



State of Wisconsin
Governor Tony Evers

Department of Agriculture, Trade and Consumer Protection
Bradley M. Pfaff, Secretary

TO: Senator Stephen Nass and Representative Joan Ballweg, JCRAR Co-Chairs

FROM: Bradley M. Pfaff, Secretary

DATE: March 29, 2019

SUBJECT: Biennial Report Reviewing Administrative Rules

As required under Wis. Stat. § 227.29(1), the Department of Agriculture, Trade and Consumer Protection (“the Department”) has reviewed the administrative rules promulgated or administered by the Department for rules that are: unauthorized; restricted in promulgation authority; obsolete or have been rendered unnecessary by, duplicative of, superseded by, or in conflict with another rule, state statute, federal statute or regulation, or a ruling of a court of competent jurisdiction; or economically burdensome. This memorandum lists those rules the Department has determined fall under each category, along with an explanation of the Department’s determination and a description of the Department’s actions, if any, to address each rule listed.

Rules Reportable Under Wis. Stat. § 227.29(1)(a)—Unauthorized Rules

ATCP § 3.02 (1)(g) is unauthorized due to the repeal of Wis. Stat. § 92.105, .106, requiring Department review of county soil and water conservation standards, by 2009 Wisconsin Act 28. The Department plans to include this provision of ATCP ch. 3 in a petition for expedited repeal of an unauthorized rule.

ATCP ch. 48 contains provisions that are now unauthorized due to amendments in Wis. Stat. ch. 88 made by 2017 Wisconsin Act 115. The Department has submitted a petition for expedited repeal of an unauthorized rule. That petition has been referred to the Legislature. In addition, ATCP § 48.60 is unauthorized due to the repeal of Wis. Stat. §§ 20.115(7)(d) and 88.15 which authorized and appropriated funds for grants to county drainage boards. The Department plans to include this provision of ATCP ch. 48 in a petition for expedited repeal of an unauthorized rule.

ATCP § 161.50(3)(e) is unauthorized due to the repeal of Wis. Stat. §§ 20.115(4)(s) and 93.60 by 2013 Wisconsin Act 20, which authorized and appropriated funds for grazing lands conservation grants. The Department plans to include this provision of ATCP ch. 161 in a petition for expedited repeal of an unauthorized rule.

Rules Reportable Under Wis. Stat. § 227.29(1)(b)—Rules for Which Authority to Promulgate Restricted

ATCP §§ 72.145(7) and ATCP § 73.145(7) are restricted by Wis. Stat. § 97.625(1)(am) (“[R]ules may not require the department to inspect sealed combustion units during the period in which the sealed combustion units are covered by a manufacturer’s warranty against defects.”) 2017 Wisconsin Act 330 repealed Wis. Stat. §

Agriculture generates \$88 billion for Wisconsin

2811 Agriculture Drive • PO Box 8911 • Madison, WI 53708-8911 • Wisconsin.gov

An equal opportunity employer

97.625(1)(am), effective November 1, 2019. The Department plans to undertake a rulemaking to align the rule with statute.

Rules Reportable Under Wis. Stat. § 227.29(1)(c)—Obsolete or Unnecessary Rules

ATCP §§ 21.12 and .17, establishing import controls and quarantine for the pine shoot beetle and emerald ash borer, are no longer necessary as the entire state was added to the federal quarantines of these pests in 2006 and 2018, respectively. The Department plans to undertake a rulemaking to update the rule.

ATCP § 29.10(3)(c)2. is unnecessary as it requires pesticide manufacturers and labelers applying for a license to include with an application a report that states the gross revenue of each pesticide product used in this state. 2017 Wisconsin Act 59 removed this requirement from Wis. Stat. § 94.68(2)(bm). The Department plans to undertake a rulemaking to update the rule.

ATCP § 149.10, suspending operations applicable to the potato industry, is unnecessary as 1991 Wisconsin Act 39 repealed the Potato Industry Act, Wis. Stat. § 100.39 (establishing operations applicable to the potato industry and allowing the Potato Industry Board, with consent of the Department Secretary, to suspend such operations when in the public interest). The Department plans to undertake a rulemaking to update the rule.

ATCP § 160.92(6) is unnecessary as it requires a fair organization to submit to the Department a copy of its annual financial report as published in a newspaper. 2015 Wisconsin Act 207 repealed the requirement that a fair organization publish in a newspaper its annual financial statement. The Department plans to undertake a rulemaking to update the rule.

Rules Reportable Under Wis. Stat. § 227.29(1)(d)—Duplicative, Superseded, or Conflicting Rules

ATCP § 1.06(3)(a) conflicts with Wis. Stat. § 227.42(2) as it requires the Secretary to grant or deny a contested case hearing request within 30 days after a complete request is filed. Wis. Stat. § 227.42(2) deems a request denied if an agency does not enter an order disposing of the request for hearing within 20 days from the date of filing. The Department plans to undertake a rulemaking to align the rule with statute.

ATCP §§ 29.11, .15(4), .20(6), .25(5), .2 conflict with Wis. Stat. §§ 94.681, 94.685(3)(a)2., 94.703(3)(a)2., and 94.704(3)(a)2. due to changes in license fees by 2017 Wisconsin Act 59. Additionally, ATCP ch. 29 may conflict with the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and thus may require changes to the rule to maintain the Department's federal grant of authority to administer FIFRA in Wisconsin. The Department plans to undertake a rulemaking to align the rule with statute.

ATCP § 35.22 conflicts with Wis. Stat. § 94.73(6)(b), (c) as 2017 Wisconsin Act 59 increased the maximum eligible reimbursement costs for eligible sites under the Agricultural Chemical Cleanup Program. The Department plans to undertake a rulemaking to align the rule with statute.

ATCP ch. 50 conflicts with Wis. Stat. § 281.16(3)(e), which requires the Department to specify cost-sharing criteria for performance standards, because the recently promulgated NR § 151.075 created new Silurian bedrock performance standards for which the Department must now promulgate the companion cost-sharing standards. The Department plans to undertake a rulemaking to align the rules.

ATCP §§ 51.16, .18, and .20, standards for nutrient management, waste facility storage, and runoff management, are in conflict with Wis. Stat. § 93.90(2)(a), which requires siting standards be consistent with similar provisions in ATCP ch. 50 and NR ch. 151. ATCP §§ 51.16, .18, and .20 are not consistent due to the recent updates to those rules. The Department plans to undertake a rulemaking to align the rules.

ATCP §§ 70.19 and .21 conflict with the Federal Model Ordinance for Marine Shellfish, 21 C.F.R. Pt. 123. ATCP 70 conflicts with Wis. Stat. §§ 97.01(9m), (99) .30(3s), (4)(b), which creates a new regulatory mechanism for micromarkets that is not currently reflected in the rule. The Department is currently undergoing a rulemaking updating ATCP ch. 70 which corrects these conflicts. The final rule has been referred to the Legislature.

ATCP §§ 77.01(4m), 77.02(1), 77.22(2)(a), (3)(c) and (7), and 77.24(5)(a) 1. and (c) are in conflict with uniform requirements for milk testing in the Pasteurized Milk Ordinance, U.S. Public Health Service, U.S. Food and Drug Administration. ATCP §§ 77.02, 77.10(2)(b), 77.14(1)(b) and (c), 77.34(5)(a) and (b) are in conflict with updates of 40 CFR 141 (National Primary Drinking Water Regulations), which are federal requirements adopted in Wisconsin through NR ch. 809 and required to be followed by the Department for water testing lab certification pursuant to Wis. Stat. § 93.12(9). These provisions are currently being updated in a rulemaking for ATCP ch. 77.

ATCP §§ 93.020(6)(b), .050(1), .400(1)(c), (7)(b)2. regulate above-ground storage tanks greater than 110 gallons and thus conflict with Wis. Stat. § 168.22(3) (“This subchapter does not apply to storage tanks which are installed above ground level and which are less than 5,000 gallons in capacity.”). The Department recommends a statutory change to align the rule with statute.

ATCP ch. 99 conflicts with Wis. Stat. § 126.88(1) as 2017 Wisconsin Act 155 modified the statute to combine grain dealers and grain warehouse keepers’ minimum and maximum fund balances. The Department is currently undergoing a rulemaking updating ATCP ch. 99. The final rule is nearly complete.

ATCP § 134.05(4)(a) permits a landlord to require a prospective tenant to pay the landlord’s actual cost, up to \$20, of obtaining a consumer credit report and thus conflicts with Wis. Stat. § 704.085(1)(a), created by 2017 Wisconsin Act 317 (allowing a landlord to require a prospective tenant to pay landlord’s actual costs up to \$25). The Department plans to undertake a rulemaking to align the statute with rule.

ATCP § 163.30(3)(b) conflicts with Wis. Stat. §§ 71.07(3), 71.28(3p), 71.47(3p) which limit the Dairy Manufacturing Facility Investment Credit to taxable years beginning after December 31, 2013. ATCP §

163.30(3)(b) prohibits claims for taxable years beginning on or after January 1, 2015. The Department is considering a potential rulemaking to align the rule with statute.

ATCP § 164.30(3)(b) conflicts with Wis. Stat. §§ 71.07(3r), 71.28(3r), 71.47(3r) which limit the Meat Processing Facility Investment Credit to taxable years beginning after December 31, 2013. ATCP § 164.30(3)(b) prohibits claims for taxable years beginning on or after January 1, 2017. The Department is considering a potential rulemaking to align the rule with statute.

ATCP § 165.30(3)(b) conflicts with Wis. Stat. §§ 71.07(3rn), 71.28(3rn), 71.47(3rn) which limit the Food Processing Plant and Food Warehouse Investment Credit to taxable years beginning after December 31, 2013. ATCP § 165.30(3)(b) prohibits claims for taxable years beginning on or after January 1, 2017. The Department is considering a potential rulemaking to align the rule with statute.

ATCP § 166.30(3)(b) conflicts with Wis. Stat. §§ 71.07(3rm), 71.28(3rm), 71.47(3rm) which limit the Woody Biomass Harvesting and Processing Credit to taxable years beginning after December 31, 2014. ATCP § 166.30(3)(b) prohibits claims for taxable years beginning on or after January 1, 2016. The Department is considering a potential rulemaking to align the rule with statute.

Rules Reportable Under Wis. Stat. § 227.29(1)(e)—Economically Burdensome Rules

ATCP § 83.02(7)(c)3. is economically burdensome by requiring a person claiming that a dairy product is rBST-free substantiate that claim with an annual affidavit from milk producers supplying the dairy certifying the milk producer does not use synthetic bovine somatotropin. The Department is considering a potential rulemaking to ease the economic burden of annual re-certification by instead requiring a new affidavit if a milk producer changes its practices.