



State of Wisconsin
Governor Tony Evers

Department of Agriculture, Trade and Consumer Protection

DATE: March 5, 2020

TO: Board of Agriculture, Trade and Consumer Protection

FROM: Randy J. Romanski, Interim Secretary
Steve Ingham, Administrator, Division of Food and Recreational Safety

SUBJECT: ATCP 76, Safety, Maintenance, and Operation of Public Pools and Water Attractions; Rulemaking Scope Statement

TO BE PRESENTED BY: Steve Ingham

REQUESTED ACTION:

At the March 5, 2020 Board meeting, the Department of Agriculture, Trade and Consumer Protection (DATCP) will ask the DATCP Board (Board) to approve a scope statement (copy attached) for potential changes to ch. ATCP 76 relating to Safety, Maintenance, and Operation of Public Pools and Water Attractions.

A scope statement spells out the general purpose and scope of a proposed rule. DATCP may not begin drafting a proposed rule (including a proposal to amend or repeal an existing rule) until the Governor approves a scope statement for the proposed rule and the DATCP Board approves the scope statement. In accordance with Wis. Stat. § 227.135 (2), the Governor approved this scope statement for permanent rule changes on February 7, 2020, thereby allowing DATCP to submit this scope statement for publication and to seek approval of the scope statement by the DATCP Board.

DATCP formally published this draft scope statement in the February 10, 2020 *Wisconsin Administrative Register* and filed a copy with the Department of Administration (DOA) at least 10 days before the Board could approve the scope statement. After publication, the Joint Committee for the Review of Administrative Rules required DATCP to hold a public hearing on the scope statement under Wis. Stat. § 227.136 (1). The Board approved the public hearing notice at its January 30, 2020 meeting as required by Wis. Stat. § 227.136 (2). The Department held the hearings on Friday, February 14, 2020 in Madison, and in Wausau on Monday, February 17, 2020. Public comments were held open until Monday, February 24, 2020. DATCP received 38 oral and written comments on the scope statement. The comments primarily expressed opinions on several issues identified in the scope statement as worthy of consideration during rule revision. No comments indicated a need for the rule revision scope to be broadened or narrowed. Several commenters expressed interest in working with the DATCP on its revision efforts.

If the Board approves the scope statement, the Department will begin work to draft the permanent rule. Approval of a scope statement is an important initial step in a lengthy process for enacting permanent rules. The Board will have at least two further opportunities to review the proposed rule. The Board must approve a hearing draft rule before DATCP may hold public hearings on the rule proposal. The Board must also approve the final draft rule before DATCP may adopt the rule. The permanent rule will be effective when the final draft has been approved by the DATCP Board, approved by the Governor, reviewed by the Legislature, and adopted by the Secretary.

STATEMENT OF SCOPE

Department of Agriculture, Trade and Consumer Protection

Rule No.: Chapter ATCP 76, Wis. Adm. Code (Existing)

Relating to: Safety, Maintenance, and Operation of Public Pools and Water Attractions

Rule Type: Permanent

1. Finding/nature of emergency (Emergency Rule only):

N/A

2. Detailed description of the objective of the proposed rule:

The objectives of the proposed rule revision are to:

- a. Consider expanding, clarifying, or eliminating definitions. Revising the definitions section could provide clarity to the terms that are vague or undefined. Expanding the definitions to include more examples could further clarify terms used throughout the rule.
- b. Consider harmonizing state rule requirements with federal requirements and recommendations, thereby addressing public health problems not foreseen at the time of the last rule revision (2007). Making these changes could increase consistency, better ensure public safety, and aid pool operators in achieving compliance. Examples of topics for consideration include:
 - Virginia Graeme Baker Pool and Spa Safety Act (VGBA): Federal requirements intended to prevent swimmer suction entrapment in pool drains.
 - Americans with Disabilities Act (ADA): Federal requirements for accessibility.
 - Updated best practices for pool fecal incident response from the Centers for Disease Control and Prevention (CDC).
- c. Consider codifying frequently-approved variance conditions that achieve comparable compliance with public health standards. Examples include variances for the location of first aid kits, drinking fountains, and emergency phones. These changes could allow more flexibility for pool operators in meeting rule requirements.
- d. Consider requirements for flow sensors and electrical interconnection on both disinfectant and acid feeder systems intended to prevent unintended chemical releases.
- e. Consider setting requirements for proper use of carbon monoxide detection devices to protect against pool emergencies caused by fuel-burning pool heaters.
- f. Consider making the rule easier to use by replacing text with tables.
- g. Consider adopting relevant national best practices found in the Model Aquatic Health Code (MAHC). The MAHC is a comprehensive code that provides standards for pool design, and pool construction, safety, maintenance and operation. The MAHC is a voluntary national pool code that has been created by members of the Council for the Model Aquatic Health Code. The Council is comprised of pool service and sales professionals, pool safety researchers, health and safety regulators, pool designers, engineers, contractors, and medical professionals. The MAHC is sponsored by the CDC and is periodically revised to better protect health and safety.

- h. Consider updating the proposed rule to address additional causes of illness, drownings, near-drownings, and chemical release events. Updating requirements could improve the health and safety of pool staff and swimmers. Since 2007, the food and recreational safety program has collected incident forms and conducted investigations surrounding severe injuries, illnesses, deaths, near-drowning, and drowning incidents. These data support eliminating current rules for lifeguard or attendant staff *i.e.* there is a lack of reported incidents. Examples of rule changes that might decrease adverse events include, but are not limited to, requiring lifeguard or attendant staff for specific types of pools, water features, or activities, and clarifying requirements for the minimum number of pool staff, their locations, roles, and responsibilities. Consideration could be given to the required type and location of certain rescue equipment items. Specific requirements pertaining to chemical distribution devices and equipment associated with the recirculation system could also be considered.
- i. Consider clarifying the term “imminent hazard.” The presence of an imminent hazard has long been regarded as justification for a pool closure to prevent serious injury, illness, and death. By extensively listing examples of imminent hazards, the revised rule could more clearly specify what events or observations lead to a pool closing. Improved clarity could reduce confusion for pool operators as well as staff of the Department and local health departments serving as agents of the Department.
- j. Consider creating a variance process, or revising the “approved comparable compliance” process currently found in ATCP 76.03, to provide the pool industry increased flexibility to incorporate newer products, equipment, and technology shown to adequately protect public health, increase cost effectiveness, and decrease labor costs.
- k. Consider requiring all pools larger than a to-be-determined size to have a Certified Pool Operator (CPO) on staff. Currently only a pool categorized as a water attraction must be supervised by a CPO. The Department has collected pool inspection violation data for over five years and, in each year, the most common violations across “regular” pools and water attractions (accounting for 15% of total violations) are related to basic water quality maintenance. The CPO training is the primary venue for learning how to properly maintain pool water quality. If an increased proportion of licensed pools and water attractions are supervised by a CPO, there is a decreased likelihood of water quality problems, and chemical-associated hazards to patrons. Having a CPO on staff may also reduce facility insurance liability.
- l. Consider updating the licensing structure and fees to better reflect the risk and complexity of pool design, operation, and the amount of time required for the Department to complete inspections. The range of pool designs has drastically increased over the last decade. Many designers now create pools with multiple sections and various activity types that remain connected via a single water supply and circulation system. There are also new features and designs that are not currently addressed in rule but are considered high-risk, such as zip lines, climbing walls, and mobile pools. The current rule does not clearly address licensing in these situations.
- m. Consider assigning a level of risk to each type of violation. This could help clarify to stakeholders how a component of a swimming pool or water attraction could present risk to the general public.

3. Description of the existing policies relevant to the rule, new policies proposed to be included in the rule, and an analysis of policy alternatives:

The Department strives to provide a regulatory climate that protects public health without unnecessarily hindering innovation. With the passage of time the current rule has become less amenable to industry innovation. Nonetheless, the Department has tried to remain flexible in its interpretation of rules so that new features at water attractions may be utilized, but in a manner that protects public safety, as generally required by the rule. This overarching Department policy is not expected to be changed by updating the rule. However, Department interpretations should be, to the extent possible, included in the rule, so that there is an opportunity for thorough vetting in the rule revision process, and the balance between allowing industry innovation and maintaining safety is transparent to all stakeholders.

The alternative to updating the rule would be to continue as is, attempting to continue to apply the existing rule to new methods, innovations and trends not currently addressed or permitted. Industry groups and stakeholder associations generally find this alternative unacceptable and are eager for the rule be updated to reflect current industry practices and trends that can be utilized safely by the public.

4. Detailed explanation of statutory authority for the rule (including the statutory citation and language):

97.67 Recreational licenses and fees.

(1) Except as provided in sub. (1g) and s. 93.135, the department or a local health department granted agent status under s. 97.615 (2) shall issue licenses to and regulate campgrounds and camping resorts, recreational and educational camps and public swimming pools. No person or state or local government who has not been issued a license under this section may conduct, maintain, manage or operate a campground and camping resort, recreational camp and educational camp or public swimming pool, as defined by departmental rule.

(4) Licenses issued under this section expire on June 30, except that licenses initially issued during the period beginning on April 1 and ending on June 30 expire on June 30 of the following year. Except as provided in s. 97.615 (2) (d) and (e), the department shall promulgate rules that establish, for licenses issued under this section, amounts of license fees, pre-licensing inspection fees, reinspection fees, fees for operating without a license, and late fees for untimely license renewal.

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

The Department estimates that the work to develop and promulgate the proposed rule will require approximately 0.4 FTE. This includes conducting advisory group meetings and researching the MAHC.

6. List with description of all entities that may be affected by the proposed rule:

Entities that may be affected by the proposed rule include:

- General public who swim at public pools
- Pool operators including maintenance staff, management, lifeguards, and attendants
- Pool facilities associated with municipalities, schools, lodging facilities like hotels, motels, and tourist rooming houses; resorts, bed and breakfast establishments, water parks, campgrounds, apartments/condominium complexes, country clubs, health care facilities, fitness centers, and other applicable establishments
- Pool service and sales industry professionals
- Pool designers and engineers
- Credentialing agencies responsible for training and issuing certifications for pool operation, lifeguarding, first aid, CPR/AED
- Local health department agent program pool inspection staff
- Department pool inspection staff

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

The Model Aquatic Health Code is a voluntary national guidance document that is comparable to a national pool code. It is created and revised by the Council for the Model Aquatic Health Code under sponsorship of the Centers for Disease Control and Prevention. Wisconsin actively

participates at the MAHC Convention. The MAHC sections that pertain to health, safety and maintenance may be considered for inclusion into the rule. At least 22 states/counties are in the process of, or considering, adoption. Of our neighboring states, Minnesota, Iowa, and Indiana have all indicated interest in adoption or are in the process of adoption. Michigan and Illinois have not indicated their stance on MAHC adoption.

There are also federal requirements that will be under consideration for incorporation into the rule. These federal requirements include the Virginia Graeme Baker Pool and Spa Safety Act, and the Americans with Disabilities Act mandating handicap accessibility to swimming pools.

8. Anticipated economic impact of implementing the rule (note if the rule is likely to have a significant economic impact on small businesses):

The Department expects stakeholders may favorably view consideration of rule provisions that allow industry more flexibility in meeting standards and more fairly allocate regulatory requirements. Businesses operating in multiple states may react favorably to adoption of Wisconsin swimming pool requirements that are consistent with national standards. Some licensees may face increased costs associated with rule revisions, depending on the proposals brought forward by the Department after consultation with stakeholder groups. If stakeholders recommend a requirement for a CPO to be on staff at pools above a to-be-determined minimum size, some businesses may incur the costs of initial CPO certification (\$285 – \$325) and recertification for each CPO after 5 years (\$125 - \$150). Employees holding the CPO credential may command a higher wage than non-credentialed employees. Licensing fees have not increased since 2007, and are not currently meeting program costs. However, the Department may consider revising licensing fees to reflect risk and activity, which should moderate or avoid any fee increase for less complicated or low-risk operations. Overall, comments from stakeholders indicate eagerness for an update of this rule.

Contact Person: Steve Ingham, Administrator, Division of Food and Recreational Safety; (608) 224-4701

Signed this 16 day of January 2020



Randy Romanski
Interim Secretary
State of Wisconsin Department of Agriculture,
Trade and Consumer Protection