



State of Wisconsin
Governor Tony Evers

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

DATE: November 7, 2019

TO: Board of Agriculture, Trade and Consumer Protection

FROM: Bradley Pfaff, Secretary
Lara Sutherlin, Administrator, Division of Trade and Consumer Protection

SUBJECT: ATCP 94: Petroleum and Other Liquid Fuel Products; Rulemaking Scope Statement

TO BE PRESENTED BY: Alicia Clark and David Woldseth

REQUESTED ACTION:

At the November 7, 2019 Board meeting, the Department of Agriculture, Trade and Consumer Protection (DATCP) will ask the DATCP Board to approve the attached Statement of Scope (SS 071-19) for proposed amendments to the current DATCP rule related to petroleum and other liquid fuel products. The DATCP Board approved a joint scope statement for ATCP 93 and ATCP 94 in September 2013. Although DATCP initially considered some changes to ATCP 94, DATCP did not formally present any such changes to its Board and never held a public hearing on proposed changes to ATCP 94.

DATCP requests approval of a new ATCP 94 scope statement for two main reasons: first, the nature of the industry has changed since September 2013; second, the current scope statement will expire in February 2020, per Wis. Stat. § 227.135 (5), and approving a new scope statement will effectively reset the calendar and permit more time for a thorough discussion of the rule.

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 then approves the scope statement. In accordance with Wis. Stat. § 227.135 (2), the Governor approved this scope statement for permanent rule changes on July 29, 2019, thereby allowing DATCP to submit this scope statement for publication and to seek approval of the scope statement by the DATCP Board.

DATCP shared this draft scope statement informally with identified stakeholders on November 12, 2018, gave three weeks for comment, and received no comments during that time. DATCP formally published this draft scope statement in the August 5, 2019 *Wisconsin Administrative Register* and filed a copy with the Department of Administration (DOA) at least 10 days before the Board is asked to 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 October 21, 2019 meeting as required by Wis. Stat. § 227.136 (2). The Department held the hearing on

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Friday, September 6, 2019, and it permitted public comments until Monday, September 23, 2019. DATCP only received one comment on the scope statement; that comment is attached. DATCP did not act upon the comment because it addressed the substance of the rule itself, rather than the scope statement.

If the Board approves the scope statement, the Department will thereafter begin work to draft the permanent rule. Approval of a scope statement is just the first, preliminary step in a lengthy process for enacting permanent rules. The Board will have at least two future opportunities to review the proposed rule. First, the Board must approve a hearing draft rule before DATCP may hold public hearings on the rule proposal. Second, after the public hearings have been held, the Board must again approve the final draft rule before DATCP may adopt the rule. The permanent rule will only take effect after the final draft has been approved by the DATCP Board, approved by the Governor, approved by the legislature via the legislative review process, and adopted by the Secretary.

STATEMENT OF SCOPE

Department of Agriculture, Trade and Consumer Protection

Rule No.: Ch. ATCP 94

Relating

to: Petroleum and Other Liquid Fuel Products (Permanent)

1. Description of the objective of the rule:

With the enactment of 2013 Wisconsin Act 20 (the biennial budget bill), the state of Wisconsin transferred the Petroleum and Other Liquid Fuel Products program (“petroleum inspection program”) from the Department of Safety and Professional Services (“DSPS”) to the Department of Agriculture, Trade and Consumer Protection (“DATCP”). Section 9138 (3) (fm) and (4) (f) authorized the transfer of the existing administrative rule (from Chapter SPS 348 to Chapter ATCP 94).

2013 Wisconsin Act 20 also included Chapter SPS 310 becoming Chapter ATCP 93. DATCP plans to finalize those substantial rule revisions to ATCP 93 in early 2019. Since ATCP 93 makes reference to ATCP 94, it would make sense to harmonize the two rules with one another since they interact. Acting on ATCP 94 now will minimize the period where the two may conflict. During the ATCP 93 informal commentary period, a stakeholder who represents numerous businesses sought clarification on the interaction.

The current ATCP 94 refers to SPS Chapters 302 and 303. Whether DATCP should refer to another agency’s rules or adopt language into their own rules should receive discussion and investigation.

Ch. ATCP 94 incorporates by reference ASTM standards for fuel specifications and testing procedures. ASTM standards change on a regular basis, and any changes to this rule would likely update these standards to the most recently adopted ones.

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:

During the 1980s and early 1990s, Wisconsin’s tanks and petroleum inspection programs were housed within the Department of Industry Labor, and Human Relations (DILHR). These programs were transferred to the Department of Commerce (“Commerce”) in 1996. They were transferred from Commerce to DSPS as part of the 2011-13 biennial budget (2011 Wisconsin Act 32). SPS 348 was previously titled ILHR 48 and COMM 48 before becoming the current ATCP 94.

DSPS approved a scope statement in January 2011, but the program transferred before action was taken. The DATCP Board approved a joint scope statement for ATCP 93 and ATCP 94 in September 2013, and DATCP initially considered some changes to ATCP 94. DATCP did not formally present any changes to its Board and never held a public hearing on the proposed changes.

DATCP advocates a new scope statement be created for two main reasons: first, the nature of the industry has changed; second, the current scope statement will expire in February 2020 per Wis. Stat. § 227.135 (5), and a reset of the calendar with a new scope statement will permit a thorough discussion of the rule.

DATCP may also contemplate adopting by reference the engine fuel quality standards published in NIST Handbook 130. Other states (including Illinois) have adopted this model regulation.

Per Section 1680M of 2017 Wisconsin Act 59, any gasoline-ethanol fuel blend rule must be delayed until at least July 1, 2019:

SECTION 1680M. 168.04 (4) of the statutes is created to read:

168.04 (4) (a) In this subsection, "gasoline-ethanol fuel blend" includes such a fuel blend for both automotive and nonautomotive uses.

(b) Except as provided under par. (c), compliance with the requirements, established by the department by rule under sub. (1), of ASTM D4814-17 or the most current version of testing methods adopted by the department may be demonstrated by testing a gasoline-ethanol fuel blend or testing the gasoline base stock from which the gasoline-ethanol fuel blend is produced.

(c) The department may promulgate rules that require that a gasoline-ethanol fuel blend and the gasoline base stock from which the gasoline-ethanol fuel blend is produced meet the requirements of ASTM D4814-17, or the most current version of testing methods adopted by the department. A rule promulgated under this paragraph may not take effect sooner than July 1, 2019.

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

Wis. Stat. § 168.04 and Wis. Stat. § 168.16 (4).

168.04 Standards.

(1) The department by rule shall prescribe minimum product grade specifications for gasoline, automotive gasoline, gasoline-alcohol fuel blends, reformulated gasoline, as defined in s. 285.37 (1), and kerosene and may prescribe product grade specifications for aviation gasoline, fuel oils, and diesel fuels.

(2) (a) Except as provided in par. (b), the rules required under sub. (1) shall prohibit gasoline, automotive gasoline, gasoline-alcohol fuel blends, and reformulated gasoline, as defined in s. 285.37 (1), beginning on August 1, 2004, from containing more than 0.5 percent, by volume, of methyl tertiary-butyl ether.

(b) The rules required under sub. (1) shall not prohibit racing fuel used at racing events or in preparation for racing events from containing any amount of methyl tertiary-butyl ether.

(3) Except as otherwise provided in this section, rules promulgated under this section shall be in conformity with nationally recognized standards, specifications, and classifications, such as those published by ASTM International, the Society of Automotive Engineers, and the U.S. Environmental Protection Agency. The department may not promulgate or enforce a rule prohibiting the placement of additional information on the dispensing device.

168.16 Standards.

(4) The department may promulgate reasonable rules relating to the administration and enforcement of this subchapter.

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 0.25 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 extensive communication with affected persons and groups. DATCP has used and will continue to use existing staff to develop this rule.

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

This rule may impact businesses that sell or distribute petroleum and other liquid fuel products at wholesale or at retail. It may also impact businesses that manufacture, sell, or distribute chemical liquids regulated under the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). These businesses are already regulated under the existing rule, but there may be minor changes to the specific requirements if the rule is amended.

If DATCP adopts the model regulations published in NIST Handbook 130, businesses that sell or distribute engine lubricants may be impacted. The current rule contains technical specifications and requirements for fuel but not for lubricant.

DATCP contacted stakeholders on multiple occasions both formally and informally in their rewrite of ATCP 93, and it plans similar extensive outreach in regard to changes it would propose to ATCP 94. The preliminary list for ATCP 94 will include all ATCP 93 stakeholders and will be adjusted accordingly as additional interested parties self-identify or withdraw.

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:

The EPA regulates standards for gasoline in a number of ways. EPA regulates the amount of sulfur in gasoline and certain toxic substances that can be emitted when fuel is burned. EPA also mandates reformulated gasoline (RFG) in certain metropolitan areas. EPA also mandates that fuels sold during the summer meet certain Reid vapor pressure standards to reduce emissions that contribute to smog.

The federal Clean Air Act (CAA) authorizes Environmental Protection Agency (EPA) to establish emissions standards for motor vehicles to address air pollution that may reasonably be anticipated to endanger public health or welfare. EPA also has authority to establish fuel controls to address such air pollution. 40 CFR Parts 79, 80, 85 and 86 establish fuel quality and emissions standards by rule, which are enforced by EPA. These rules incorporate by reference ASTM International standards and test methods.

EPA regulates the vapor pressure of gasoline sold at retail stations during the summer ozone season to reduce evaporative emissions from gasoline that contribute to ground-level ozone and diminish the effects of ozone-related health problems.

42 U.S.C. § 7545 regulates fuels and allows for a temporary waiver of a control or prohibition respecting the use of a fuel or fuel additive. By this authority, EPA may grant partial waivers allowing for gasoline-ethanol blends greater than 10 percent up to 15 percent (E15) for use in MY2001 and newer light-duty vehicles. 40 CFR Part 80 establishes E15 labeling and survey requirements, and transfer document requirements for gasoline-oxygenate blends.

7. Anticipated economic impact

The proposed rule may have moderate economic impact statewide and locally. Adopting more recent fuel quality standards may have a moderate economic impact on certain businesses within the petroleum industry.

Contact Person: David A. Woldseth (DavidA.Woldseth@wisconsin.gov); phone (608) 224-5164.



Bradley Pfaff
Secretary
Department of Agriculture, Trade and Consumer Protection



Date Submitted



AMERICAN PETROLEUM INSTITUTE

Minnesota & Wisconsin

Erin T. Roth
Executive Director

September 20, 2019

David Wolseth
WI Department of Agriculture,
Trade and Consumer Protection
2811 Agriculture Dr.
Madison, WI 53708

SS 071-19

Dear Mr. Wolseth,

The American Petroleum Institute (API) and its member companies who do business in the State of Wisconsin would like to provide these comments regarding the recent Ch. ACTP 94 Scope Statement. We strongly encourage the department to consider these following issues of concern to the industry as the agency moves forward with a draft rule:

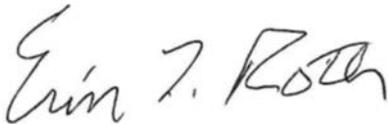
1. Allowance of the base (i.e. BOB) or blend (after blending with ethanol) testing to demonstrate conformance with ASTM standard D4814-19 or latest published version. We want WI to align itself with most surrounding states (MN, MI, IN, ND, SD) to allow free exchange with other states and delivers unconstrained supply to WI consumers with fit for purpose gasoline. Moving to a blend only state makes gasoline harder to make and harder to supply without providing the consumer with better performance or additional environmental benefits.
2. There needs to be a recognition and allowance of the 1 psi vapor pressure waiver for gasoline ethanol blends E1 to E15 outside the Federal control period May 1 (terminal), June 1 (retail) through Sept. 15.
3. Studies have shown that engine performance in vehicles is virtually the same between base or blend vs. blended gasoline.
4. Making gasoline under a blended requirement cost more to make. These costs inevitably get passed on to consumers. Also, gasoline refiners could opt to make cheaper base or blend gasoline and bypass Wisconsin in favor of state with the less restrictive fuel specification requirements.

5. An API recent study shows that the average per gallon gasoline price in IL from January 2017 to July 2019, minus taxes and fees, are .09 cents per gallon higher than the average equivalent price in WI during the same period. This means IL consumers paid \$1 billion more in gasoline purchases than Wisconsin motorists over this time period. While the fuel specification requirements in both may not be the sole reason for the price differential, certainly it is a factor that should be considered by the department.

6. Two refineries in Minnesota, Marathon and Flint Hills Resources, and the Husky refinery in Superior, WI currently use the base or blend option when making gasoline. These refineries supply a substantial amount of gasoline to both Wisconsin and Minnesota. Changing to a blended requirement will increase refining costs, and in the case of Husky as it is a small refinery, it may be significant.

I want to thank the department for the opportunity to submit these comments on behalf of API members. We look forward to sitting down with the Weights and Measures Division staff to have a more thorough discussion on these issues.

Sincerely,

A handwritten signature in black ink that reads "Erin T. Roth". The signature is written in a cursive style with a large initial "E".

Mr. Erin T. Roth

Schmidt, Julie S - DATCP

From: Woldseth, David A - DATCP
Sent: Friday, September 20, 2019 1:49 PM
To: rothe@api.org
Subject: ACTP 94 Scope Statement Comments
Attachments: ACTP 94 scope statement (2).docx

Thank you for your comments. Per Wis. Stat. § 227.135 (2), “No state employee or official may perform any activity in connection with the drafting of a proposed rule, except for an activity necessary to prepare the statement of the scope of the proposed rule until the governor and the individual or body with policy-making powers over the subject matter of the proposed rule approve the statement.” In your e-mail and your letter, you stated a wish to discuss the rule with DTCP. Legally, we cannot do so until at least November 7, the earliest that the DATCP Board (... “body with policy-making powers over the subject matter...”) can consider approval of this scope statement.

From: DATCP Admin Rules <datcpadminrules@wisconsin.gov>
Sent: Friday, September 20, 2019 1:04 PM
To: Woldseth, David A - DATCP <DavidA.Woldseth@wisconsin.gov>
Subject: FW: ACTP 94 Scope Statement Comments

From: Erin Roth <Rothe@api.org>
Sent: Friday, September 20, 2019 12:28 PM
To: DATCP Admin Rules <datcpadminrules@wisconsin.gov>
Subject: ACTP 94 Scope Statement Comments

David,

Please find attached API’s comments. Thanks and will be in touch.

Erin T Roth
Executive Director
API MN/WI
400 Robert St. N. #1560
St. Paul, MN 55101
608-209-0789

Woldseth, David A - DATCP

From: Erin Roth <Rothe@api.org>
Sent: Monday, October 7, 2019 2:05 PM
To: Woldseth, David A - DATCP
Subject: API Scoping Comments

David,

I just want to clarify one paragraph in my recent comment letter on the ACTP 94 scoping statement that references our API WI vs. IL gasoline price analysis. The differential should read **9 cents per gallon** rather than .09 as stated in the comments. Thanks.

“An API recent study shows that the average per gallon gasoline price in IL from January 2017 to July 2019, minus taxes and fees, are **.09 cents per gallon** higher than the average equivalent price in WI during the same period. This means IL consumers paid \$1 billion more in gasoline purchases than Wisconsin motorists over this time period. While the fuel specification requirements in both may not be the sole reason for the price differential, certainly it is a factor that should be considered by the department.”

Erin T Roth
Executive Director
API MN/WI
400 Robert St. N. #1560
St. Paul, MN 55101
608-209-0789