

DATCP Docket No. 06-R-01
Rules Clearinghouse No. 07-067

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

1 The state of Wisconsin department of agriculture, trade and consumer protection adopts
2 an order *to repeal* ATCP 141.09, ch. ATCP 147, 148.06(2) and (3) and 148.09; *to amend*
3 ATCP 140.13(1)(b)3.(intro.) and a., 140.14(2)(d), 140.19(4)(b)6., (5)(a), (b)3., (c) and
4 (e), and (6)(a) and (b)3., 140.20(2), and 148.01(1); *to repeal and recreate* ATCP
5 148.06(1) and (5): and to create ATCP 140.01 (1m), *relating to* agricultural marketing
6 orders and marketing boards.

Analysis by the Department of Agriculture,
Trade and Consumer Protection

This rule modifies current rules governing Wisconsin's agricultural marketing order program (ATCP 140). This rule also repeals the current mint marketing order (ATCP 147), and amends current marketing orders related to cherries (ATCP 141) and ginseng (ATCP 148).

Statutory Authority

Statutory Authority: ss. 93.07(1) and 96.15, Stats.
Statutes Interpreted: ch. 96, Stats.

DATCP has general authority, under s. 93.07(1), Stats., to adopt rules interpreting statutes under its jurisdiction. DATCP is specifically authorized, under s. 96.15, Stats., to adopt rules to administer the marketing order program under ch. 96, Stats.

Background

The Department of Agriculture, Trade and Consumer Protection (DATCP) administers

Wisconsin's agricultural marketing order program under ch. 96, Stats. DATCP may adopt marketing orders for Wisconsin agricultural commodities, with the approval of affected commodity producers. DATCP has adopted marketing orders for cherries, cranberries, corn, milk, mint, soybeans, ginseng and potatoes.

A marketing order imposes assessments on commodity producers. Affected producers elect a marketing board, which spends assessment revenues for purposes specified in the marketing order. Marketing orders may be used to finance market development, research and education. DATCP monitors marketing board activities for compliance with applicable law, including the marketing order.

DATCP has adopted general rules to govern the operation of marketing orders and marketing boards. DATCP must also adopt marketing orders as rules. Affected producers must approve (by referendum) the adoption, amendment or repeal of a marketing order. DATCP may bill a marketing board for administrative services provided to the marketing board.

Rule Contents

This rule does all of the following:

- Amends current rules (ATCP 140) governing all marketing order referenda and marketing board elections:
 - Authorizes, but does not require, DATCP to conduct referenda and elections by electronic communication.
 - As an alternative to mailing ballots to all eligible producers in a marketing board election (but not a marketing order referendum), authorizes DATCP to notify producers how they may obtain election ballots.
- Amends the cherry marketing order (ATCP 141) to eliminate the requirement of an advisory referendum every 4 years (non-binding advisory referendum asks producers whether they wish to continue the cherry marketing order). A marketing order may be repealed at any time, with or without a non-binding advisory referendum, if the repeal is approved in a formal binding referendum of affected producers.
- Repeals the mint marketing order (ATCP 147).
- Amends the ginseng marketing order (ATCP 148):
 - Eliminates the current annual producer assessment based on sales, and replaces it with an assessment based on acres in ginseng production.

- The ginseng marketing board must annually determine the assessment rate, which may not exceed \$150 per acre in ginseng production. The ginseng board may require affected producers to report acreage in production.
 - The ginseng board may verify reported acreage by aerial photography or other reliable means.
 - The ginseng board must annually notify each producer of the assessment amount owed by that producer.
 - DATCP no longer determines assessment amounts, but may audit the ginseng board's determination of assessment amounts.
 - Eliminates the requirement of an advisory referendum every 5 years (advisory referendum asks producers whether they wish to continue the ginseng marketing order). A marketing order may be repealed at any time, with or without a non-binding advisory referendum, if the repeal is approved in a formal binding referendum of affected producers.
- Makes other minor changes to current rules.

Fiscal Impact

The proposed rules will not have a significant fiscal impact on DATCP and will have no fiscal effect on local government. A complete fiscal estimate is attached.

Business Impact

Businesses Affected

In a general sense, this rule affects producers of all agricultural commodities that are covered by an agricultural marketing order or that may be covered in the future. This rule more specifically affects cherry, mint and ginseng producers. Many of the affected businesses are "small businesses." The effects of this rule are generally insignificant, and there are no adverse effects on small business. A complete Business Impact Analysis is attached.

Agricultural producers; general

This rule gives DATCP more procedural flexibility related to the conduct of marketing order referenda and marketing board elections. Under this rule:

- DATCP may use electronic communication to conduct referenda and elections (DATCP is not required to use electronic communication).

- In a marketing board election (but not a marketing order referendum), DATCP may notify producers how to obtain ballots rather than actually mailing ballots to all producers.

DATCP may use these alternative procedures where appropriate. In appropriate circumstances, the alternative procedures may be at least as effective in encouraging producer participation, and may be substantially cheaper. Cost savings may be passed on to marketing boards and individual producers. Cost savings to individual producers will not be significant.

Mint Producers

This rule repeals the current mint marketing order, and eliminates the producer assessments associated with that order. There may be some cost savings to individual mint producers, but the savings will be insignificant. Currently, there are only 14 mint producers in Wisconsin.

Cherry Producers

This rule repeals a current marketing order provision that requires an advisory referendum of cherry producers every 4 years, to determine whether they support continuation of the marketing order. The repeal will save some costs for the marketing board and affected producers. The savings for individual producers will not be significant.

Ginseng Producers

This rule requires ginseng marketing order assessments based on acres in production, rather than sales. Sales assessments are difficult to collect, because most buyers are outside the United States. This rule will charge assessments based on reported acres in production (verified by aerial photography or other reliable means). Assessments based on acres in production will be more fair and reliable. Some individual assessments will go up, but others will go down. Overall assessments will increase, but there will not be a major financial impact on ginseng producers.

This rule repeals a current marketing order provision that requires an advisory referendum of ginseng producers every 5 years, to determine whether they support continuation of the marketing order. The repeal will save some costs for the marketing board and affected producers. The savings for individual producers will not be significant.

Federal Regulation

The United States Department of Agriculture (USDA) administers an agricultural marketing order program, under which USDA has broad authority to regulate prices and production, as well as to charge assessments for market development, promotion,

research and education. USDA has adopted marketing orders for some of the same commodities covered by Wisconsin marketing orders (including potatoes, corn, milk and soybeans). However, the state marketing orders do not directly duplicate or conflict with the federal marketing orders.

Surrounding State Regulation

Surrounding states have marketing orders for some, but not all, of the commodities covered by Wisconsin marketing orders. For example, Illinois, Iowa, Minnesota and Michigan have marketing orders for corn. Illinois and Iowa also have marketing orders for soybeans, milk and other commodities. Nearly all United States ginseng is grown in Wisconsin, so no other states have ginseng marketing orders.

Summary of Factual Data and Analytical Methods

DATCP worked with the affected producers and the marketing boards that represent them to obtain the information that supports the need for this rule. In particular, the Mint Marketing Board provided the historical data evidencing the reduction of mint producers and the Ginseng Marketing Board provided the historical data on ginseng assessments and the information needed for the new assessment method.

Agency Contact

Noel Favia
Wisconsin Department of Agriculture Trade and Consumer Protection
Agricultural Development Division
P.O. Box 8911
Madison, WI 53708-8911
Telephone: 608-224-5140
Email noel.favia@datcp.state.wi.us.

- 1 **SECTION 1.** ATCP 140.01 (1m) is created to read
- 2 ATCP 140.01 (1m) “Electronic communication” means Internet, electronic mail,
- 3 facsimile, or any other form or process of communication that does not directly involve
- 4 the physical transfer of paper and that is suitable for the retention, retrieval and
- 5 reproduction of information by the recipient.
- 6 **SECTION 2.** ATCP 140.13(1)(b)3.(intro.) and a. are amended to read:

1 ATCP 140.13(1)(b)3.(intro.) A specific statement describing how marketing
2 order assessments would be computed and paid under the marketing order. ~~The~~
3 ~~description shall be illustrated by examples which are based on typical market~~
4 ~~transactions in the affected commodity.~~ The description shall indicate:

5 a. How the ~~volume~~ basis for assessments would be determined.

6 **SECTION 3.** ATCP 140.14(2)(d) is amended to read:

7 ATCP 140.14(2)(d) “Assessment due” means an assessment for which a
8 producer, handler or producer-handler has incurred a specific legal obligation of payment
9 under the marketing order. ~~An assessment becomes due when title to the affected~~
10 ~~commodity transfers and the volume basis used to determine the assessment amount~~
11 ~~becomes known.~~

12 **SECTION 4.** ATCP 140.19(4)(b)6. and (5)(a), (b)3., (c) and (e) are amended to
13 read:

14 ATCP 140.19(4)(b)6. Balloting instructions, indicating whether the referendum
15 is to be conducted by mail ~~ballots~~ or electronic communication, or at polling places under
16 sub. (5)(e). If the referendum is to be conducted at polling places, rather than by mail
17 ~~ballot~~ or electronic communication, the notice of announcement shall give the locations
18 of polling places and the times during which votes may be cast at the polling places.

19 (5)(a) Referendum ballots and related materials shall be prepared and distributed
20 by mail or electronic communication, or at polling places pursuant to par. (e). Every
21 ballot shall be designed and handled so as to insure the secrecy of the producer’s or
22 handler’s vote. Ballots shall be accompanied by the instructions required under par. (b).
23 Every ballot shall be accompanied by a separate certificate, ~~to be signed by the producer~~

1 ~~or handler~~, certifying that the producer or handler is eligible to vote in the referendum.

2 No vote is valid unless accompanied by a ~~signed~~ certificate of eligibility. Ballots and
3 certificates shall be returned together, but shall be designed and handled so that the
4 department removes and separates the certificates from the ballots before any vote can be
5 examined or counted, so that no vote when revealed can be identified with a certificate.

6 (b)3. Instructions for entering a vote on the ballot and ~~signing~~ returning the
7 certificate of eligibility which accompanies the ballot. Instructions shall state that no
8 vote may be counted unless returned with a ~~signed~~ valid certificate of eligibility.

9 (c) Except as provided in par. (e), the department shall mail or send by electronic
10 communication a referendum ballot to every producer or handler who is included on the
11 list of affected producers or handlers compiled by the department under s. ATCP 140.15.
12 The department shall exclude from its mailing list those producers for whom an
13 incorporated cooperative association has been authorized to cast a bloc vote, and who are
14 listed by the cooperative as being represented in the bloc vote. A producer or handler
15 who is not on the department's mailing list, or who did not receive a referendum ballot,
16 may request a ballot from the department. A producer who desires to be excluded from a
17 cooperative's bloc vote may request an individual ballot as provided in sub. (3)(e). The
18 department may require documentation to verify that any person requesting a ballot is
19 eligible to vote in the referendum.

20 (e) If the secretary determines that it would be unreasonably costly or difficult to
21 conduct a referendum by mail ~~ballot~~ or electronic communication, the secretary may
22 direct that ballots be cast at polling places announced by the secretary as provided in sub.

1 (4)(b)6. The secretary may further direct that ballots be pre-distributed to producers by
2 mail or electronic communication, rather than at the designated polling places.

3 **SECTION 5.** ATCP 140.19(6)(a) and (b)3. are amended to read:

4 ATCP 140.19(6)(a) Referendum ballots shall be tabulated by the department,
5 according to procedures set forth in this subsection. Before tabulating ballots, the
6 department shall examine voting certificates to determine the validity of each ballot cast.
7 All referenda, including referenda conducted at polling places, shall be conducted so as to
8 exclude ineligible voters and assure the secrecy of individual votes. ~~Signed certificates~~
9 Certificates of eligibility shall be obtained from all voters in conjunction with the casting
10 of ballots, but shall be separated from all ballots before any vote is examined or counted,
11 so that no vote can be identified with a certificate of eligibility.

12 (b)3. The certificate of eligibility required to accompany the ballot was not
13 properly ~~signed or~~ returned.

14 **SECTION 6.** ATCP 140.20(2) is amended to read:

15 ATCP 140.20(2) ELECTION PROCEDURE: GENERAL. The election of marketing
16 board members shall be conducted by the department according to applicable procedures
17 set forth under s. ATCP 140.19 for marketing order referenda. In a marketing board
18 election, as an alternative to sending a ballot to every producer and handler, the
19 department may send to each producer or handler a notice by mail, electronic
20 communication or other effective means explaining how the producer or handler may
21 obtain a ballot. The department may also make other changes in the procedure under s.
22 ATCP 140.19 ~~may be modified by the department as that are necessary~~ to accommodate
23 relevant differences between a marketing order referendum and an election of marketing

1 board members. Supplementary procedures, not inconsistent with this chapter, may be
2 set forth in the marketing order. A marketing board shall reimburse the department for
3 its costs in conducting an election of marketing board members. Bloc voting is not
4 permitted in the election of marketing board members.

5 **SECTION 7.** ATCP 141.09 is repealed.

6 **SECTION 8.** Chapter ATCP 147 is repealed.

7 **SECTION 9.** ATCP 148.01(1) is amended to read:

8 ATCP 148.01(1) "Affected producer" means an individual, partnership,
9 corporation or other business entity in Wisconsin engaged in the production ~~and sale~~ of
10 ginseng.

11 **SECTION 10.** ATCP 148.06(1) is repealed and recreated to read:

12 ATCP 148.06(1) An affected producer shall pay, for each calendar year, an
13 annual assessment for each acre of land that the producer has in ginseng production at
14 any time during that calendar year. The ginseng board shall annually determine and
15 publish the assessment rate per acre, which may not exceed \$150 per acre. The
16 assessment for any fraction of an acre shall be proportionate to the assessment per acre.
17 The ginseng board may require affected producers to report acreage in ginseng
18 production, and may use aerial photography or other reliable methods to verify reported
19 acreage.

20 **SECTION 11.** ATCP 148.06(2) and (3) are repealed.

21 **SECTION 12.** ATCP 148.06(5) is repealed and recreated to read:

22 ATCP 148.06(5) Prior to March 1, 2009 and each year thereafter, the ginseng
23 board shall determine the assessment amount owed by each affected producer under sub.

1 (1) for the last completed calendar year, and shall issue to each producer a written notice
2 showing the assessment amount owed by that producer. The assessment is due and
3 payable when the producer receives the notice from the ginseng board. The ginseng
4 board shall determine and record assessments in a manner that protects the confidentiality
5 of producer information.

6 **SECTION 13.** ATCP 148.09 is repealed.

SECTION 14. EFFECTIVE DATE. The rules contained in this order shall take effect on the first day of the month following publication in the Wisconsin administrative register, as provided under s. 227.22(2)(intro.), Stats.

Dated this _____ day of June, 2008.

STATE OF WISCONSIN
DEPARTMENT OF AGRICULTURE,
TRADE AND CONSUMER PROTECTION

By _____
Rodney J. Nilsestuen,
Secretary

7