



State of Wisconsin
Governor Tony Evers

Department of Agriculture, Trade and Consumer Protection
Secretary Randy Romanski

DATE: May 11, 2023

TO: Board of Agriculture, Trade and Consumer Protection

FROM: Michelle Reinen, Acting Administrator, Division of Trade and Consumer Protection

SUBJECT: ATCP 93: Flammable, Combustible and Hazardous Liquids; Rulemaking Scope Statement Approval

TO BE PRESENTED BY: David A. Woldseth, Policy Analyst

REQUESTED ACTION:

At the May 11, 2023 Board meeting, the Department of Agriculture, Trade and Consumer Protection (DATCP) will ask the DATCP Board to approve the attached Statement of Scope (SS 009-23) for proposed amendments to the current DATCP rule related to flammable, combustible, and hazardous liquids.

A scope statement explains the general purpose and scope of a proposed rule. In accordance with Wis. Stat. § 227.135 (2), the Governor approved this scope statement for permanent rule changes on January 19, 2023, thereby allowing DATCP to submit this scope statement for publication in the *Wisconsin Administrative Register* and to seek approval of the scope statement by the DATCP Board.

DATCP formally published this draft scope statement in the January 30, 2023 *Wisconsin Administrative Register* and filed a copy with the Department of Administration (DOA) at least 10 days before the Board could consider approving 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). At its March meeting, the DATCP Board approved that hearing, and it was held on Monday, March 27, 2023, at 1:00 p.m.

During the hearing, no one testified. During the comment period that ended the following day, no one submitted comments.

If the Board approves the scope statement, the Department will draft a proposed permanent rule. Approval of a scope statement is just the first step in enacting permanent rules. The Board will have at least two future opportunities to review the proposed rule after it is drafted. 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. A proposed permanent rule can only take effect after the final draft has been approved by the DATCP Board, approved by the Governor, completed the legislative review process, and published.

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STATEMENT OF SCOPE

Department of Agriculture, Trade and Consumer Protection

Rule No.: Ch. ATCP 93

Relating to: Flammable, Combustible and Hazardous Liquids (Permanent)

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

Not applicable

2. Detailed description of the objective of the rule:

The Department of Agriculture, Trade and Consumer Protection (department) plans to consider modifications to ch. ATCP 93.

Chapter ATCP 93 incorporates industry standards by reference, and those standards frequently update due to recommended changes by experts in the industry. The department may consider updating the standards by reference in ch. ATCP 93. The standards in question are generally accepted by industry and are readily available in published form through the publishers or online.

The publishing organizations are the American Concrete Institute; the American Petroleum Institute (API); ASTM International; Energy Institute; HIR Technical Services; Ken Wilcox Associates; NACE International; the National Fire Protection Association (NFPA); Petroleum Equipment Institute; the Society for Protective Coatings; Steel Tank Institute; Underwriters Laboratories, Inc.; and the United States Department of Energy. As required, the department would petition the Attorney General under Wis. Stat. s. 227.21 (2) for approval of any updated standards.

Additionally, the department's most recent review of its administrative rules, required by 2017 Wisconsin Act 108 and released March 31, 2021, indicated that ss. ATCP 93.110 (1), 93.020 (6) (b), 93.050 (1), 93.400 (1) (c) and (7) (b) 2. are in conflict with statute and may be beyond the scope of the department's authority. The department may repeal or modify provisions of the proposed rule to address these statutory conflicts.

Finally, the department may consider modifications to its forms in ch. ATCP 93.

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

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 first transferred to the Department of Commerce and then to the Department of Safety

and Professional Services in 2011 before transferring to the department in 2013. Therefore, ch. ATCP 93 has previously been titled ILHR 10, COMM 10, and SPS 310.

During this review, the department may consider updating its incorporation by reference standards in ch. ATCP 93 to comply with current industry standards. Incorporation by reference would avoid unnecessary repetition of technical standards and unnecessary expense for the state. If the department does not update these standards, the rule will be out of compliance with the most recent industry standards.

The department may consider repealing or modifying ss. ATCP 93.110 (1), 93.020 (6) (b), 93.050 (1), 93.400 (1) (c) and (7) (b) 2. These rules, as identified in the department's March 31, 2021 letter to the Joint Committee on the Review of Administrative Rules, are conflicting with statute. If the department does not update these identified rules, they will be out of compliance with statute. To quote:

Section ATCP 93.110 (1) is reportable as conflicting with Wis. Stat. s. 168.25 (1) requiring that the department shall enforce this subchapter [storage of dangerous substances]. The rule provides for an agent to exercise jurisdiction over certain provisions of the rule without statutory authority to make that delegation. The rule also provides for a chief elected municipal officer to approve certain delegations of department jurisdiction without statutory authority. The department intends to undertake rulemaking to align the rule with statute.

...

Sections ATCP 93.020 (6) (b), 93.050 (1), 93.400 (1) (c) and (7) (b) 2. regulate above ground storage tanks greater than 110 gallons and thus conflict with Wis. Stat. s. 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 identified this rule in its March 29, 2019 report and has sought a statutory change to align the rule with the statute. Neither the department nor its agents have enforced ch. ATCP 93 for tanks less than 5,000 gallons since October 2019. The department plans to undertake rulemaking to align the rule with the statute.

Finally, the department may consider rule changes to ch. ATCP 93 that will update the forms management process.

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

Wis. Stat. ss. 15.04 (1) (i) through (m), 168.23, 168.25, and 168.28 (2)

15.04 (1) (i) through (m)

(i) *Records and forms management program.* Establish and maintain a records and forms management program.

(j) *Records and forms officer.* Appoint a records and forms officer, who shall be responsible for compliance by the department or independent agency with all records and forms management laws and rules and who may prevent any form from being put into use.

(k) *Form numbering and filing system.* Establish a numbering and filing system for forms.

(m) *Notice on forms.* See that each form used by the department or independent agency to seek information from municipalities, counties or the public contains on the first page of the form, or in the instructions for completing the form, a conspicuous notice of the authorization for the

form, whether or not completing the form is voluntary, if it is not voluntary, the penalty for failure to respond and whether or not any personally identifiable information, as defined under s. 19.62 (5), requested in the form is likely to be used for purposes other than for which it is originally being collected. This paragraph does not apply to state tax forms.

168.23 Rules.

(1) The department shall promulgate by rule construction, maintenance and abandonment standards applicable to tanks for the storage, handling or use of liquids that are flammable or combustible or are federally regulated hazardous substances, and to the property and facilities where the tanks are located, for the purpose of protecting the waters of the state from harm due to contamination by liquids that are flammable or combustible or are federally regulated hazardous substances. The rule shall comply with ch. 160. The rule may include different standards for new and existing tanks, but all standards shall provide substantially similar protection for the waters of the state. The rule shall include maintenance requirements related to the detection and prevention of leaks. The rule may require any person supplying heating oil to any noncommercial storage tank for consumptive use on the premises to submit to the department, within 30 days after the department requests, the location, contents and size of any such tank.

(2) The department may transfer any information which the department receives under sub. (1) to any other agency or governmental unit. The department and any such agency shall treat the name of the owner and the location of any noncommercial storage tank which stores heating oil for consumptive use on the premises, required to be submitted to the department under sub. (1), as confidential and shall not permit inspection or copying under s. 19.35 of any record containing the information.

(3) The rule promulgated under sub. (1) may require the certification or registration of persons who install, remove, clean, line, perform tightness testing on and inspect tanks and persons who perform site assessments. Any rule requiring certification or registration shall also authorize the revocation or suspension of the certification or registration. The department may not require an individual who is eligible for the veterans fee waiver program under s. 45.44 to pay any fee that may be charged pursuant to such a rule.

(4) The department shall promulgate a rule specifying fees for plan review and inspection of tanks for the storage, handling, or use of flammable or combustible liquids and for any certification or registration required under sub. (3).

(5) (a) Subject to par. (b), in addition to any fee charged by the department by rule for plan review and approval for the construction of a new or additional installation or change in operation of a previously approved installation for the storage, handling or use of a liquid that is flammable or combustible or a federally regulated hazardous substance, as defined in s. 168.21 (3), the department shall collect a groundwater fee of \$100 for each plan review submittal. The moneys collected under this subsection shall be credited to the environmental fund for environmental management.

(b) Notwithstanding par. (a), an installation for the storage, handling or use of a liquid that is flammable or combustible or a federally regulated hazardous substance, as defined in s. 168.21 (3), that has a capacity of less than 1,000 gallons is not subject to the groundwater fee under par. (a).

(6) The department may not promulgate or enforce a rule that requires the owner or operator of a motor vehicle fueling facility to have a telephone or other means for contacting emergency services available to the public.

168.25 Enforcement.

(1) The department shall enforce this subchapter.

(2) The department shall issue orders directing and requiring compliance with the rules and standards of the department adopted under this subchapter whenever, in the judgment of the department, the rules or standards are threatened with violation, are being violated or have been violated.

(3) The circuit court for any county where violation of such an order occurs has jurisdiction to enforce the order by injunctive and other appropriate relief.

168.28 Inventory of petroleum product storage tanks.

(2) INVENTORY OF STORAGE TANKS. The department shall undertake a program to inventory and determine the location of aboveground storage tanks and underground storage tanks. The department may require its deputies and any person engaged in the business of distributing petroleum products to provide information on the location of aboveground storage tanks and underground storage tanks.

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

The department estimates that it will use approximately 1,200 hours of staff time to develop this rule.

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

Businesses that design, install, inspect, remove, own, or operate storage tank systems for flammable, combustible, or hazardous liquids may be impacted by this rule. This may include retail gasoline stations, fuel wholesalers or distributors, fleet operators, industrial facilities, petroleum equipment service companies, engineering firms and consultants, fire prevention inspectors, and farmers.

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

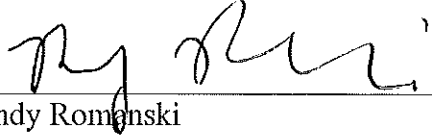
The federal government references many industry standards as best practices. The department's proposed rule modifications are not expected to conflict with adopted federal regulations.

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

The proposed rule should have minimal economic impact statewide and locally. Neither the department nor its agents have enforced ch. ATCP 93 for aboveground tanks less than 5,000 gallons since October 2019. Therefore, the current impact on industry from this proposed revision will be minimal. Some businesses may need to purchase standards they may not otherwise possess.

Contact Person: David A. Woldseth, Program and Policy Analyst, Phone (608) 224-5164

Signed this 10 day of January, 2023

A handwritten signature in black ink, appearing to read "Randy Romenski", written over a horizontal line.

Randy Romenski

Secretary

Wisconsin Department of Agriculture, Trade and Consumer Protection