DATCP Docket#: 13-R-02 **Proposed Hearing Draft**
Rules Clearinghouse No. _____ **July 16, 2013**

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

The Wisconsin department of agriculture, trade and consumer protection proposes the following order ***to repeal*** ATCP 17.01(19) and ch. 53; ***to repeal and recreate*** ATCP 21, Appendix A, ***to amend*** ATCP 17.01(9), 21.21(1)(c)1, 60.08(3) and (6), 60.01(23m), 70.03(7)(b)1, 80.01(7)(c), 80.01(27m), 80.24(3)(a)2 and 80.24(3)(b); and, ***to create*** ATCP 80.24(3)(a)3; ***relating to*** various minor and technical rule changes.

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

This rule makes minor technical changes to a number of current rules administered by the department of agriculture, trade and consumer protection ("DATCP").

Statutes Interpreted

Statutes Interpreted: ss. 94.01(1), 94.81 (1m) and (2m), 95.51, 97.20, 97.22 and 97.29, Stats.

Statutory Authority

Statutory Authority: ss. 93.07 (1), 94.01(1), 94.81(2m), 95.51(7), 97.20(4), 97.22 (8) and 97.29 (5), Stats.

Explanation of Statutory Authority

DATCP has general authority, under s. 93.07(1), Stats., to adopt rules to interpret laws under its jurisdiction. It also has specific rulemaking authority related to various matters addressed by this rule (see above). This rule makes minor changes to a number of different rules administered by DATCP. The changes are adopted under essentially the same authority used to adopt the original rules.

Related Rules or Statutes

This rule is not substantially affected by statutes or rules other than those identified in this rule.

Plain Language Analysis

This rule makes minor or technical changes to a number of current DATCP rules. This rule does all of the following:

Livestock Premises Registration

This rule amends current DATCP rule ch. ATCP 17, relating to Livestock Premises Registration. In ATCP 17.01, certain terms used in the chapter are defined. In that section, there are currently two definitions for "captive game birds," at ATCP 17.01(9) and (19). This rule amends ATCP 17.01(9) by amending the current definition to conform to the definition for "captive game bird" now found in ATCP 17.01(19), and repealing the definition now found in ATCP 17.01(19).

Plant Inspection and Pest Control

This rule makes two minor technical changes in ch. ATCP 21. The current rule defines, in ATCP 21.21(1)(c)1, an "infested area" by listing the states known to be infected at the time the current rule was adopted. The proposed amendment adds the states of North Carolina, Virginia, Ohio, and Pennsylvania to the list of states included in that definition. Each of those states now has quarantined counties based on a detection of TCD (Thousand Cankers Disease).

Appendix A to ATCP 21 is being repealed and replaced because Hemlock Woolly Adelgid has been detected in additional counties in other states since the last time ATCP 21 was updated. The proposed language identifies those new counties. In some states the status has changed so that the entire state is now considered generally infested and the state as a whole is now listed. Because this pest is not federally regulated, DATCP cannot reference the Code of Federal Regulations to identify infested areas, but has to identify them specifically in our rule.

Agricultural Enterprise Areas

This rule repeals ch. ATCP 53 in its entirety for the following reasons. Section 91.84, Stats., authorizes the department to designate agricultural enterprise areas (AEAs) for the Farmland Preservation Program. Section 91.84(2) previously required that designation to be made through the emergency rulemaking process. For two years, the department used emergency rulemaking to designate AEAs in ch. ATCP 53. In 2011 Wis. Act 253, sec. 91.84 (2) on emergency rulemaking was repealed, sub. (2m) was created (requiring all previous designations by rule to remain in effect only through December 31, 2012), and other provisions of s. 91.84 were amended to authorize the department's secretary to designate AEAs by order. Since, as of January 1, 2013, ch. ATCP 53 is no longer in effect, this proposed rule repeals that chapter in its entirety.

Dairy Farms

This rule makes the following technical changes to ch. ATCP 60 relating to dairy farms. In ATCP 60.08(3) and (6), the references to "NR 811 or 812" are changed to "NR 810, 811, or 812" due to the splitting of the former NR 811 into NR 810 and NR 811. This rule also amends the reference in ATCP 60.01(23m) to the "2005 revision" of the Pasteurized Milk Ordinance (the "PMO") to refer to the "2011 revision" of the PMO, since the PMO is updated every two years.

Food Processing Plants

This rule amends ch. ATCP 70 by making the following technical change. ATCP 70.03 (7) (b)1 currently exempts a restaurant, which holds a permit under s. 254.64, Wis. Stats., from the requirement to obtain a food processing plant license if the restaurant "does not process food for wholesale distribution, and is not engaged in canning or production of processed fish." This rule would amend that language to read "does not process food for wholesale distribution, and is not engaged in canning of food products or in the production of processed fish." The proposed change clarifies that "canning" applies to all canned foods and not just processed fish.

Dairy Plants

This rule amends ch. ATCP 80 relating to dairy plants as follows. ATCP 80.01(7) (c) defines a "dairy product" as a "commodity in which milk or any milk product or by-product is a principal ingredient." This rule amends this section by adding, after "ingredient," the following: "except prepared foods made in a licensed food processing plant for which the federal food and drug administration has not prescribed a standard of identity under title 21 of the code of federal regulations and which contain dairy products manufactured at a dairy plant from ingredients that are pasteurized or are produced under other processes that eliminate or reduce to an acceptable level the food safety hazards associated with the dairy products, including aseptically processed foods, high acid foods, heat treated foods, aged foods, cold pack foods, and similarly processed foods." The proposed amendment incorporates new statutory language in, 2011 Wisconsin Act 195, which narrows the definition of a dairy product in s. 97.20(2)(e)5, Wis. Stats.

This rule amends ATCP 80.01 (27m) by changing the reference to the "2005 revision" of the PMO to the "2011 revision" of the PMO.

This rule amends ATCP 80.24(3)(a)2 by deleting "dried whey and nonfat dry milk." This rule amends ATCP 80.24(3)(a) by adding a new section, ATCP 80.24(3)(a)3, to read: "3. 10,000 per gram for nonfat dry milk, dried whey and dry milk products." This rule amends ATCP 80.24 (3) (b) by deleting "other than cultured grade A dairy products" from that section. These changes reflect changes in the most recent PMO.

Standards Incorporated by Reference

Pursuant to s. 227.21, Stats., DATCP has requested permission from the Department of Justice to incorporate the updated technical standards incorporated by reference in this rule. Copies of the updated standards will be kept on file with DATCP and the Legislative Reference Bureau.

Summary of, and Comparison with Existing or Proposed Federal Statutes and Regulations

The vast majority of dairy farms in Wisconsin have Grade "A" permits, which means that their milk, or pasteurized milk and certain other dairy products made from the farm's milk, can be shipped across state and international boundaries. Milk moving in this manner, referred to as Grade "A" milk, must be produced, transported, and processed in accordance with the Pasteurized Milk Ordinance (PMO). The PMO is a document written by the US Food and Drug Administration and regulators from the 50 states and Puerto Rico, which participate in the biennial National Conference on Interstate Milk Shipments, and it is periodically revised. State regulations governing the production and processing of Grade "A" milk must be at least as stringent, and consistent with, the PMO. Some states adopt the PMO by reference; Wisconsin regularly revises ATCP 60 (Dairy Farms), ATCP 82 (Milk Haulers), and ATCP 80 (Dairy Plants) to ensure the necessary stringency and consistency with the current PMO.

Comparison with rules in adjacent States

The housekeeping and technical rules changes proposed in this rule will not create any disparities between Wisconsin and the adjacent states.

Summary of Factual Data and Analytical Methodologies

This rule does not depend on any complex analysis of data. This rule merely makes minor or technical changes to current rules.

Analysis and Supporting Documents used to Determine Effect on Small Business

Because this bill makes minor housekeeping technical changes, no significant analysis or documentation was required to determine that the proposed rule will have no impact on small businesses.

Effect on Business Impact

This rule will not have any impact on small business or other business. This rule makes minor technical "housekeeping" changes that will not have any impact on business standards, costs or operations. See the complete *initial regulatory flexibility analysis* that accompanies this rule.

Environmental Impact

This "housekeeping" rule will have no significant impact on the environment.

Agency Contact for Submitting Comments

Questions or comments related to this rule may be sent to the following address:

Kelly Monaghan
Department of Agriculture, Trade and Consumer Protection
2811 Agriculture Drive
Madison, WI 53718
Telephone: (608) 224-5033

E-Mail: kelly.monaghan@wi.gov

Comments must be received no later than 14 days following the administrative rule hearing which has yet to be scheduled.

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1 **SECTION 1.** ATCP 17.01 (19) is repealed.

2 **SECTION 2.** ATCP ch. 53 is repealed.

3 **SECTION 3.** ATCP 21, APPENDIX A, is repealed and recreated as shown in the appendix

4 attached.

5 **SECTION 3.** ATCP 17.01(9) is amended to read:

6 ATCP 17.01(9) "Captive games birds" means birds of a normally wild type, such as

7 pheasants, quail, wild turkeys, migratory wildfowl, pigeons, and exotic birds raised for hunting,

8 that are raised in captivity. "Captive game birds" does not include poultry or ratites~~.~~, but does

9 include birds kept pursuant to a license issued under s. 169.15, 169.19, 169.20 or 169.21, Stats.

10 **SECTION 4.** ATCP 21.21(1)(c)1 is amended to read:

11 ATCP 21.21(1)(c)1. The states of Arizona, California, Colorado, Idaho, Nevada, New

12 Mexico, North Carolina, Ohio, Oregon, Pennsylvania, Tennessee, Utah, Virginia, and

13 Washington.

14 **SECTION 5.** ATCP 60.08(3) and its Note are amended to read:

ATCP 60.08(3) Wells used to supply water for milk-house and milking operations on grade A farms shall comply with ch. NR 810, 811 or 812 in the case of a community water system.

NOTE: Wells on grade A and grade B farms are currently subject to well construction requirements under ch. NR 810, 811 or 812, which are rules administered by the Wisconsin department of natural resources.

SECTION 6. ATCP 60.08(6)1 is amended to read:

ATCP 60.08(6)1 The recirculated water originates from a safe source that complies with ch. NR 810, 811 or 812.

SECTION 7. ATCP 60.01(23m) is amended to read:

ATCP 60.01(23m) "PMO" means the grade A pasteurized milk ordinance, ~~2005~~ 2011 revision, published by the United States department of health and human services, public health service, food and drug administration.

SECTION 8. ATCP 70.03(7)(b)1 is amended to read:

ATCP 70.03(7)(b)1 The restaurant does not process food for wholesale distribution, and is not engaged in canning of food products or in the production of processed fish.

SECTION 9. ATCP 80.01(7)(c) is amended to read:

ATCP 80.01(7)(c) A commodity in which milk or any milk product or by-product is a principal ingredient, except prepared foods made in a licensed food processing plant for which the federal food and drug administration has not prescribed a standard of identity under title 21 of the code of federal regulations and which contain dairy products manufactured at a dairy plant from ingredients that are pasteurized or are produced under other processes that eliminate or reduce to an acceptable level the food safety hazards associated with the dairy products,

including aseptically processed foods, high acid foods, heat treated foods, aged foods, cold pack foods, and similarly processed foods.

SECTION 10. ATCP 80.01(27m) is amended to read:

ATCP 80.01(27m) "PMO means the grade A pasteurized milk ordinance, ~~2005~~ 2011 revision, published by the United States department of health and human services, public health service, food and drug administration.

SECTION 11. ATCP 80.24(3)(a)2 is amended to read:

ATCP 80.24(3)(a)2 30,000 per ml. for condensed milk, whey, and whey products~~, dried whey and nonfat dried milk~~.

SECTION 12. ATCP 80.24(3)(a)3 is created to read:

ATCP 80.24(3)(a)3 10,000 per gram for nonfat dry milk, dried whey and dry milk products.

SECTION 13. ATCP 80.24(3)(b) is amended to read:

ATCP 80.24(3)(b) Coliform counts in pasteurized grade A dairy products ~~other than cultured grade A dairy products~~ may not exceed 10 per ml. or per gram, except that coliform counts in bulk milk tanker shipments of pasteurized grade A dairy products may not exceed 100 per ml.

SECTION 14. EFFECTIVE DATE: This rule takes effect on the first day of the month following publication in the Wisconsin administrative register, as provided in s. 227.22 (2) (intro.), Stats.

Dated this _____ day of _____, 2013.

STATE OF WISCONSIN
DEPARTMENT OF AGRICULTURE,
TRADE AND CONSUMER PROTECTION

By_____
Ben Brancel, Secretary

Chapter ATCP 21

APPENDIX A

AREAS INFESTED BY HEMLOCK WOOLLY ADELGID

States (entire state)

- Alaska
- California
- Connecticut
- Delaware
- Maryland
- Massachusetts
- New Jersey
- Oregon
- Rhode Island
- Washington

Counties

- In the state of Georgia, the counties of Banks, Dade, Dawson, Fannin, Gilmer, Habersham, Hall, Lumpkin, Murray, Pickens, Rabun, Stephens, Towns, Union, Walker, White.

- In the state of Kentucky, the counties of Bell, Breathitt, Clay, Floyd, Harlan, Knott, Knox, Laurel, Lee, Leslie, Letcher, Martin, McCreary, Menifee, Morgan, Owsley, Perry, Pike, Powell, Rowan, Whitley, Wolfe.

- In the state of Maine, the counties of Cumberland, Lincoln, Sagadahoc, York.

- In the state of New Hampshire, the counties of Belknap, Carroll, Cheshire, Hillsborough, Merrimack, Rockingham, Strafford.

- In the state of New York, the counties of Albany, Bronx, Broome, Cayuga, Chemung, Columbia, Delaware, Dutchess, Greene, Kings, Livingstone, Monroe, Nassau, New York, Orange, Putnam, Queens, Rensselaer, Richmond, Rockland, Schenectady, Schoharie, Schuyler, Seneca, Steuben, Suffolk, Sullivan, Tioga, Tompkins, Ulster, Westchester, Wyoming, Yates.

- In the state of North Carolina, the counties of Alamance, Alexander, Alleghany, Ashe, Avery, Buncombe, Burke, Caldwell, Caswell, Catawba, Cherokee, Clay, Durham, Forsyth, Graham, Haywood, Henderson, Iredell, Jackson, Macon, Madison, McDowell, Mitchell, Orange, Polk, Rockingham, Rutherford, Stokes, Surry, Swain, Transylvania, Wake, Watauga, Wilkes, Yancey.
- In the state of Ohio, the counties of Meigs and Washington.

• In the state of Pennsylvania, the counties of Adams, Allegheny, Beaver, Bedford, Berks, Blair, Bradford, Bucks, Cambria, Cameron, Carbon, Centre, Chester, Clearfield, Clinton, Columbia, Cumberland, Dauphin, Delaware, Elk, Fayette, Franklin, Fulton, Huntingdon, Indiana, Juniata, Lackawanna, Lancaster, Lebanon, Lehigh, Luzerne, Lycoming, Mifflin, Monroe, Montgomery, Montour, Northampton, Northumberland, Perry, Philadelphia, Pike, Potter, Schuylkill, Snyder, Somerset, Sullivan, Susquehanna, Tioga, Union, Wayne, Westmoreland, Wyoming, York.

• In the state of South Carolina, the counties of Greenville, Oconee, Pickens, Spartanburg.

• In the state of Tennessee, the counties of Anderson, Blount, Campbell, Carter, Claiborne, Cocke, Cumberland, Fentress, Franklin, Grainger, Greene, Hamblen, Hamilton, Hancock, Hawkins, Jefferson, Johnson, Knox, Loudon, Marion, McMinn, Monroe, Morgan, Pickett, Polk, Putnam, Rhea, Roane, Scott, Sequatchie, Sevier, Sullivan, Unicoi, Union, Washington.

• In the state of Vermont, the counties of Bennington and Windham.

• In the state of Virginia, the counties of Albemarle, Alexandria, Alleghany, Amherst, Appomattox, Arlington, Augusta, Bath, Bedford, Bland, Botetourt, Bristol, Buchanan, Buckingham, Buena Vista, Campbell, Caroline, Carroll, Charlottesville, Chesterfield, Clarke, Craig, Culpeper, Danville, Dickenson, Essex, Fairfax, Falls Church, Fauquier, Floyd, Fluvanna, Franklin, Frederick, Galax, Giles, Grayson, Greene, Hanover, Harrisonburg, Henrico, Henry, Highland, King William, Lee, Lexington, Loudon, Lunenburg, Lynchburg, Madison, Manassas, Manassas Park, Martinsville, Montgomery, Nelson, Northumberland, Norton, Orange, Page, Patrick, Pittsylvania, Prince William, Pulaski, Radford, Rappahannock, Richmond, Roanoke, Rockbridge, Rockingham, Russell, Salem, Scott, Shenandoah, Smyth, Spotsylvania, Staunton, Tazewell, Warren, Washington, Waynesboro, Winchester, Wise, Wythe.

• In the state of West Virginia, the counties of Barbour, Berkeley, Boone, Braxton, Cabell, Clay, Fayette, Grant, Greenbrier, Hampshire, Hardy, Harrison, Jefferson, Kanawha, Lewis, Lincoln, Logan, Marion, McDowell, Mercer, Mineral, Mingo, Monongalia, Monroe, Morgan, Nicholas, Pendleton, Pocahontas, Preston, Raleigh, Randolph, Roane, Summers, Taylor, Tucker, Tyler, Upshur, Wayne, Webster, Wirt, Wood, Wyoming.