STATEMENT OF SCOPE

Department of Agriculture, Trade and Consumer Protection (DATCP)

Rule No.: Ch. ATCP 40, Wis. Admin. Code (Existing)

Relating to: Fertilizer Mislabeling

1. Description of the objective of the rule:

This proposed revision is limited to reviewing whether administrative rule section ATCP 40.14 ("ATCP 40.14"), which concerns labeling requirements for the nutrient contents of fertilizer, should be modified or updated. In particular, the current formula in ATCP 40.14 to determine the "economic value" of fertilizer nutrients will be reviewed. DATCP may also propose other modifications to ATCP 40.14 resulting from that review.

Fertilizer product labels must provide minimum guarantees of certain nutrients if those nutrients are represented as part of that fertilizer product. ATCP 40.14 provides criteria to establish whether a fertilizer's nutrient content falls below the label guarantees for those nutrients. If the criteria in the rule are not met, then the fertilizer is deemed mislabeled.

2. Description of existing policies relevant to the rule and of new policies proposed to be included in the rule and an analysis of policy alternatives; the history, background and justification for the proposed rule:

Background and History. Under current law, DATCP is authorized to regulate the manufacture, distribution, and labeling of fertilizer. *See* Wis. Stat. §§ 94.64 to 94.645. Fertilizer is considered to be "any substance, containing one or more plant nutrients, which is used for its plant nutrient content and which is designed for use or claimed to have value in promoting plant growth ...." *See* Wis. Stat. § 94.64(1)(f). Administrative rules implementing fertilizer regulation are found in subchapter II of Wis. Admin. Code ch. ATCP 40.

Currently, ATCP 40.14 (titled "Fertilizer content deficiencies") identifies the criteria used to determine whether a fertilizer product label properly states the nutrient content of the product. Under one criterion, fertilizer is mislabeled if, based on a sample collected and tested as specified in the rule, "[t]he economic value of primary nutrients actually present is less than 98% of the economic value of the amounts guaranteed, where the economic value is calculated according to sub. (3)." *See* ATCP 40.14(1)(c). (Emphasis added.) The economic value formula provided in ATCP 40.14(3) states:

Economic value = {[total nitrogen (N) guarantee] x 2} + {[total phosphate (P_2O_5) guarantee] x 2} + soluble potash (K_2O) guarantee}

The multipliers in the economic value formula are based on wholesale costs of nitrogen, phosphate and potash, which may have changed since the formula was established in the 1970s and therefore could require revision.

Justification and Policies. Some fertilizer industry representatives have suggested that either the economic value formula or the percentage listed in ATCP 40.14 (1)(c), or both, need review. DATCP may examine whether the existing economic value formula accurately represents wholesale prices of these nutrients. DATCP may also examine whether "98% of the economic value of the amounts guaranteed" or another percentage should be used in the formula. DATCP may also review the other criteria described in ATCP 40.14 determine whether the nutrient content in the fertilizer falls below the fertilizer label's percentage guarantees of those nutrients. DATCP may consider combinations of the above alternatives or consider other alternatives.

Additionally, DATCP may review ATCP 40.14 as a whole to determine if modifications or updates are needed. DATCP will seek input from the fertilizer industry, interested consumers, and the public at large to determine what, if any, changes are needed to address fertilizer mislabeling. DATCP may amend other rules that are directly impacted by a change to ATCP 40.14, if any.

Policy Alternatives. If this scope statement is approved, DATCP expects to look at various alternatives when reviewing the current fertilizer mislabeling rule, as described above. If DATCP does nothing, then DATCP will be unable to explore any concerns relating to mislabeling that have been posed by some members of the fertilizer industry.

3. Statutory authority for the rule (including the statutory citation and language):

Wis. Stat. §§ 93.07 (1) and 94.64 (9) (b), (c), (d) and (f).

93.07 Department duties. It shall be the duty of the department:

(1) REGULATIONS. To make and enforce such regulations, not inconsistent with law, as it may deem necessary for the exercise and discharge of all the powers and duties of the department, and to adopt such measures and make such regulations as are necessary and proper for the enforcement by the state of chs. 93 to 100, which regulations shall have the force of law.

94.64 Fertilizer.

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(9) RULES. The department may promulgate rules:

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(b) Regulating the sale and labeling of fertilizer, including warning or caution statements or directions for use in connection with the labeling of fertilizer.

(c) Governing methods of sampling, testing, examining and analyzing fertilizer.

(d) Prescribing tolerances for deficiencies found in percentages of plant nutrient guaranteed to be present.

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(f) Establishing standards of identity and purity for fertilizer materials.

4. Estimate of the amount of time that state employees will spend to develop the rule and of other resources necessary to develop the rule:

DATCP estimates that it will use approximately 0.5 FTE staff to develop this rule. That includes time required for investigation and analysis, rule drafting, preparing related documents, coordinating advisory committee meetings, holding public hearings and communicating with affected persons and groups. DATCP will use existing staff to develop this rule.

5. Description of all entities that may be impacted by the rule:

Fertilizer manufacturers and labelers. This rule revision may change the criteria currently being used to establish whether the nutrient contents of fertilizer meets the fertilizer's label guarantees of those nutrients and could include modification of the economic value formula. While this rule revision will not affect any nutrient percentage guarantees that the fertilizer industry makes on fertilizer labels, it may reduce the instances in which tested fertilizer products fail to meet existing labeling criteria in ATCP 40.14.

Consumers of fertilizer products. This rule revision may benefit fertilizer product consumers because the criteria that ensure accurate labeling of guaranteed amounts of nutrient content in fertilizer products will be reexamined and updated if needed.

6. Summary and preliminary comparison of any existing or proposed federal regulation that is intended to address the activities to be regulated by the rule:

There is no significant federal regulation of fertilizers, although there is a long history of regulation by states.

7. Anticipated economic impact

DATCP expects the proposed rule revision to have minimal to no negative economic impact statewide or locally.

Contact Person:

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GOVERNOR APPROVAL

In accordance with 2011 Wisconsin Act 21, (Sec 227.135(2)) this scope statement was approved by the Governor on _____(date) before DATCP took any action in proceeding with this proposed rule including submission of this scope statement for publication.

DATCP BOARD AUTHORIZATION:

DATCP may not begin drafting this rule revision until the Board of Agriculture, Trade and Consumer Protection (Board) approves this scope statement. The Board may not approve this scope statement sooner than 10 days after this scope statement is published in the Wisconsin Administrative Register. If the Board takes no action on the scope statement within 30 days after the scope statement is presented to the Board, the scope statement is considered approved. Before DATCP holds public hearings on this rule, the Board must approve the hearing draft. The Board must also approve the final draft rule before the department adopts the rule.

Ben Brancel

Ben Brancel
Secretary
Department of Agriculture, Trade and
Consumer Protection

9-22-14
Date Submitted