessment for deferred payment contracts, in an amount specified by department rule.

Wis. Stat. § 126.81 (2m) (b) directs DATCP to promulgate rules to specify fund assessments under Wis. Stat. § 126.46 (1).

Section 76 of 2017 Wisconsin Act 155 directs DATCP to promulgate these rules as emergency rules until the permanent rules become effective and waives the otherwise applicable requirement that DATCP provide a finding of emergency.

Plain Language Analysis

Background

The Agricultural Producer Security Fund (Fund) is a public trust administered by the Wisconsin Department of Agriculture, Trade and Consumer Protection (DATCP). Milk contractors, grain dealers, grain warehouse keepers, and vegetable contractors (collectively known as contractors) must purchase a license to obtain milk, grain, or vegetables from producers, and most contractors are required to contribute to the Fund annually. The Fund is used to settle claims by producers in the event that a contractor defaults on payment. Assessment contributions from each industry are accounted for separately and deposited into the overall Fund. Wis. Stat. ch. 126, establishes detailed assessment requirements, except that it requires DATCP to establish milk contractor assessments by rule. Wis. Stat. ch. 126, sets minimum and maximum Fund balances for each industry, as well as a minimum and maximum balance requirement for the overall Fund.

In March 2018, the Governor signed 2017 Wisconsin Act 155 (Act) into law. This Act permits milk contractors and producers to enter into contracts to defer payments for up to 120 days. The Act also requires DATCP to promulgate rules to establish a Fund assessment rate for milk contractors that enter into deferred payment contracts with milk producers. The Act further requires DATCP to promulgate these rules as an emergency rule until a permanent rule takes effect.

Prior to the Act, milk producers were required to be paid on the 4th and the 19th of every month. Allowing producer payments to be deferred for up to 120 days exposes the Fund to larger default payouts in the event a contractor fails to pay the producer. The deferred payment assessment is intended to cover this additional risk.

Rule Content

This emergency rule will establish a milk contractor deferred payment assessment rate of 0.0035. This rate will be applied to the total deferred amount that a milk contractor pays to a milk producer or producer agent. The rule also slightly modifies EmR 1803 by including deferred payments and fulfills the emergency rule requirement of the Act.

The proposed emergency rule establishes an effective date of August 1, 2018. This date is necessary because DATCP expects producers will begin deferring payments as early as September 4, 2018. An emergency rule effective date of August 1, 2018 will allow both milk contractors and producers to know the assessment amount prior to any payments being withheld.

Fiscal Impact

As the milk industry begins paying deferred payment assessments, the proposed rule will increase revenue into the Fund. The amount of increased revenue is unknown and will depend on the amount of milk paid for under deferred payment contracts.

Business Impact

This emergency rule will establish a deferred payment assessment rate that will cover the additional risk to the milk producers and the Fund associated with deferring payments by milk contractors to milk producers by up to 120 days. Milk contractors entering into deferred payment contracts with producers will pay higher assessments; however, the statute permits these assessments to be passed on to the producers whose payments are being deferred.

Milk, grain, and vegetable producers are all protected against financial defaults by contractors who contribute to the overall Fund. All producers could potentially benefit from a higher Fund balance.

Federal and Surrounding State Programs

Federal Programs

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

Surrounding States

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.

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FINDING OF EMERGENCY

2017 Wisconsin Act 155 (Act 155) directs the Wisconsin Department of Agriculture, Trade and Consumer Protection (DATCP) to promulgate rules establishing an annual assessment rate for milk contractors entering into deferred payment contracts. Furthermore, Act 155 directs DATCP to promulgate these rules as emergency rules until the permanent rule takes effect. Notwithstanding Wis. Stat. § 227.24 (1) (a) and (3), Act 155 waives the requirement to provide evidence that promulgating this rule is necessary for the preservation of the public peace, health, safety, or welfare and waives the requirement to provide a finding of emergency. Act 155 became effective April 28, 2018, and requires DATCP to establish a milk contractor deferred payment assessment rate by emergency rule that may remain in effect for up to 24 months while permanent rules are being developed.

EMERGENCY RULE

SECTION 1. EmR1803 SECTION 3. ATCP 100.135 (1) is amended to read:

(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 sum of the deferred payment assessment in sub. (1m) and the greater of the minimum assessment amount listed in sub. (9) or the sum of the following multiplied by 0.8, ~~whichever is greater:~~

SECTION 2. ATCP 100.135 (1m) is created to read:

(1m) DEFERRED PAYMENT ASSESSMENT. A contributing milk contractor shall pay a deferred payment assessment under s. 126.485 (5), Stats., equal to the amount the milk contractor reports under s. 126.41 (6) (ag), Stats., in the milk contractor's license application for that license year, multiplied by 0.0035.

SECTION 3. ATCP 100.135 (10) (intro.) is amended to read:

(10) EXEMPTION. A contributing milk contractor is not required to pay any fund assessment under this section for a license year, other than a deferred payment assessment required under sub. (1m), if all of the following apply:

SECTION 4. EFFECTIVE DATE: This emergency rule takes effect on August 1, 2018, and remains in effect for two years. The department implements this emergency rule as provided in Wis. Stat. § 126.81 (2m) (b) and 2017 Wisconsin Act 155.

Dated this ____ day of _____, 2018.

WISCONSIN DEPARTMENT OF AGRICULTURE,
TRADE AND CONSUMER PROTECTION

By: _____
Sheila Harsdorf

Secretary