Wisconsin Administrative Register

No. 589

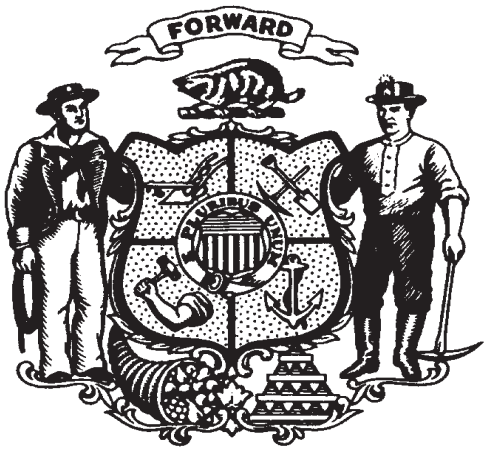

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Table of contents

Emergency rules now in effect

Under s. 227.24, Stats., state agencies may promulgate rules without complying with the usual rule−making procedures. Using this special procedure to issue emergency rules, an agency must find that either the preservation of the public peace, health, safety or welfare necessitates its action in bypassing normal rule−making procedures.

Emergency rules are published in the official state newspaper, which is currently the Wisconsin State Journal. Emergency rules are in effect for 150 days and can be extended up to an additional 120 days with no single extension to exceed 60 days.

Occasionally the Legislature grants emergency rule authority to an agency with a longer effective period than 150 days or allows an agency to adopt an emergency rule without requiring a finding of emergency.

Extension of the effective period of an emergency rule is granted at the discretion of the Joint Committee for Review of Administrative Rules under s. 227.24 (2), Stats.

Notice of all emergency rules which are in effect must be printed in the Wisconsin Administrative Register. This notice will contain a brief description of the emergency rule, the agency finding of emergency or a statement of exemption from a finding of emergency, date of publication, the effective and expiration dates, any extension of the effective period of the emergency rule and information regarding public hearings on the emergency rule.

Copies of emergency rule orders can be obtained from the promulgating agency. The text of current emergency rules can be viewed at www.legis.state.wi.us/rsb/code.

Commerce
(Financial Assistance for Businesses & Communities, Chs. Comm 105—)

Rules were adopted creating **ch. Comm 129**, relating to technology commercialization programs.

Finding of Emergency

The Department of Commerce finds that an emergency exists within the state of Wisconsin and that adoption of a rule is necessary for the immediate preservation of the public health, safety and welfare. A statement of the facts constituting the emergency is as follows.

1. In accordance with sections 560.205 (3) and 560.275 (7), Stats., the department has the responsibility to promulgate rules to administer an Early Stage Business Investment Program and a Technology Commercialization Grant and Loan Program.

2. Section 560.205 (1) and (2), Stats., makes available certain tax benefits for investors in early stage businesses for tax years beginning after December 31, 2004.

3. Section 560.275 (2), Stats., makes available grant and loan program funds appropriated as of July 1, 2004.

4. The department, being the agency with primary authority for economic development in the state, recognizes that there is a verified need to assist the development of high growth early stage technology businesses. Wisconsin has historically ranked low in the development of new start−ups and in the attraction of risk capital.

5. The department recognizes that promulgating this emergency rule will alleviate the need for investors to defer investments into qualified new businesses while they wait for the promulgation of the permanent rule. Such a circumstance would effectively halt new investment into early stage high tech companies in Wisconsin, a result that would be contrary to the intent of the legislation.

6. In addition, the department recognizes that without promulgating this emergency rule, the department would likely be unable to fully utilize the funds made available to benefit early stage businesses.

7. Finally, the department recognizes that without promulgating this emergency rule, Wisconsin's early stage businesses would be unable to compete fairly to attract much−needed risk capital and federal research dollars to Wisconsin.

Publication Date:	**December 2, 2004**
Effective Date:	**December 2, 2004**
Expiration Date:	**May 1, 2005**
Hearing Date:	**January 12, 2005**

Insurance

Rules were adopted creating **ch. Ins 14**, Wis. Adm. Code, relating to vehicle protection plans.

Finding of Emergency

The Commissioner of Insurance finds that an emergency exists and that the attached rule is necessary for the immediate preservation of the public peace, health, safety, or welfare. Facts constituting the emergency are as follows:

The statute requiring these changes is effective on December 1, 2004. The length of the rulemaking process has not permitted OCI to finish promulgating the rule. This emergency implementation will allow vehicle protection businesses to start getting registered and selling their products. Many of these products are promoted as safety related such as glass etching, the "club," vehicle entry warning sirens and others. Consumer would then be able obtain the promoted safety benefits of these products as soon as the legislature permitted them.

Publication Date:	**December 10, 2004**
Effective Date:	**December 10, 2004**
Expiration Date:	**May 9, 2005**

Natural Resources (2)
(Fish, Game, etc., Chs. NR 1−)

1. Rules adopted revising **chs. NR 10 and 19**, relating to the regulation of baiting and feeding to control and manage chronic wasting disease and bovine tuberculosis.

Finding of emergency

The emergency rule procedure, pursuant to s. 227.24, Stats., is necessary and justified in establishing rules to protect the public health, safety and welfare. The state legislature has delegated to the department rule − making authority in 2001 Wisconsin Act 108 to control the spread of Chronic Wasting Disease (CWD) in Wisconsin. CWD, bovine tuberculosis and other forms of transmissible diseases pose a risk to the health of the state's deer herd and citizens and is a threat to the economic infrastructure of the department, the state, it's citizens and businesses. The state legislature has also delegated to the department rule − making authority in 2003 Wisconsin Act 240 to regulate feeding of wild animals for non−hunting purposes including recreational and supplemental feeding. These restrictions on deer baiting and feeding need to be implemented through the emergency rule procedure to help control and prevent the spread of CWD, bovine tuberculosis and other forms of transmissible diseases in Wisconsin's deer herd.

Publication Date:	**June 10, 2004**
Effective Date:	**June 10, 2004**
Expiration Date:	**November 7, 2004**
Hearing Date:	**August 25 and 26, 2004**
Extension Through:	**March 6, 2005**

2. Rules adopted creating **ss. NR 1.05, 1.06 and 1.07,** relating to Natural Resources Board policies on protection and management of public waters.

Finding of emergency

The emergency rule procedure, pursuant to s. 227.24, Stats., is necessary and justified in establishing rules to protect the public health, safety and welfare. The Wisconsin Legislature recently enacted 2003 Wisconsin Act 118, to streamline the regulatory process for activities in public trust waters. The state has an affirmative duty to administer the new law in a manner consistent with the public trust responsibilities of the State of Wisconsin under Article IX, Section I of the Wisconsin Constitution.

2003 Act 118 identifies certain activities that may be undertaken in public trust waters exempt from a permit, or under a general permit. Certain activities may not be undertaken in waters that are defined as "areas of special natural resource interest" or at other locations where the activity would cause detrimental impacts on public rights and interests in navigable waters. Without emergency rules to aid in administering the new law, the following severe problems will occur:

• Until general permits are created by rule, any activity which is not exempt requires an individual permit with an automatic 30−day public notice. The required 30−day comment period will unnecessarily delay hundreds of construction projects that otherwise could go ahead with specified conditions for protecting lakes and streams (for example, all new riprap and culvert applications currently require public notices).

• Unclear wording of exemptions currently puts property owners, contractors and consultants at risk of violation. Without clear procedures and standards established by emergency rule, many more people may request exemption determinations, slowing the decisions on individual permit applications.

• Wording of exemptions and temporary grading jurisdiction puts lakes and streams at risk. Without standards as intended and described in the new law, exempted activities and grading along shorelines will cause inadvertent but permanent destruction of fish and wildlife habitat, loss of natural scenic beauty and reduced water quality. Rights of neighboring property owners may also be harmed. Cumulatively over one or two construction seasons, these impacts will have immediate and permanent effects on Wisconsin's water−based recreation and tourism industry.

Publication Date:	**August 24, 2004**
Effective Date:	**August 24, 2004**
Expiration Date:	**January 21, 2005**
Hearing Date:	**September 28, 2004**
Extension Through:	**March 21, 2005**

Natural Resources (8)
(Environmental Protection − Water Regulation, Chs. NR 300—)

1. Rules adopted revising **ch. NR 320,** relating to the regulation of bridges and culverts in or over navigable waterways.

Finding of emergency

The emergency rule procedure, pursuant to s. 227.24, Stats., is necessary and justified in establishing rules to protect the public health, safety and welfare. The Wisconsin Legislature recently enacted 2003 Wisconsin Act 118, to streamline the regulatory process for activities in public trust waters. The state has an affirmative duty to administer the new law in a manner consistent with the public trust responsibilities of the State of Wisconsin under Article IX, Section I of the Wisconsin Constitution.

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Unclear wording of exemptions currently puts property owners, contractors and consultants at risk of violation. Without clear procedures and standards established by emergency rule, many more people may request exemption determinations, slowing the decisions on individual permit applications.

Wording of exemptions and temporary grading jurisdiction puts lakes and streams at risk. Without standards as intended and described in the new law, exempted activities and grading along shorelines will cause inadvertent but permanent destruction of fish and wildlife habitat, loss of natural scenic beauty and reduced water quality. Rights of neighboring property owners may also be harmed. Cumulatively over one or two construction seasons, these impacts will have immediate and permanent effects on Wisconsin's water−based recreation and tourism industry.

To carry out the intention of the Legislature that 2003 Act 118 to speed decision−making but not diminish the public trust in state waters, these emergency rules are required to establish definitions, procedures and substantive standards for exemptions, general permits and jurisdiction under the new law.

Publication Date: **August 24, 2004**
Effective Date: **August 24, 2004**
Expiration Date: **January 21, 2005**
Hearing Date: **September 28, 2004**
Extension Through: **March 21, 2005**

2. Rules adopted revising **ch. NR 326,** relating to regulation of piers, wharves, boat shelters, boat hoists, boat lifts and swim rafts in navigable waterways.

Finding of emergency

The emergency rule procedure, pursuant to s. 227.24, Stats., is necessary and justified in establishing rules to protect the public health, safety and welfare. The Wisconsin Legislature recently enacted 2003 Wisconsin Act 118, to streamline the regulatory process for activities in public trust waters. The state has an affirmative duty to administer the new law in a manner consistent with the public trust responsibilities of the State of Wisconsin under Article IX, Section I of the Wisconsin Constitution.

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Unclear wording of exemptions currently puts property owners, contractors and consultants at risk of violation. Without clear procedures and standards established by emergency rule, many more people may request exemption determinations, slowing the decisions on individual permit applications.

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To carry out the intention of the Legislature that 2003 Act 118 to speed decision−making but not diminish the public trust in state waters, these emergency rules are required to establish definitions, procedures and substantive standards for exemptions, general permits and jurisdiction under the new law.

Publication Date: **April 19, 2004**
Effective Date: **April 19, 2004***
Expiration Date: **September 16, 2004**
Hearing Date: **May 19, 2004**

***On June 24, 2004, the Joint Committee for Review of Administrative Rules suspended this emergency rule.

3. Rules adopted revising **ch. NR 328,** relating to shore erosion control of inland lakes and impoundments.

Finding of emergency

The emergency rule procedure, pursuant to s. 227.24, Stats., is necessary and justified in establishing rules to protect the public health, safety and welfare. The Wisconsin Legislature recently enacted 2003 Wisconsin Act 118, to streamline the regulatory process for activities in public trust waters. The state has an affirmative duty to administer the new law in a manner consistent with the public trust responsibilities of the State of Wisconsin under Article IX, Section I of the Wisconsin Constitution.

2003 Act 118 identifies certain activities that may be undertaken in public trust waters exempt from a permit, or under a general permit. Certain activities may not be undertaken in waters that are defined as "areas of special natural resource interest" or at other locations where the activity would cause detrimental impacts on public rights and interests in navigable waters. Without emergency rules to aid in administering the new law, the following severe problems will occur:

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Unclear wording of exemptions currently puts property owners, contractors and consultants at risk of violation. Without clear procedures and standards established by emergency rule, many more people may request exemption determinations, slowing the decisions on individual permit applications.

Wording of exemptions and temporary grading jurisdiction puts lakes and streams at risk. Without standards as intended and described in the new law, exempted activities and grading along shorelines will cause inadvertent but permanent destruction of fish and wildlife habitat, loss of natural scenic beauty and reduced water quality. Rights of neighboring property owners may also be harmed. Cumulatively over one or two construction seasons, these impacts will have immediate and permanent effects on Wisconsin's water−based recreation and tourism industry.

To carry out the intention of the Legislature that 2003 Act 118 to speed decision−making but not diminish the public trust in state waters, these emergency rules are required to establish definitions, procedures and substantive standards for exemptions, general permits and jurisdiction under the new law.

Publication Date: **August 24, 2004**
Effective Date: **August 24, 2004**
Expiration Date: **January 21, 2005**
Hearing Date: **September 28, 2004**
Extension Through: **March 21, 2005**

4. Rules adopted revising **ch. NR 329,** relating to miscellaneous structures in navigable waterways.

Finding of emergency

The emergency rule procedure, pursuant to s. 227.24, Stats., is necessary and justified in establishing rules to protect the public health, safety and welfare. The Wisconsin Legislature recently enacted 2003 Wisconsin Act 118, to streamline the regulatory process for activities in public trust waters. The state has an affirmative duty to administer the new law in a manner consistent with the public trust responsibilities of the State of Wisconsin under Article IX, Section I of the Wisconsin Constitution.

2003 Act 118 identifies certain activities that may be undertaken in public trust waters exempt from a permit , or under a general permit. Certain activities may not be undertaken in waters that are defined as "areas of special natural resource interest" or at other locations where the activity would cause detrimental impacts on public rights and interests in navigable waters. Without emergency rules to aid in administering the new law, the following severe problems will occur:

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To carry out the intention of the Legislature that 2003 Act 118 to speed decision−making but not diminish the public trust in state waters, these emergency rules are required to establish definitions, procedures and substantive standards for exemptions, general permits and jurisdiction under the new law.

Publication Date:	**August 24, 2004**
Effective Date:	**August 24, 2004**
Expiration Date:	**January 21, 2005**
Hearing Date:	**September 28, 2004**
Extension Through:	**March 21, 2005**

5. Rules adopted revising **ch. NR 340,** and creating **ch. NR 343**, relating to regulation of construction, dredging, and enlargement of an artificial water body.

Finding of emergency

The emergency rule procedure, pursuant to s. 227.24, Stats., is necessary and justified in establishing rules to protect the public health, safety and welfare. The Wisconsin Legislature recently enacted 2003 Wisconsin Act 118, to streamline the regulatory process for activities in public trust waters. The state has an affirmative duty to administer the new law in a manner consistent with the public trust responsibilities of the State of Wisconsin under Article IX, Section I of the Wisconsin Constitution.

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To carry out the intention of the Legislature that 2003 Act 118 to speed decision−making but not diminish the public trust in state waters, these emergency rules are required to establish definitions, procedures and substantive standards for exemptions, general permits and jurisdiction under the new law.

Publication Date:	**August 24, 2004**
Effective Date:	**August 24, 2004**
Expiration Date:	**January 21, 2005**
Hearing Date:	**September 28, 2004**
Extension Through:	**March 21, 2005**

6. Rules adopted revising **ch. NR 345,** relating to dredging in navigable waterways.

Finding of emergency

The emergency rule procedure, pursuant to s. 227.24, Stats., is necessary and justified in establishing rules to protect the public health, safety and welfare. The Wisconsin Legislature recently enacted 2003 Wisconsin Act 118, to streamline the regulatory process for activities in public trust waters. The state has an affirmative duty to administer the new law in a manner consistent with the public trust responsibilities of the State of Wisconsin under Article IX, Section I of the Wisconsin Constitution.

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To carry out the intention of the Legislature that 2003 Act 118 to speed decision−making but not diminish the public trust in state waters, these emergency rules are required to establish definitions, procedures and substantive standards for exemptions, general permits and jurisdiction under the new law.

Publication Date:	**August 24, 2004**
Effective Date:	**August 24, 2004**
Expiration Date:	**January 21, 2005**
Hearing Date:	**September 28, 2004**
Extension Through:	**March 21, 2005**

7. Rules adopted repealing **s. NR 340.02 (2), (8) and (19)** and to creating **ch. NR 341,** relating to regulation of grading on the bank of a navigable waterway.

Finding of emergency

The emergency rule procedure, pursuant to s. 227.24, Stats., is necessary and justified in establishing rules to protect the public health, safety and welfare. The Wisconsin Legislature recently enacted 2003 Wisconsin Act 118, to streamline the regulatory process for activities in public trust waters. The state has an affirmative duty to administer the new law in a manner consistent with the public trust responsibilities of the State of Wisconsin under Article IX, Section I of the Wisconsin Constitution.

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To carry out the intention of the Legislature that Act 118 will speed decision−making but not diminish the public trust in state waters, these emergency rules are required to establish definitions, procedures and substantive standards for general permits and jurisdiction under the new law.

Publication Date:	**May 19, 2004**
Effective Date:	**May 19, 2004**
Expiration Date:	**October 16, 2004**
Hearing Date:	**June 16, 2004**
Extension Through:	**February 12, 2005**

8. Rules adopted creating **ch. NR 310,** relating to procedures for exemptions, general permits and individual permits for activities in navigable waterways.

Finding of emergency

The emergency rule procedure, pursuant to s. 227.24, Stats., is necessary and justified in establishing rules to protect the public health, safety and welfare. The Wisconsin Legislature recently enacted 2003 Wisconsin Act 118, to streamline the regulatory process for activities in public trust waters. The state has an affirmative duty to administer the new law in a manner consistent with the public trust responsibilities of the State of Wisconsin under Article IX, Section I of the Wisconsin Constitution.

2003 Act 118 identifies certain activities that may be undertaken in public trust waters exempt from a permit, or under a general permit. Certain activities may not be undertaken in waters that are defined as "areas of special natural resource interest" or at other locations where the activity would cause detrimental impacts on public rights and interests in navigable waters. Without emergency rules to aid in administering the new law, the following severe problems will occur:

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Publication Date: **August 24, 2004**
Effective Date: **August 24, 2004**
Expiration Date: **January 21, 2005**
Hearing Date: **September 28, 2004**
Extension Through: **March 21, 2005**

Public Instruction (2)

1. Rules were adopted revising **ch. PI 35,** relating to financial reporting requirements under the Milwaukee Parental Choice Program.

Finding of emergency

The Department of Public Instruction finds an emergency exists and that a rule is necessary for the immediate preservation of the public welfare. A statement of the facts constituting the emergency is:

Per 2003 Wisconsin Act 15, the provisions under the rule must take effect beginning in the 2004−05 school year. Because some of the reporting requirements must be made by August 1, the rule must be in place as soon as possible to give the private schools enough notice to meet such requirements.

Publication Date: **June 30, 2004**
Effective Date: **June 30, 2004**
Expiration Date: **November 27, 2004**
Hearing Date: **September 13, 2004**
Extension Through: **March 26, 2005**

2. Rules adopted repealing **s. PI 24.02 (3)** and repealing and recreating **subchapter II of chapter PI 24**, relating to the payment of state aid under the student achievement guarantee in education (SAGE) program.

Finding of emergency

The Department of Public Instruction finds an emergency exists and that a rule is necessary for the immediate preservation of the public welfare. A statement of the facts constituting the emergency is:

Section 118.43 (6m), Stats., requires the department to promulgate rules to implement and administer the payment of state aid under s. 118.43 (6), Stats. Because the next deadline for pupil reporting requirements occurs in January 2005, the rule must take effect as soon as possible to give eligible schools enough notice to meet such requirements.

Publication Date: **December 20, 2004**
Effective Date: **December 20, 2004**
Expiration Date: **May 19, 2005**

Regulation and Licensing (2)

1. Rules were adopted repealing **ss. RL 31.035 (1m) and 31.036 (1m);** and creating **ss. RL 4.01 (3g), (3r) and (5m), 4.07 and 4.09,** relating to criminal background investigations of applicants.

Exemption from finding of emergency

SECTION 4, Nonstatutory provisions., of 2003 Wisconsin Act 151 states: "(1) The department of regulation and licensing may, using the procedure under section 227.34 of the statutes, promulgate the rules under section 440.03 (13) (b) of the statutes, as created by this act, for the period before permanent rules become effective, but not to exceed the period authorized under section 227.24 (1) (c) and (2) of the statutes. Notwithstanding section 227.24 (1) (a), (2) (b), and (3) of the statutes, the department is not required to provide evidence that promulgating a rule under this subsection as an emergency rule is necessary for the preservation of the public peace, health, safety, or welfare and is not required to provide a finding of emergency for a rule promulgated under this subsection."

Analysis prepared by the Department of Regulation and Licensing

This emergency rule is promulgated pursuant to 2003 Wisconsin Act 151. Act 151 was created in response to federal Public Law 92−544, which required authorization by state statute to continue the FBI's policy of honoring state requests for criminal background reports.

Act 151 modifies the authority of the Department of Regulation and Licensing to conduct criminal background checks of applicants and requires rule−making by the Department to conduct investigations whether an applicant for or holder of any credential issued by the Department has been charged with or convicted of a crime. The emergency rule preserves the ability of the Department to continue its practice of conducting criminal background investigations of applicants and credential holders.

Publication Date: **July 3, 2004**
Effective Date: **July 3, 2004**
Expiration Date: **November 30, 2004**
Hearing Date: **October 1, 2004**
Extension Through: **March 29, 2005**

2. Rules adopted creating **ch. RL 150 to 154**, relating to the licensure and regulation of athlete agents.

Exemption from finding of emergency

SECTION 4. Nonstatutory provisions of 2003 Wisconsin Act 150 states in part:

(2) The department of regulation and licensing may, using the procedure under section 227.24 of the statutes, promulgate the rules under section 440.9935 of the statutes,

as created by this act, for the period before permanent rules become effective, but not to exceed the period authorized under section 227.24 (1) (c) and (2) of the statutes. Notwithstanding section 227.24 (1) (a), (2) (b), and (3) of the statutes, the department is not required to provide evidence that promulgating rules under this subsection as emergency rules is necessary for the preservation of the public peace, health, safety, or welfare and is not required to provide findings of emergency for rules promulgated under this subsection.

Analysis prepared by the Department of Regulation and Licensing

Statutes authorizing promulgation: s. 227.11 (2), Stats., and ss. 440.99, 440.991, 440.915, 440.992, 440.9925, 440.993, 440.9935, 440.994, 440.9945, 440.995, 440.9955, 440.996, 440.9975, 440.998 and 440.999, Stats., as created by 2003 Wisconsin Act 150.

Statutes interpreted: Chapter 440, Subchapter XII.

This emergency rule is promulgated pursuant to 2003 Wisconsin Act 150. This Act grants the Department of Regulation and Licensing the authority to create rules relating to the licensure and regulation of athlete agents.

In this order adopting emergency rules the Department of Regulation and Licensing creates rules relating to the licensure of athlete agents. These rules are as a result of 2003 Wisconsin Act 150 which enacted the Uniform Athlete Agents Act. Chapters RL 150 to 154 establish requirements and standards for registration and the practice of registered athlete agents. The rules specify the registration requirements for temporary and permanent registration, renewal requirements, and prohibited conduct for athlete agents.

SECTION 1 creates Chapter RL 150 which sets forth the statutory authority and the definitions for the proposed rules.

SECTION 2 creates Chapter RL 151 which sets forth the application process and requirements for an initial certificate of registration, including the application process for a temporary certificate of registration.

SECTION 3 creates Chapter RL 152 which sets forth the application process and requirements for renewal of a certificate of registration.

SECTION 4 creates Chapter RL 153 which outlines the standards of practice which apply to a credential holder.

SECTION 5 creates Chapter RL 154 which defines unprofessional conduct.

Publication Date:	**October 5, 2004**
Effective Date:	**October 5, 2004**
Expiration Date:	**March 4, 2005**
Hearing Date:	**November 12, 2004**

Revenue (3)

1. Rules adopted creating **s. Tax 2.99,** relating to the dairy investment credit.

Finding of emergency

The Department of Revenue finds that an emergency exists and that the attached rule order is necessary for the immediate preservation of the public peace, health, safety or welfare. A statement of the facts constituting the emergency is:

The emergency rule is to clarify the following terms as they apply to the dairy investment credit:

- "amount the claimant paid in the taxable year,"
- "dairy farm modernization or expansion,"
- "milk production," and
- "used exclusively related to dairy animals."

It is necessary to promulgate this rule order to remove the threat of inappropriate credit claims and the revenue loss to the state as a result of clarification of the above terms being absent in the statutes.

Publication Date:	**September 17, 2004**
Effective Date:	**September 17, 2004**
Expiration Date:	**February 14, 2005**
Hearing Date:	**December 28, 2004**
Extension Through:	**April 14, 2005**

2. Rules adopted creating **s. Tax 3.04**, relating to the subtraction from income allowed for military pay received by members of a reserve component of the armed forces.

Finding of emergency

The Department of Revenue finds that an emergency exists and that the attached rule order is necessary for the immediate preservation of the public peace, health, safety or welfare. A statement of the facts constituting the emergency is:

Section 71.05 (6) (b) 34, Stats., provides that a subtraction from income may be claimed for "any amount of basic, special, and incentive pay received from the federal government by a person who is a member of a reserve component of the U.S. armed forces, after being called into active federal service under the provisions of 10 USC 12302 (a) or 10 USC 12304, or into special state service authorized by the federal department of defense under 32 USC 502 (f), that is paid to the person for a period of time during which the person is on active duty."

Included under 32 USC 502 (f) are persons who are serving on active duty or full−time duty in the active guard reserve (AGR) program. Discussion between the departments of revenue and military affairs and legislative personnel revealed that it was not intended that these persons benefit from the subtraction provided for in s. 71.05 (6) (b) 34, Stats.

It is necessary to promulgate this rule order to remove the threat of inappropriate subtractions from income and the revenue loss to the state as a result of information contained in the statutes that implies persons who are serving on active duty or full−time duty in the active guard reserve program are eligible to claim the subtraction from income for military pay received by members of a reserve component of the armed forces.

Publication Date:	**September 17, 2004**
Effective Date:	**September 17, 2004**
Expiration Date:	**February 14, 2005**
Hearing Date:	**December 28, 2004**
Extension Through:	**April 14, 2005**

3. Rules adopted revising **s. Tax 18.07**, relating to the assessment of agricultural land.

Finding of emergency

The Wisconsin Department of Revenue finds that an emergency exists and that a rule is necessary for the immediate preservation of the public welfare. The facts constituting the emergency are as follows:

Pursuant to s. 70.32 (2r) (c), the assessment of agricultural land is assessed according to the income that could be generated from its rental for agricultural use. Wisconsin Chapter Tax 18 specifies the formula that is used to estimate the net rental income per acre. The formula estimates the net income per acre of land in corn production based on a 5−year average corn price per bushel, cost of corn production per bushel and corn yield per acre. The net income is divided by a capitalization rate that is based on a 50 year average interest rate for a medium−sized, 1−year adjustable rate mortgage and net 0 tax rate for the property tax levy two years prior to the assessment year.

For reasons of data availability, there is a three−year lag in determining the 5−year average. Thus, the 2003 use value is based on the 5−year average corn price, cost and yield for the 1996−2000 period, and the capitalization rate is based on the 5−year average interest rate for the 1998−2002 period. The 2005 use value is to be based on the 5−year average corn price, cost and yield for the 1998−2002 period, and the capitalization rate is to be based on the 2000−2004 period.

The data for the 1998−2002 period yields negative net income per acre due to declining 0 corn prices and increasing costs of corn production. As a result, reliance on data for the 1998−2002 period will result in negative use values.

The department is issuing this emergency rule in order to ensure positive and stable assessments of agricultural land for 2005.

Publication Date: **December 29, 2004**
Effective Date: **December 29, 2004**
Expiration Date: **May 28, 2005**

Transportation (2)

1. Rules adopted creating **ch. Trans 135,** relating to creation of a school bus oxidation catalyst grant program in certain counties.

Exemption from finding of emergency

The Legislature, by Section 2r of 2003 Wis. Act 220, provides an exemption from a finding of emergency for the adoption of the rule.

Analysis prepared by the Department of Transportation

Plain Language Analysis: 2003 Wis. Act 220 requires the Wisconsin Department of Transportation, in consultation with the Wisconsin Department of Natural Resources, to develop and administer a program to provide grants for the purchase and installation of oxidation catalysts on school buses customarily kept in the counties identified in s. 110.20 (5), Stats.: Kenosha, Milwaukee, Ozaukee, Racine, Sheboygan, Washington and Waukesha. Act 220 amends s. 20.395 (5) (hq), Stats., to provide funds for the grant program under WisDOT's vehicle inspection/maintenance (I/M) program appropriation.

Publication Date: **September 1, 2004**
Effective Date: **September 1, 2004**
Expiration Date: **See Section 2r 2003 Wis. Act 220**
Hearing Date: **September 14, 2004**

2. Rules adopted revising **ch. Trans 112**, relating to medical standards for driver licensing and general standards to school bus endorsements.

Exemption from finding of emergency

The Legislature, by Section 30 of 2003 Wis. Act 280, provides an exemption from a finding of emergency for the adoption of the rule.

Analysis prepared by the Department of Transportation

Under current law, a person may not operate a school bus without a school bus endorsement issued by the Department of Transportation (DOT). DOT may issue a school bus endorsement to a person's valid motor vehicle operator's license if the person meets certain qualifications, including being free of conviction for certain crimes. A school bus endorsement is valid for the eight–year duration of the person's operator's license. Under certain circumstances, DOT must cancel the operator's license of a person to whom a school bus endorsement has been issued.

2003 Wisconsin Act 280 modified the existing criminal history requirements, and imposed additional requirements for the initial issuance or renewal of a school bus endorsement. That act prohibits DOT from issuing or renewing a school bus endorsement to an applicant if the applicant has been convicted of or adjudicated delinquent for any specified disqualifying crime or offense within a prior minimum specified time. These disqualifying crimes and offenses and minimum time periods for disqualification include those specified under current statutes, including various crimes against children. The act also authorizes DOT to specify by rule additional disqualifying crimes and offenses and the time period during which the disqualification applies.

Prior to Act 280, persons were not eligible for a school bus endorsement if he or she has been convicted of listed offenses (including a felony or an "offense against public morals") within the past five years, if the circumstances of the offense are "substantially related" to the circumstances of operating a school bus, or was convicted of specified offenses (including OWI and operating with a suspended or revoked license) within the past two years, regardless of whether the circumstances of the offense are "substantially related" to the circumstances of operating a school bus. Thus, Act 280 lengthened the periods of disqualification for some offenses, and listed some offenses that arguably are not "substantially related" to the circumstances of operating a school bus.

This rule establishes three periods of disqualification from eligibility for a school bus driver endorsement for conviction of listed felonies and misdemeanors. A lifetime disqualification is imposed on any person convicted of violent crimes resulting in death or serious physical injury to another, of sex offenses involving children and other vulnerable persons, or of other crimes involving predation or victimization of children or other vulnerable persons. A five−year disqualification is imposed on any person convicted of other crimes against life and bodily security, of other crimes against children, of crimes involving use of a motor vehicle, including operating while intoxicated (OWI), of possession of illegal weapons or of similar offenses likely to result in serious injury to others. A two−year disqualification is imposed on any person convicted of negligent operation of a motor vehicle, of obstructing emergency and rescue personnel or of other crimes.

Many of the listed offenses comprise felonies and misdemeanors. Under the rule, if a person provides evidence to the Department that his or her conviction of a listed offense is a misdemeanor conviction, the disqualification period is shortened to the next shorter disqualification period. However, there is no reduced disqualification period for misdemeanor sexual assault convictions, and the minimum

period of disqualification for any listed offense (whether felony or misdemeanor) is two years.

The rule requires the Department to conduct a criminal history record search of every applicant for initial issuance or renewal to determine whether the person is convicted of disqualifying offenses. Although a school bus endorsement is renewed every eight years, DOT must conduct a criminal history search four years after the person obtains a school bus endorsement and, if appropriate, cancel the endorsement.

The rule also requires any person applying for initial issuance or renewal of a school bus endorsement to certify whether he or she has been convicted of any disqualifying offense, and allows the department to disqualify the person for the appropriate period based on that certification.

The rule requires any person who has resided in another state within the previous two years to notify the department of those other states, and requires the department to make a god faith effort to obtain the criminal history records from those other states, including submitting the persons fingerprints to the Department of Justice for a nationwide criminal history search.

The rule allows DOT to require every applicant for initial issuance or renewal of a school bus endorsement to provide two sets of fingerprints, and to pay fees for the two criminal history records searches that will be completed at initial issuance or renewal, and four years after the person obtains the school bus endorsement.

This rule also makes minor changes to medical standards for school bus drivers not required under 2003 Wis. Act 280, including the following:

1. Allows physician to certify driver is following treatment plan for cerebrovascular function, without such certification of the patient.

2. Shortens from 12 to 6 months the period during which a school bus driver must be free of any cerebrovascular incident.

3. Eliminates the 12 month period during which school bus driver must be free of destructive behavior or suicidal tendencies, instead making eligible a driver who is free of such behaviors or tendencies at the time of application.

4. Provides that a license restriction imposed on a physician's recommendation may be lifted only by the physician that recommended the restriction or by the Department following its evaluation of the person's ability to drive.

5. Provides that a person who does not meet minimum waiting periods following certain medical disqualifications cannot request a medical review board assessment of those disqualifications, because those waiting periods cannot be waived.

Publication Date:	**November 4, 2004**
Effective Date:	**November 4, 2004**
Expiration Date:	**See 2003 Wis. Act 280**
Hearing Date:	**November 15, 2004**

Workforce Development
(Labor Standards, Chs. DWD 270−279)

Rules adopted revising **ss. DWD 274.015 and 274.03** and creating **s. DWD 274.035,** relating to overtime pay for employees performing companionship services.

Finding of emergency

The Department of Workforce Development finds that an emergency exists and that the attached rule is necessary for the immediate preservation of the public peace, health, safety, or welfare. A statement of facts constituting the emergency is:

On January 21, 2004, pursuant to s. 227.26(2)(b), Stats., the Joint Committee for Review of Administrative Rules directed the Department of Workforce Development to promulgate an emergency rule regarding their overtime policy for nonmedical home care companion employees of an agency as part of ch. DWD 274.

Analysis Prepared by the Department of Workforce Development

Statutory authority: Sections 103.005, 103.02, and 227.11, Stats.

Statutes interpreted: Sections 103.01 and 103.02, Stats.

Section 103.02, Stats., provides that "no person may be employed or be permitted to work in any place of employment or at any employment for such period of time during any day, night or week, as is prejudicial to the person's life, health, safety or welfare." Section 103.01 (3), Stats., defines "place of employment" as "any manufactory, mechanical or mercantile establishment, beauty parlor, laundry, restaurant, confectionary store, or telegraph or telecommunications office or exchange, or any express or transportation establishment or any hotel."

Chapter DWD 274 governs hours of work and overtime. Section DWD 274.015, the applicability section of the chapter, incorporates the statutory definition of "place of employment" and limits coverage of the chapter to the places of employment delineated in s. 103.01 (3), Stats., and various governmental bodies. Section DWD 274.015 also provides that the chapter does not apply to employees employed in domestic service in a household by a household.

Section 103.02, Stats., directs that the "department shall, by rule, classify such periods of time into periods to be paid for at the rate of at least one and one−half times the regular rates." Under s. DWD 274.03, "each employer subject to this chapter shall pay to each employee time and one−half the regular rate of pay for all hours worked in excess of 40 hours per week." Section DWD 274.04 lists 15 types of employees who are exempt from this general rule and s. DWD 274.08 provides that the section is inapplicable to public employees.

Nonmedical home care companion employees who are employed by a third−party, commercial agency are covered by the overtime provision in s. DWD 274.03. Section DWD 274.03 applies to all employees who are subject to the chapter and not exempt under ss. DWD 274.04 or 274.08. The chapter applies to companion employees of a commercial agency because under s. DWD 274.015 a commercial agency is considered a mercantile establishment. Section DWD 270.01

(5) defines a mercantile establishment as a commercial, for−profit business. The chapter does not apply to companion employees of a nonprofit agency or a private household. In addition, none of the exemptions to the overtime section in ss. DWD 274.04 or 274.08 apply to companion employees of a commercial agency.

The Joint Committee for the Review of Administrative Rules has directed DWD to promulgate an emergency rule regarding the overtime policy for nonmedical home care companion employees of an agency. This provision is created at s. DWD 274.035 to say that employees who are employed by a mercantile establishment to perform companionship services shall be subject to the overtime pay requirement in s. DWD 274.03. "Companionship services" is defined as those services which provide fellowship, care, and protection for a person who because of advanced age, physical infirmity, or mental infirmity cannot care for his or her own needs. Such services may include general household work and work related to the care of the aged or infirm person such as meal preparation, bed making, washing of clothes, and other similar services. The term "companionship services" does not include services relating to the care and protection of the aged or infirm person that require and are performed by trained personnel, such as registered or practical nurses.

This order also repeals and recreates the applicability of the chapter section and the overtime section to write these rules in a clearer format. There is no substantive change in these sections.

Publication Date: **March 1, 2004**
Effective Date: **March 1, 2004***
Expiration Date: **July 29, 2004**

* On April 28, 2004, the Joint Committee for Review of Administrative Rules suspended s. DWD 274.035 created as an emergency rule.

Workforce Development
(Public Works Construction, Chs. DWD 290−294)

A rule was adopted amending **s. DWD 290.155 (1)**, relating to the adjustment of thresholds for application of prevailing wage rates.

Finding of emergency

The Department of Workforce Development finds that an emergency exists and that the attached rule is necessary for the immediate preservation of the public peace, health, safety, or welfare. A statement of facts constituting the emergency is:

Adjusting the thresholds for application of the prevailing wage rate requirements by emergency rule ensures that the adjustments are effective on a date certain that is prior to the time of year that project requests are generally submitted to the Department and applicability of the prevailing wage law is determined. The adjustment avoids imposing an additional administrative burden on local governments and state agencies caused by an effective decrease of the thresholds due solely to inflation in the construction industry. If these new thresholds are not put into effect by emergency rule, the old thresholds will remain effective for approximately six to seven months, until the conclusion of the permanent rule−making process. The thresholds are based on national construction cost statistics and are unlikely to be changed by the permanent rule−making process.

Publication Date: **December 20, 2004**
Effective Date: **January 1, 2005**
Expiration Date: **May 30, 2005**

Scope statements

Natural Resources

Subject

The department will be presenting a rule package pertaining to the eradication and control of CWD in Wisconsin. This rule may include modifications to the deer hunting seasons, management zones and other deer hunting related regulations. This rule is necessary to update rules that were approved by the NRB last year, in order to adapt and modify CWD management strategies based on testing results and hunter success.

Policy analysis

Adaptive management is essential to effective management and control of Chronic Wasting Disease (CWD) in Wisconsin. Since the discovery of CWD in February of 2002, our wildlife health and wildlife management staff have made major strides in what is known about the extent of the disease in the state, what is known about the hunters attitudes regarding the disease and its management, and through research done here and abroad, what is known about the disease. By annually reviewing, and when necessary modifying zones, harvest strategies and regulations, we are able to adapt our management strategies to more effectively react and use what information is available to our managers. In 2005, we will be forwarding a rule package that will be developed based on hunter surveys, 2004 post−harvest deer season results and population data, and testing results. Proposed changes will not deviate from the previous CWD rule order. The modifications proposed will be consistent with the Department's and the Board's policy of aggressive measures to control the spread of the disease, prevent new areas of disease establishment and to eradicate the disease in areas of known infection.

Statutory authority

Sections 29.014, 29.063, 29.307, 29.335 and 167.31, Stats.

Staff time required

505 hours.

Groups likely affected by the proposed rule

Groups likely impacted will be landowners in close proximity to CWD positive cases, deer hunters, meat processors and other businesses.

Preliminary federal regulatory analysis

Provided state rules and statutes do not relieve individuals from the restrictions, requirements and conditions of Federal statutes and regulations, regulation of hunting and trapping of native species has been delegated to state fish and wildlife agencies. No federal regulations regarding CWD hunting seasons, zones or harvest regulations have been drafted or implemented. Additionally, none of the proposed rules exceed the authorities granted the states in 50 CFR 10.

Transportation

Subject

Objective of the rule.

Trans 196.04 (1) (d) establishes the convenience fee for telephone vehicle registration renewal. DOT has entered into a new vendor contract for this service, and the rule will be amended to reflect the new cost to DOT. In addition, DOT offers Internet as well as telephone registration renewal service, and the rule will be amended to reflect this service option. In addition, Trans 196.04 (10) (a), (b) and (c) establish the fee for special handling of vehicle title and registration transactions. The rule will be amended to increase the fee from $4 to $5 for title and title/registration transactions, and from $2 to $3 for renewal transactions. This fee will equal the fee a person pays for in−person counter service at DMV customer service centers, and reflects the cost to DOT to provide immediate service, whether by in−person or by special handling transactions.

Policy analysis

Currently, the cost to DOT, and the fee charged to the customer, is $2.50 per transaction. DMV has negotiated a new vendor contract with US Bank through the state banking arrangement. Under the new contract, DOT will be charged the actual vendor billing from each credit card company. Our current projection for the remainder of FY 05 is that the charge to DOT will approximate $1.50 per transaction; however, that is not certain and, moreover, it will change as the actual volume and composition of renewal transactions change. The convenience fee resides in a Program Revenue (PR) appropriation, which must clear at the end of the fiscal year. On the other hand, a rule amendment takes at least 7 months, even in the best of circumstances. This means that DOT would never be able to clear the PR appropriation at the end of the fiscal year. Moreover, DOT would always be in a rule−change process to update the fee.

This rule making proposes to re−word the provision so that DMV establishes the fee at least annually to approximate the cost to DMV, and that DMV publishes the fee on the DOT Internet web site and on the DOT telephone IVR message.

In addition, DOT offers Internet as well as telephone vehicle registration renewal. The rule making will add the Internet service option in the rule language.

Also, DOT incurs extra cost to provide immediate service, whether it is through in–person transactions at a customer service center or through special handling. The rule increases the special handling fee to reflect this cost, and makes the fees equal.

Comparison to federal regulations

This is a state activity, and no federal regulations apply.

Entities affected by the rule

The general public will be affected, as vehicle registration renewal by telephone and Internet is available for many types of vehicles.

Statutory authority

Section 341.255 (3), Stats.

Staff time required

Approximately 20 hours.

Submittal of rules to legislative council clearinghouse

Please check the Bulletin of Proceedings − Administrative Rules for further information on a particular rule.

Agriculture, Trade and Consumer Protection

Rule Submittal Date

On December 21, 2004, the Department of Agriculture, Trade and Consumer Protection submitted a proposed rule to the Legislative Council Rules Clearinghouse.

Subject Matter

The proposed rule−making order affects ch. ATCP 40, relating to manufacture and distribution of fertilizer and related products.

Agency Procedure for Promulgation

A public hearing is required and will be held on February 15, 17 and 22, 2005.

Contact Information

James K. Matson, Chief Counsel

608−224−5022

Health and Family Services

Rule Submittal Date

On December 29, 2004, the Department of Health and Family Services submitted a proposed rule to the Legislative Council Rules Clearinghouse.

Subject Matter

The proposed rule−making order affects ch. HFS 148, relating to the cancer drug repository program.

Agency Procedure for Promulgation

A public hearing will be scheduled at a later date.

Contact Information

Doug Englebert,

608−266−5388

engleda@dhfs.state.wi.us

Office of State Employment Relations

Rule Submittal Date

On December 15, 2004, the Office of State Employment Relations (OSER) submitted a proposed rule to the Legislative Council Rules Clearinghouse.

Subject Matter

The proposed rule−making order affects rules relating to the references to the Compensation Plan, day care providers, the Entry Professional Program, paid leave to vote, continuous service, reinstatement, sick leave credit restoration, annual leave schedules, annual leave options, personal holidays, catastrophic leave, paid leave for bone marrow or organ donation, project compensation, hiring above the minimum and supervisor training.

Agency Procedure for Promulgation

A public hearing will be held on these proposed rules, although a date has not been set as of yet.

Contact Information

David J. Vergeront

608−266−0047

email: david.vergeront@oser.state.wi.us

Office of State Employment Relations − Merit Recruitment & Selection

Rule Submittal Date

On December 15, 2004, the Office of State Employment Relations (OSER) submitted a proposed rule to the Legislative Council Rules Clearinghouse.

Subject Matter

The proposed rule−making order affects rules relating to the Entry Professional Program, submission of notices and requests to the administrator.

Agency Procedure for Promulgation

A public hearing will be held on these proposed rules, although a date has not been set as of yet.

Contact Information

Robert VanHoesen

608−267−1003

email: bob.vanhoesen@oser.state.wi.us

Pharmacy Examining Board

On January 3, 2005, the Pharmacy Examining Board submitted a proposed rule to the Legislative Council Rules Clearinghouse.

Subject Matter

Statutory Authority: ss. 15.08 (5) (b), 227.11 (2) and 450.02 (3) (b) and (d), Stats.

The proposed rule−making order relates to variance alternatives of alarm systems.

Agency Procedure for Promulgation

A public hearing is required and will be held on February 9, 2005, at 9:30 a.m. in Room 180, 1400 East Washington Avenue, Madison, Wisconsin, 53702.

Contact Information

Pamela Haack, Paralegal

Office of Legal Counsel

(608) 266−0495.

Pamela.haack@drl.state.wi.us

Transportation

Rule Submittal Date

On December 22, 2004, the Department of Transportation submitted a proposed rule to the Legislative Council Rules Clearinghouse.

Subject Matter

The proposed rule−making order affects ch. Trans 102, relating to military vehicle operator CDL exemption.

Agency Procedure for Promulgation

A public hearing is required and scheduled for January 27, 2005.

Contact Information

Julie A. Johnson, Paralegal
608−266−8810

Rule−making notices

Notice of Hearing

Agriculture, Trade and Consumer Protection

[CR 04−140]

The State of Wisconsin Department of Agriculture, Trade, and Consumer Protection (DATCP) announces that it will hold a public hearing on a rule which will repeal and recreate DATCP's current rules related to the manufacture and distribution of fertilizer and soil or plant additives. This rule clarifies standards and procedures related to all of the following:

- Licensing manufacturers and distributors.
- License and tonnage fees (this rule does not increase fees).
- Product labeling and ingredient guarantees.
- Permits for low−nutrient mixed fertilizers and soil or plant additives.
- Substantiation of performance claims.
- Product sampling and analysis.
- Toxic contaminants.
- Enforcement and appeals.

DATCP will hold three public hearings at the times and places shown below. DATCP invites the public to attend the hearings and comment on the proposed rule. Following the public hearing, the hearing record will remain open until **Wednesday, March 2, 2005** for additional written comments. Comments may be sent to the Division of Agricultural Resource Management at the address below or by e−mail to lorett.jellings@datcp.state.wi.us.

DATCP's proposed rule will be posted on the Wisconsin Legislative Council web site at http://www.legis.state.wi.us/lc/adm_rules.htm. You may also obtain a free copy of this rule by making a request to:

WI Department Agriculture, Trade, & Consumer Protection

Division of Agricultural Resource Management

2811 Agriculture Drive

Madison, WI 53708−8911

Telephone: (608) 224−4545

Copies will also be available at the public hearing.

To provide comments or concerns relating to small business, please contact DATCP's small business regulatory coordinator Keeley Moll at the address above, by e−mail at Keeley.Moll@datcp.state.wi.us or by telephone at (608) 224−5039.

Hearing impaired persons may request an interpreter for these hearings. Please make reservations for a hearing interpreter by **Thursday, January 27, 2005** by writing to Kris Gordon, Division of Agricultural Resource Management, 2811 Agriculture Drive, Madison, WI 53708−8911, telephone (608) 224−4509. Alternatively, you may contact the DATCP TDD at (608) 224−5058. Handicap access is available at the hearings.

Hearing Locations:

Tuesday, February 15, 2005, 2:00 p.m. to 9:00 p.m.
Green Bay Regional State Office Building
200 N. Jefferson Street
Green Bay, WI 54301

Thursday, February 17, 2005, 2:00 p.m. to 9:00 p.m.
Prairie Oak State Office Building
2811 Agriculture Drive
Board Room
Madison, WI 53708

Tuesday, February 22, 2005, 2:00 p.m. to 9:00 p.m.
Eau Claire Regional State Office Building
3610 Oakwood Hills Parkway
Eau Claire, WI 54701−7754

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

The Department of Agriculture, Trade and Consumer Protection ("DATCP") regulates the manufacture and sale of *fertilizer* and *soil or plant additives*, as required by ss. 94.64 and 94.65, Stats. DATCP regulates to protect farmers, consumers and honest competitors against unfair and deceptive sales practices. Regulation is designed to prevent fraudulent sales of worthless products, deceptive ingredient and performance claims, and latent safety hazards.

Under current law, companies must be licensed to manufacture or distribute fertilizer and soil or plant additives in this state. License holders file annual tonnage reports and pay tonnage fees. Product−specific permits are required for low−nutrient mixed fertilizers, and for soil or plant additives. Permit applicants must submit product labels, and must be able to justify label claims.

This rule repeals and recreates DATCP's current rules related to the manufacture and distribution of fertilizer and soil or plant additives. This rule clarifies standards and procedures related to all of the following:

- Licensing manufacturers and distributors.
- License and tonnage fees (this rule does not increase fees).
- Product labeling and ingredient guarantees.
- Permits for low−nutrient mixed fertilizers and soil or plant additives.
- Substantiation of performance claims.
- Product sampling and analysis.
- Toxic contaminants.
- Enforcement and appeals.

This rule does not regulate the *application* of fertilizer or soil or plant additives. This rule exempts, from regulation, a farmer who sells unpackaged manure produced on his or her farm. This rule also exempts federally listed "organic" products from permit requirements (and from certain labeling and substantiation requirements) under this rule.

DATCP developed this rule in consultation with an advisory committee including agricultural producers, product

manufacturers and distributors, "organic" industry representatives, and University of Wisconsin experts.

Statutory Authority

Statutory authority: ss. 93.07 (1), 94.64 (1) (p), (3m) (a) 1. and (9), 94.65 (1) (a) 2. and (f), (5) (g) and (9), and 100.37 (2) and 100.42 (2), Stats.

Statutes interpreted: ss. 93.06 (7) and (8), 94.64, 94.65, 100.37 and 100.42, Stats.

DATCP regulates the manufacture and sale of *fertilizer* under s. 94.64, Stats. A *fertilizer* is a substance that contains one or more recognized plant nutrients, is used for its plant nutrient content, and is designed for use or claimed to have value in promoting plant growth. The fertilizer law does not apply to "unmanipulated" manure, liming materials or other exempt products. Under the fertilizer law:

• DATCP licenses fertilizer manufacturers and distributors, regulates fertilizer labeling and sales practices, issues permits for low−nutrient mixed fertilizers, regulates deceptive labeling claims, and tests products for compliance with ingredient guarantees.

• DATCP collects license, permit and tonnage fees, and allocates fee revenues (according to a statutory formula) for program administration, environmental cleanup and research.

• DATCP may deny, suspend or revoke licenses or permits, impose license or permit conditions, issue holding orders to prevent the sale of adulterated or misbranded fertilizer, and pursue court action against law violators.

• DATCP may adopt rules, under s. 94.64 (1) (p), (3m) (a) 1. and (9), Stats., related to this regulatory program. DATCP also has general rulemaking authority under s. 93.07 (1), Stats.

DATCP regulates the manufacture and sale of *soil or plant additives* under s. 94.65, Stats. A *soil or plant additive* is a substance (other than a fertilizer) which is intended for application to seeds, soil or plants, and which is designed for use or claimed to have value in promoting or sustaining plant growth, improving crop yield or quality, promoting or sustaining the fertility of soil, or favorably modifying the structure, physical or biological properties of the soil for agronomic or horticultural purposes. The soil or plant additive law does not apply to "unmanipulated" manure, fertilizer, registered pesticides, liming materials or other exempt products. Under the soil or plant additive law:

• DATCP licenses product manufacturers and distributors, regulates product labeling and sales practices, issues permits for individual products, regulates deceptive labeling claims, and tests products for compliance with ingredient guarantees.

• DATCP collects license, permit and tonnage fees, and allocates fees (according to a statutory formula) for program administration, environmental cleanup and research.

• DATCP may deny, suspend or revoke licenses or permits, impose license or permit conditions, issue holding orders to prevent the sale of adulterated or misbranded products, and pursue court action against law violators.

• DATCP may adopt rules, under s. 94.65 (1) (a) 2. and (f), (5) (g) and (9), Stats., to implement this regulatory program. DATCP also has general rulemaking authority under s. 93.07 (1), Stats.

DATCP also regulates hazardous substances and consumer product safety under ss. 100.37 and 100.42, Stats. Under these statutes, DATCP may regulate products (including fertilizers or soil or plant additives) that may pose latent safety hazards under foreseeable use conditions.

Rule Contents

License to Manufacture or Distribute

Under current law, a person must have an annual license to manufacture or distribute fertilizers, and a separate license to manufacture or distribute soil or plant additives. This rule clarifies current licensing requirements and procedures.

This rule exempts certain persons from licensing. For example, this rule exempts a farmer who sells unpackaged manure for application to land covered by a nutrient management plan, regardless of whether the manure is "manipulated." This rule also exempts persons who merely sell ingredients to licensed manufacturers, or distribute the packaged and labeled products of license holders.

A person must apply for a license on a form provided by DATCP. The person must include the required license information and fees, and must identify any low−nutrient mixed fertilizers or soil or plant additives for which product−specific permits are required (see below).

DATCP must normally grant or deny a license application within 45 working days after DATCP receives a complete license application. If DATCP denies a license application, or issues a conditional license, it must give its reasons.

License holders are currently required to pay annual license fees (based on number of business locations). License holders must also file confidential annual tonnage reports with DATCP, and pay tonnage fees based on product tonnage distributed in this state. Fee revenues are allocated according to a statutory formula for program administration, environmental cleanup and research. *This rule does not change current license or tonnage fees, or the allocation of fee revenues.*

Product−Specific Permits

Under current law, a license holder must have a product−specific permit to distribute a low−nutrient mixed fertilizer (in which the sum of the guarantees for primary plant nutrients is less than 24%) or a soil or plant additive. This rule exempts, from these permit requirements, a federally listed "organic" product that is labeled solely for organic crop production (see below).

An application for a product−specific permit must include all of the following:

• Proposed product labeling. The product label must include recommended uses and use directions to ensure effectiveness.

• A fee of $25 for a fertilizer and $100 for a soil or plant additive (*this rule does not change current fees*).

The applicant must certify all of the following in the application:

• The product is effective and useful for labeled purposes when applied under Wisconsin conditions according to label directions.

• The applicant has reliable information to substantiate product labeling, including content guarantees. The applicant must specify a lab method for testing the amount of each active ingredient guaranteed on the product label.

• The applicant has relevant scientific evidence to substantiate product performance claims.

The applicant is not required to submit substantiating information unless DATCP requests that information. DATCP may review a permit application to the extent that it deems appropriate. DATCP may review:

• Product labeling.

• Product efficacy, under Wisconsin conditions, when the product is used according to label directions.

• Product content and performance claims. DATCP may determine whether claims are truthful and properly substantiated. DATCP may also review lab methods used to determine product contents.

• Possible health, safety and environmental hazards (and hazard labeling).

DATCP has 30 working days to determine whether an application is complete. If an application is incomplete, DATCP must tell the applicant what is needed to complete the application. If the applicant fails to complete the application within 30 days, DATCP may deny the application.

DATCP must grant or deny an application within 60 working days after the applicant submits a complete application, unless DATCP reasonably finds that a supplementary review is necessary (for example, DATCP might request substantiation of performance claims that appear to be false or exaggerated). DATCP must identify the scope of any supplementary review, the reasons for the supplementary review, and any additional information requested of the applicant. DATCP must complete the supplementary review as soon as reasonably possible, but not more than 120 days after DATCP receives the requested information.

When the supplementary review is complete, DATCP must grant or deny the permit. DATCP may impose conditions on a permit as necessary (for example, DATCP may require the applicant to change false label claims).

DATCP currently processes 350 to 400 permits each year. In some cases, where there are serious concerns related to product efficacy or label claims, DATCP consults with university experts and evaluates available scientific evidence.

Fertilizer Labeling

This rule clarifies current fertilizer labeling requirements. Under this rule, all packaged fertilizer must be clearly and conspicuously labeled with the following information:

• The name and address of the licensed manufacturer or distributor.

• The fertilizer product name.

• The fertilizer "grade." This is a shorthand statement of primary plant nutrient contents. Primary plant nutrients are nitrogen (N), available phosphate (P_2O_5) and soluble potash (K_2O), commonly designated as N−P−K.

• A "guaranteed analysis" of primary nutrients, secondary nutrients, micro−nutrients and enhancing elements, if any. The guaranteed analysis must be presented in a standard format. Guarantees must be expressed as minimum percentages by weight of the fertilizer. Supplementary information is required in some cases.

• The net weight of the fertilizer contained in the package.

• Any statements or disclaimers required by this rule.

A manufacturer or distributor of bulk (unpackaged) fertilizer must provide similar information related to each bulk fertilizer delivery, on a written label statement that accompanies the delivery. The label statement must also indicate the delivery date, the name and address of the recipient, and the weight of the delivery.

A manufacturer who "custom−mixes" bulk fertilizer according to the purchaser's specifications may provide the purchaser with a written statement listing the weight and grade of each *ingredient*, rather than the grade and guarantee of the finished product, unless the purchaser contracts for a specified grade of finished product.

Under current rules, a person who sells bulk agricultural fertilizer to a landowner must record (and keep for 2 years) the name and address of the nutrient management planner who prepared the landowner's nutrient management plan (if any). This rule does not change that requirement.

Soil or Plant Additive Labeling

This rule clarifies current labeling requirements for soil or plant additives. Soil or plant additives must be clearly and conspicuously labeled with the following information:

• The name and address of the licensed manufacturer or distributor.

• The product name.

• The net weight or liquid measure of the package or bulk delivery.

• The purposes for which the soil or plant additive is recommended.

• Complete use directions to ensure that the product is effective and useful under Wisconsin conditions. The use directions must include the recommended application sites, methods, rates and frequencies. If effectiveness depends on use with other products or practices, that must be disclosed.

• A "guaranteed analysis."

• Supplementary disclosures, if applicable.

The "guaranteed analysis" must list all active and inert ingredients in a standard format. The amount of each active ingredient must be guaranteed as a percentage by weight of the soil or plant additive, unless the active ingredient is a microorganism. If microorganisms are claimed as active ingredients, the label must identify the type of microorganism and must guarantee the number of viable microorganisms per milliliter of liquid product or per gram of non−liquid product.

A federally listed "organic" product need *not* be labeled with recommended uses or use directions, provided the product is designed and labeled solely for organic crop production (see below). Product labeling must comply with other requirements under this rule. A manufacturer or distributor may not make any untrue, deceptive or misleading claims for the product.

Implied Warranty

A person who distributes a low−nutrient mixed fertilizer or soil or plant additive implicitly warrants that the product is effective for all of the purposes recommended in the product labeling, when applied under Wisconsin conditions according to label directions. This warranty does not apply to federally listed "organic" products that are designed and labeled solely for organic crop production (see below).

Combination Products; Labeling

Combination products (fertilizers or soil or plant additives combined with each other, or with pesticides, seed or liming materials) must be labeled according to this rule and other applicable regulations. For example, fertilizer−pesticide combinations (such as "weed and feed" products) must be labeled according to this rule and applicable pesticide rules.

Substantiating Label Claims

Manufacturers and distributors of fertilizers or soil or plant additives must have:

• Relevant and reliable information to substantiate product labeling, including product content claims.

• Relevant scientific evidence to substantiate performance claims made for low−nutrient mixed fertilizers or soil or plant additives. The evidence must substantiate the performance claims under Wisconsin conditions, when the product is applied according to label directions.

Manufacturers and distributors must have substantiation for label claims *before* they make those claims. DATCP *may* require a manufacturer or labeler to submit substantiating information. This rule spells out standards for scientific substantiation of performance claims (for example, mere "testimonials" do not qualify).

"Organic" Products

This rule exempts federally listed "organic" products from permit requirements and certain labeling requirements under this rule (see above) if all of the following apply:

• The product is listed for organic crop production under federal law, or is approved for organic crop production by a federally−accredited certifying agency (and the product label so states).

• The product label states that "This product is intended for use according to an approved organic system plan."

• The manufacturer or distributor makes no performance claims for the product.

Although federally listed "organic" products are exempt from some requirements under this rule, they must comply with other requirements. Sellers must be licensed by DATCP, and must label product contents according to this rule. A seller may not make false, deceptive or misleading claims.

Product Sampling and Testing

DATCP may collect and test product samples to determine compliance with content guarantees. For these "official tests," DATCP will use sampling and test methods prescribed in this rule.

Content Deficiencies

A fertilizer is mislabeled if an "official test" shows any of the following:

• The fertilizer contains less than 90% of the label guarantee for any primary nutrient.

• The actual percentage amount of any primary nutrient falls at least 2 percentage points short of the percentage amount stated on the label.

• The economic value of primary nutrients actually present is less than 98% of the "economic value" of the amounts guaranteed ("economic value" is calculated according to this rule).

• The amount of any secondary nutrient, micronutrient or enhancing element falls short of the label guarantee by an amount specified in this rule.

A soil or plant additive is mislabeled if an "official test" shows that it contains less than 98% of the amount of any active ingredient guaranteed on the label.

Toxic Substances

No product may contain any of the following:

• Toxic concentrations of metals (toxic concentrations are specified in this rule).

• A substance that is toxic or injurious to plants, animals or humans when the fertilizer or soil or plant additive is handled or applied under reasonably foreseeable use conditions, unless the substance and its hazards are identified on the product label.

Special Provisions

This rule includes specific regulations or disclosure requirements related to:

• Fertilizer labeled for foliar application.

• Phosphite or phosphorus acid.

• "Humic substances" in soil or plant additives.

Prohibitions

Under this rule:

• No person may misrepresent or falsify any license or permit application, or any other information filed with DATCP under this rule.

• No person may do any of the following in connection with the labeling, promotion or distribution of any fertilizer or soil or plant additive:

− Make any statement that is false, deceptive or misleading.

− Make any statement that is inconsistent with the product label.

− Represent that a product contains a plant nutrient or other substance, unless the "guaranteed analysis" includes a guarantee for that substance.

− Make any statement or warranty that is not substantiated, to the extent required under this chapter, at the time the statement or warranty is made.

− State or imply that DATCP endorses or warrants the product.

− Make any performance claim, for a product distributed under permit, that is contrary to the product label contained in the approved permit application.

Enforcement

DATCP may take the following actions against rule violators, as appropriate (per current law):

• Deny, suspend, revoke, or impose conditions on a license or permit (the affected manufacturer or distributor may demand a formal administrative hearing).

• Issue holding orders to prevent the sale or movement of illegal products.

• Prosecute violators in court (seizure actions, injunctions, restitution, civil forfeitures or criminal penalties).

Standards Incorporated by Reference

Pursuant to s. 227.21, Stats., DATCP will request permission from the attorney general and the revisor of statutes to incorporate the following standards by reference in this rule:

• Fertilizer terms defined in the Official Publication of the Association of American Plant Food Control Officials, No. 57 (2004).

• Fertilizer sample collection methods specified in the Inspectors Manual of the Association of American Plant Food Control Officials, 6th edition (1999).

• Fertilizer test methods specified in the "Official Methods of Analysis of AOAC International," volume I, 17th edition as updated by the 2nd revision (2003).

• Statement of uniform interpretation and policy 25, related to heavy metal concentrations in fertilizer, contained in the Official Publication of the Association of American Plant Food Control Officials, No 57 (2004).

• Standard chemical names listed in the Merck Index, 12th edition (1996).

Copies of the standards will be kept on file with DATCP, the secretary of state and the revisor of statutes. Copies may be obtained from the publishing organizations.

Fiscal Impact

This rule will have no fiscal impact on DATCP or local units of government. This rule will clarify current regulations, and improve program administration. DATCP does not anticipate any additional costs or staffing needs. A complete fiscal estimate is attached.

Business Impact

This rule will protect farmers, consumers and honest competitors against unfair and deceptive sales practices. This rule is designed to prevent fraudulent sales of worthless or hazardous products. It is also designed to prevent deceptive labeling claims that may mislead purchasers or give sellers an unfair competitive advantage.

There are approximately 540 persons licensed to manufacture or distribute fertilizers or soil or plant additives in Wisconsin. Up to 30% of these license holders may be small businesses. Affected businesses include farm centers

and cooperatives, lawncare businesses, and manufacturers of nonagricultural and specialty fertilizers.

This rule will have few, if any, adverse impacts on business. This rule will not increase fees and, for most honest businesses, will not increase costs. For the most part, this rule merely clarifies current requirements and procedures. However, this rule may require some businesses to modify their labels, or be more diligent in substantiating label claims.

The fertilizer industry serves about 30,000 Wisconsin farmers, many of whom are small businesses. This rule will benefit farmers, by preventing unfair and deceptive sales practices. This rule will facilitate farmer−to−farmer sales of manure, by expanding the current exemption for "unmanipulated" manure and creating an exemption for "manipulated" manure sold for application under a nutrient management plan.

This rule makes special allowance for sellers of federally listed "organic" fertilizers and soil or plant additives. Federally listed "organic" products are exempt from permit requirements, and from certain labeling requirements, if they are designed and labeled solely for use in organic crop production (basic licensing and labeling requirements will still apply). Sellers may not make false, deceptive or misleading claims for "organic" products.

Because this rule will not have a significant adverse impact on small business, it is not subject to the delayed small business effective date provision in s. 227.22 (2) (e), Stats.

A small business analysis ("initial regulatory flexibility analysis") is attached.

Under 2003 Wis. Act 145, DATCP and other agencies must adopt rules spelling out their rule enforcement policy for small businesses. DATCP has not incorporated a small business enforcement policy in this rule, but will propose a separate rule on that subject. DATCP will, to the maximum extent feasible, seek voluntary compliance with this rule.

Environmental Impact

This rule will have no adverse environmental impact. This rule will clarify the licensing, permitting and labeling requirements for fertilizer and soil or plant additive products. This rule will help prevent environmental and safety hazards associated with some products. A complete environmental assessment is attached.

Federal Regulation

There is no significant federal regulation of fertilizers or soil or plant additives, although there is a long history of regulation by states (see below).

The United States department of agriculture (USDA) has established rules for "organic" crop production. USDA rules list fertilizers and soil or plant additives that are suitable for "organic" crop production, and accredits private organizations that may approve other "organic" products. This rule exempts these federally listed "organic" products from permit requirements and certain labeling requirements under this rule (see above).

Surrounding State Regulation

General

States have historically regulated fertilizer and soil or plant additives to prevent fraudulent sales of worthless products, and to protect farmers, consumers and honest competitors against unfair and deceptive practices.

State fertilizer regulators have organized a national Association of American Plant Food Control Officials (AAPFCO). AAPFCO promotes uniform state laws related to fertilizers, soil or plant additives (also known as soil amendments), and liming materials used to correct soil acidity. Most states, including Wisconsin and surrounding states, follow AAPFCO principles and have similar basic laws. However, there is some variation in laws from state to state.

Fertilizer laws tend to be more standardized than soil or plant additive laws. Wisconsin's soil or plant additive law is similar to laws in Minnesota and Iowa. Illinois has little regulation of soil or plant additives. Michigan's law is similar to those in Wisconsin, Minnesota and Iowa, but is narrower in scope (it exempts various biological and hormone products).

Basic Fertilizer Regulation

Wisconsin and adjoining states have similar basic fertilizer laws, based on AAPFCO models. Wisconsin and adjoining states require similar labeling, and use similar terms and definitions (typically drawn from AAPFCO). There are minor variations between states.

Manure Sales

Fertilizer laws vary in their treatment of manure. All states exempt "unmanipulated" manure from the definition of *fertilizer*, but there is uncertainty related to the definition of "unmanipulated" manure and the treatment of bulk manure sales ~~sales~~ (including, for example, sales of farm−dried or farm−composted manure). Iowa licenses distributors of "bulk dry animal nutrient products" and has mechanisms to make purchasers aware of nutrient contents. Minnesota licenses commercial animal waste technicians and, effective in 2005, will certify private manure applicators. Illinois and Michigan do not address the issue.

This rule clarifies that manure is "unmanipulated" (and thus exempt from rule coverage) if it is modified solely for purposes of on−farm storage, handling, animal husbandry or odor control, rather than commercial sales. This rule *also* exempts unpackaged "manipulated" manure sold for use on land covered by a nutrient management plan (this exemption is not available in other states). This exemption does not apply to sales of *packaged* "manipulated" manure.

Nutrient Content

Wisconsin and all adjoining states, except Minnesota, require minimum percentage guarantees for primary plant nutrients (N−P−K) in mixed fertilizers sold for general agricultural use. The minimum percentage is 24% in Wisconsin, 20% in Illinois and Michigan, and 21% in Iowa (most mixed fertilizers actually have much higher guarantees).

Wisconsin allows sales of low−nutrient mixed fertilizers (below 24%) for specialized agricultural use or nonagricultural use, but only with a permit. Illinois, Michigan and Iowa allow sales only for nonagricultural use (Iowa also allows foliar fertilizers and composts for organic crop production).

The adjoining states require *annual* permits for nonagricultural fertilizer products (Iowa requires a one−time permit). Wisconsin requires one−time (not annual) permits, and only for low−nutrient products. This rule exempts federally listed "organic" products from the Wisconsin permit requirement. Wisconsin and Iowa spell out procedures for granting and suspending permits (other states are less clear).

Tonnage Reports and Fees

Wisconsin and adjoining states require fertilizer tonnage reports and tonnage fees. Wisconsin requires once−per−year reporting, whereas adjoining states require monthly (IL) or semi−annual (MN, IA, MI) reporting. Wisconsin tonnage fees are higher than surrounding states. Wisconsin is somewhat unique in using tonnage fees to fund environmental cleanup and research, as well as program administration. This rule does not change current tonnage fees.

Use Directions

This rule requires use directions on low−nutrient mixed fertilizers (not other fertilizers) and on soil or plant additives. The AAPFCO model requires use directions for *all* packaged fertilizers, and Minnesota requires use directions on all nonagricultural fertilizers. Other states do not require use directions, but prohibit agricultural sales of low−nutrient mixed fertilizers (with limited exceptions in Iowa). Minnesota, Iowa and Michigan, like Wisconsin, regulate soil or plant additives to ensure efficacy, and some states require use directions.

Nutrient Guarantees

Wisconsin's label format for fertilizer guarantees is consistent with surrounding states. All states use the AAPFCO model format, and identify the elements or compounds that qualify as recognized plant nutrients.

Labeling Combination Products

This rule clarifies the labeling of products that combine fertilizer and soil or plant additive materials. Although DATCP frequently encounters products of this type, neither AAPFCO nor any adjoining state provides any labeling guidance.

Hazard or Caution Statements

This rule requires hazard or caution statements for certain fertilizers that may be toxic to plants or animals, consistent with the current AAPFCO model rule. Iowa, Illinois and Minnesota follow an earlier draft of the AAPFCO model rule, which specifies precautionary statements for boron or molybdenum.

This rule also prohibits excessive concentrations of heavy metals, consistent with an AAPFCO policy statement. Other states do not specifically address this toxicity concern, except to a very limited extent.

Sample Collection and Analysis

Wisconsin and all adjoining states collect and analyze samples to check for compliance with label guarantees. AAPFCO establishes standard sampling methods and product tolerances that take account of manufacturing variability. This rule follows the AAPFCO model, but allows greater tolerances for individual nutrient guarantees. Other states vary in their approach.

Notice of Hearing

Pharmacy Examining Board

[CR 05−001]

NOTICE IS HEREBY GIVEN that pursuant to authority vested in the Pharmacy Examining Board in ss. 15.08 (5) (b), 227.11 (2) and 450.02 (3) (b) and (d), Wis. Stats., and interpreting s. 450.02 (3) (b), Wis. Stats., the Pharmacy Examining Board will hold a public hearing at the time and place indicated below to consider an order to amend s. Phar 6.08, relating to variance alternatives of alarm systems.

Hearing Date, Time and Location

Date:	**February 9, 2005**
Time:	9:30 A.M.
Location:	1400 East Washington Avenue Room 180 Madison, Wisconsin

Appearances at the Hearing

Interested persons are invited to present information at the hearing. Persons appearing may make an oral presentation but are urged to submit facts, opinions and argument in writing as well. Facts, opinions and argument may also be submitted in writing without a personal appearance by mail addressed to the Department of Regulation and Licensing, Office of Legal Counsel, P.O. Box 8935, Madison, Wisconsin 53708, or by email to pamela.haack@drl.state.wi.us. Written comments must be received on or before February 21, 2005 to be included in the record of rule−making proceedings.

Analysis prepared by the Department of Regulation and Licensing.

Statutes interpreted: Section 450.02 (3) (b), Stats.

Statutory authority: Sections 15.08 (5) (b), 227.11 (2) and 450.02 (3) (b) and (d), Stats.

Explanation of agency authority: Currently, s. Phar 6.08 requires a pharmacy to have a centrally monitored alarm system in the pharmacy or the immediate physical structure within which the pharmacy is located. Depending upon the physical structure or location of the pharmacy, other means may be available to provide for security of the pharmacy consistent with the public health, safety and welfare. Providing pharmacies a means to seek a variance from the requirements of s. Phar 6.08 will allow legitimate alternative methods of achieving security to be scrutinized and approved by the board.

Related statute or rule: There are no related statutes or rules other than those listed above.

Plain language analysis: The objective of this proposed rule−making order is to improve security in pharmacies that are located within another structure. Currently such pharmacies may be licensed without requesting a variance from the board if the alarm system is monitored in the pharmacy proper or in the physical structure within which the pharmacy is located. The rule change would require pharmacies without a centrally monitored alarm system in the pharmacy or the immediate physical structure within which the pharmacy is located to seek a variance, and the board would grant the variance request only after the board has reviewed and approved a specific plan.

SECTION 1. Provides greater flexibility to pharmacies in meeting the security requirements of s. Phar 6.08 consistent with the public health, safety and welfare.

Summary of, and comparison with, existing or proposed federal regulation: Applicable Federal Law: Alarm systems are not required specifically, but may be considered a factor in obtaining substantial compliance with security regulations generally.

21 CFR Section 1301:71: Section 1301.71 Security requirements generally.

(a) All applicants and registrants shall provide effective controls and procedures to guard against theft and diversion of controlled substances. In order to determine whether a registrant has provided effective controls against diversion, the Administrator shall use the security requirements set forth in Secs. 1301.72−1301.76 as standards for the physical security controls and operating procedures necessary to prevent diversion. Materials and construction which will provide a structural equivalent to the physical security controls set forth in Secs. 1301.72, 1301.73 and 1301.75 may be used in lieu of the materials and construction described in those sections.

(b) Substantial compliance with the standards set forth in Secs. 1301.72−1301.76 may be deemed sufficient by the Administrator after evaluation of the overall security system and needs of the applicant or registrant. In evaluating the overall security system of a registrant or applicant, the Administrator may consider any of the following factors as he may deem relevant to the need for strict compliance with security requirements:

(1) The type of activity conducted (e.g., processing of bulk chemicals, preparing dosage forms, packaging, labeling, cooperative buying, etc.);

(2) The type and form of controlled substances handled (e.g., bulk liquids or dosage units, usable powders or nonusable powders);

(3) The quantity of controlled substances handled;

(4) The location of the premises and the relationship such location bears on security needs;

(5) The type of building construction comprising the facility and the general characteristics of the building or buildings;

(6) The type of vault, safe, and secure enclosures or other storage system (e.g., automatic storage and retrieval system) used;

(7) The type of closures on vaults, safes, and secure enclosures;

(8) The adequacy of key control systems and/or combination lock control systems;

(9) The adequacy of electric detection and alarm systems, if any including use of supervised transmittal lines and standby power sources;

(10) The extent of unsupervised public access to the facility, including the presence and characteristics of perimeter fencing, if any;

(11) The adequacy of supervision over employees having access to manufacturing and storage areas;

(12) The procedures for handling business guests, visitors, maintenance personnel, and nonemployee service personnel;

(13) The availability of local police protection or of the registrant's or applicant's security personnel, and;

(14) The adequacy of the registrant's or applicant's system for monitoring the receipt, manufacture, distribution, and disposition of controlled substances in its operations.

(c) When physical security controls become inadequate as a result of a controlled substance being transferred to a different schedule, or as a result of a noncontrolled substance being listed on any schedule, or as a result of a significant increase in the quantity of controlled substances in the possession of the registrant during normal business operations, the physical security controls shall be expanded and extended accordingly. A registrant may adjust physical security controls within the requirements set forth in Secs. 1301.72−1301.76 when the need for such controls decreases as a result of a controlled substance being transferred to a different schedule, or as a result of a controlled substance being removed from control, or as a result of a significant decrease in the quantity of controlled substances in the possession of the registrant during normal business operations.

(d) Any registrant or applicant desiring to determine whether a proposed security system substantially complies with, or is the structural equivalent of, the requirements set forth in Secs. 1301.72−1301.76 may submit any plans, blueprints, sketches or other materials regarding the proposed security system either to the Special Agent in Charge in the region in which the system will be used, or to the Division Operations Section, Drug Enforcement Administration, Department of Justice, Washington, DC 20537.

(e) Physical security controls of locations registered under the Harrison Narcotic Act or the Narcotics Manufacturing Act of 1960 on April 30, 1971, shall be deemed to comply substantially with the standards set forth in Secs. 1301.72, 1301.73 and 1301.75. Any new facilities or work or storage areas constructed or utilized for controlled substances, which facilities or work or storage areas have not been previously approved by the Administration, shall not necessarily be deemed to comply substantially with the standards set forth in Secs. 1301.72, 1301.73 and 1301.75, notwithstanding that such facilities or work or storage areas have physical security controls similar to those previously approved by the Administration.

[36 FR 18729, Sept. 21, 1971. Redesignated at 38 FR 26609, Sept. 24, 1973, and amended at 46 FR 28841, May 29, 1981; 47 FR 41735, Sept. 22, 1982; 51 FR 5319, Feb. 13, 1986]

21 CFR Section 1301.75:

Section 1301.75 Physical security controls for practitioners.

(a) Controlled substances listed in Schedule I shall be stored in a securely locked, substantially constructed cabinet.

(b) Controlled substances listed in Schedules II, III, IV, and V shall be stored in a securely locked, substantially constructed cabinet. However, pharmacies and institutional practitioners may disperse such substances throughout the stock of noncontrolled substances in such a manner as to obstruct the theft or diversion of the controlled substances.

(c) This section shall also apply to nonpractitioners authorized to conduct research or chemical analysis under another registration.

(d) Carfentanil etorphine hydrochloride and diprenorphine shall be stored in a safe or steel cabinet equivalent to a U.S. Government Class V security container.

[39 FR 3674, Jan. 29, 1974, as amended at 39 FR 17838, May 21, 1974; 54 FR 33674, Aug. 16, 1989; 62 FR 13957, Mar. 24, 1997]

Comparison with rules in adjacent states:

Minnesota – none.

Michigan – none.

Illinois

TITLE 68: PROFESSIONS AND OCCUPATIONS

CHAPTER VII: DEPARTMENT OF PROFESSIONAL REGULATION

SUBCHAPTER b: PROFESSIONS AND OCCUPATIONS

PART 1330

PHARMACY PRACTICE ACT OF 1987

Section 1330.75 Security Requirements

a) Whenever the pharmacy (prescription area) is not occupied by a registrant, the pharmacy (prescription area) must be secured and inaccessible to non−licensed persons (employees and public). This may be accomplished by measures such as walling off, locking doors, electronic security equipment, as approved by the Department.

Iowa

657 IAC Chapter 6 GENERAL PHARMACY PRACTICE 657—6.7(124,155A) Security.

While on duty, each pharmacist shall be responsible for the security of the prescription department, including provisions for effective control against theft of, diversion of, or unauthorized access to prescription drugs, records for such drugs, and patient records as provided in 657—Chapter 21.

6.7(1) Department locked. The prescription department shall be locked by key or combination so as to prevent access when a pharmacist is not on site except as provided in subrule 6.7(2).

6.7(2) Temporary absence of pharmacist. In the temporary absence of the pharmacist, only the pharmacist in charge may designate persons who may be present in the prescription

department to perform technical and nontechnical functions designated by the pharmacist in charge. Activities identified in subrule 6.7(3) may not be performed during such temporary absence of the pharmacist. A temporary absence is an absence of short duration not to exceed two hours. In the absence of the pharmacist, the pharmacy shall notify the public that the pharmacist is temporarily absent and that no prescriptions will be dispensed until the pharmacist returns.

Indiana

856 IAC 1−13−3 "Prescription department closed" closing hours; electronic monitoring; applicability

Authority: IC 25−26−13−4

Affected: IC 25−26−13−10; IC 25−26−13−19

Sec. 3. (a) This section and section 4 of this rule implement IC 25−26−13−19 concerning board approval for Type I and Type VI pharmacies to be opened to the general public without a pharmacist on duty. This section and section 4 of this rule apply only in situations where the entire area of the business is licensed as a pharmacy. This section, section 4 of this rule, and IC 25−26−13−19 do not apply where the only area of a business licensed as a pharmacy is the prescription department.

(b) The following definitions apply throughout this section:

(1) "Absence of pharmacist" means those periods when the prescription department is closed and secured and the pharmacist is not present in the pharmacy.

(2) "Electronic monitoring system" means a system having the ability by light beam, heat, motion, or other electronically activated method to detect the presence of unauthorized persons or instrumentalities in a given area, and relay or report that detection as described in this section.

(3) "Prescription department" means that area of the pharmacy where the legend drugs, devices, and other merchandise or items which can only be dispensed or delivered by a pharmacist are located and which must be secured in the absence of the pharmacist.

(4) "Reasonable barrier" means an obstruction or barricade that blocks or impedes the entry into the area by an ordinary person, and includes, but is not limited to, a latched or locked gate of sufficient height and construction that an ordinary person cannot breach the barrier and/or violate the space the space being monitored without detection.

(5) "Secured" means either of the following:

(A) An area is completely enclosed as to its perimeter, from floor to ceiling, and locked.

(B) Through installation of reasonable barriers, an area not readily accessible which is monitored by a board approved electronic monitoring system covering all portions of the secured areas.

(c) Before a pharmacy may be open to the general public without a pharmacist on duty, the pharmacy must file an application with the board and have it approved by the board under IC 25−26−13−19. The pharmacy must abide by the closing hours designated in the application. Any change from the hours as stated in the application must be submitted in writing to the board.

(d) Under IC 25−26−13−19, a prescription department may be locked or secured while the remainder of the pharmacy remains open to the public if the following criteria are met:

(1) The prescription department is constructed in such a manner or located in such an area that reasonable barriers are in place which prevent the easy and/or quick access to legend drugs and other articles which are in the prescription department. These barriers may be doors or other obstacles as the occasion requires.

(2) The prescription department, if not secured and locked as described in subsection (b)(5)(A), must be secured and monitored by a board approved electronic monitoring device that provides the following:

(A) On−site audible alarm that is clearly and continuously audible at all points within the pharmacy.

(B) Off−site audible or visual alarm that is continuously monitored at all times that the pharmacy remains open while the prescription department is closed and secured.

(3) Any violation or breach of the secured area shall be duly recorded by the qualifying pharmacist of the pharmacy and by the off−site security monitoring agency and reported to the board within seventy−two (72) hours of the violation or breach. This report shall include the nature of the violation or breach.

(4) Facilities monitored electronically must provide for backup power for the eventuality that there is an electronic power failure for any reason. Such backup power shall be capable of continuing the monitoring for a period of no less than thirty−six (36) hours.

(5) The electronic monitoring system shall be activated and inactivated only by key or combination. Alarms which have been triggered shall only be reset and/or reactivated by a pharmacist. The key or combination shall only be in the possession or knowledge of a pharmacist. Reasonable exceptions shall be made to this for security system operators. However, in no case shall a security system operator have access to the secured area without the presence of a pharmacist. Such exceptions shall be listed in the application under this section and shall be subject to approval by the board.

(e) Under IC 25−26−13−10(b), the board may revoke or limit the privilege to be open to the general public without a pharmacist on duty if the pharmacy violates this section or section 4 of this rule. *(Indiana Board of Pharmacy; Reg 13, Sec 3; filed Jun 18, 1962, 10:00 a.m.: Rules and Regs. 1963, p. 124; filed May 15, 1992, 5:00 p.m.: 15 IR 2246; readopted filed Nov 13, 2001, 3:55 p.m.: IR 1330)*

Summary of factual data and analytical methodologies: The board reviewed the current alarm rule in view of the security needs of pharmacies that exist in other structures. The draft of the rule was prepared after extensive analysis by both professional and public members of the board, expert advice of pharmacists who operate pharmacies located within another structure, and representatives from the small business community.

Anticipated costs incurred by private sector: The Department of Regulation and Licensing has determined that there will be no anticipated costs that would be incurred by the private sector.

Fiscal estimate:

The proposed rule will have an impact of $120 annually on the department's funds. This represents the salary and fringe benefits for staff to prepare two plans for variance to present to the board per year. The board's legal counsel and bureau director and a professional credentialing supervisor will each need to spend one half hour per variance plan. The department will incur $500 in costs to print and distribute the rule change.

Effect on small business

Pursuant to s. 227.114 (1) (a), Stats., these proposed rules will have no significant economic impact on a substantial number of small businesses.

TEXT OF RULE

SECTION 1. Phar 6.08 is amended to read:

Phar 6.08 Security. ~~Effective January 1, 2000, a~~ A pharmacy shall have a centrally monitored alarm system in the pharmacy or the immediate physical structure within which the pharmacy is located. A security system or plan that does not utilize a centrally monitored alarm system may be used if reviewed and prior approval is obtained from the board.

Notice of Hearing

Transportation

[CR 04−141]

NOTICE IS HEREBY GIVEN that pursuant to s. 343.055 (5), Stats., and interpreting s. 343.055, Stats., the Department of Transportation will hold a public hearing in **Room 132−B, Conference Room B** of the Hill Farms State Transportation Building, 4802 Sheboygan Avenue, Madison, Wisconsin on the **27th** day of **January**, 2005, at **10:00 AM**, to consider the creation of s. Trans 102.23, Wisconsin Administrative Code, relating to military vehicle operator CDL exemption.

An interpreter for the hearing impaired will be available on request for this hearing. Please make reservations for a hearing interpreter at least 10 days prior to the hearing.

Parking for persons with disabilities and an accessible entrance are available on the north and south sides of the Hill Farms State Transportation Building.

Analysis Prepared by the Wisconsin Department of Transportation

Statutory Authority: ss. 343.055 (5), Stats.

Statutes Interpreted: ss. 343.055, Stats.

Plain Language Analysis: Section 343.05 (4) (a) 1., Stats., currently exempts military persons from all state licensing requirements if they are members of the armed services driving a motor vehicle owned by or leased by the federal government.

Section 49 C.F.R. 383.3(c) permits states to exempt drivers operating a commercial motor vehicle for military purposes from CDL requirements. The federal government has requested that Wisconsin exempt all persons operating CMVs for military purposes from CDL requirements without regard to vehicle ownership. This proposed rule making would grant an exemption from CDL requirements for military purposes to the extent permitted by federal law.

Section 343.055 (5) requires WisDOT to issue administrative rules implementing all federal CDL waivers.

Summary of, and Preliminary Comparison with, Existing or Proposed Federal Regulation: Section 49 C.F.R. 383.3(c) permits states to exempt drivers operating a commercial motor vehicle for military purposes from CDL requirements. The federal government has requested that Wisconsin exempt all persons operating CMVs for military purposes from CDL requirements without regard to vehicle ownership. This proposed rule making would implement that exemption as required by s. 343.055 (5), Stats.

Comparison with Rules in Adjacent States: All 50 states have a CDL exemption for military drivers similar to this provision.

Summary of Factual Data and Analytical Methodologies Used and How the Related Findings Support the Regulatory Approach Chosen: No data or analytical methodology was employed in considering this proposed rule making.

Effect on Small Business and, If Applicable, Any Analysis and Supporting Documentation Used to Determine Effect on Small Businesses: This proposed rule making has no effect on small business. This affects only drivers working for the U.S. Military. You may contact the Department's small business regulatory coordinator by phone at (608) 267−3703, or via e−mail at the following website:

http://www.dot.wisconsin.gov/library/research/law/rulenotices.htm.

Fiscal Effect and Anticipated Costs Incurred by Private Sector: There is no fiscal effect for implementing this rule making, nor will the private sector incur any costs.

Place Where Comments are to be Submitted and Deadline for Submission: The public record on this proposed rule making will be held open until close of business the day of the hearing to permit the submission of comments in lieu of public hearing testimony or comments supplementing testimony offered at the hearing. Any such comments should be submitted to Gary Prideaux−Wentz, Department of Transportation, Division of Motor Vehicles, Room 351, P. O. Box 7995, Madison, WI 53707−7995. You may also contact Mr. Prideaux−Wentz by phone at (608) 264−8714.

To view the proposed amendments to the rule, view the current rule, and submit written comments via e−mail/internet, you may visit the following website: http://www.dot.wisconsin.gov/library/research/law/rulenotices.htm.

Rule orders filed with the revisor of statutes bureau

The following administrative rule orders have been filed with the Revisor of Statutes Bureau and are in the process of being published. The date assigned to each rule is the projected effective date. It is possible that the publication date of these rules could be changed. Contact the Revisor of Statutes Bureau at gary.poulson@legis.state.wi.us or (608) 266−7275 for updated information on the effective dates for the listed rule orders.

Justice
(CR 04−028)

An order affecting ch. Jus 16, relating to enforcement of the Tobacco Master Settlement Agreement.

Effective 3−1−05.

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