



State of Wisconsin  
Governor Tony Evers

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**Department of Agriculture, Trade and Consumer Protection**  
Secretary Randy Romanski

TO: Senator Stephen Nass and Representative Adam Neylon, JCRAR Co-Chairs

FROM: Randy Romanski, Secretary

DATE: March 31, 2023

SUBJECT: Biennial Report Reviewing Administrative Rules

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unauthorized; restricted in promulgation authority; obsolete or have been rendered unnecessary by, duplicative of, superseded by, or in conflict with another rule, state statute, federal statute or regulations, or a ruling of a court of competent jurisdiction; and economically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

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

Sections ATCP 48.01(8), 48.24, 48.01(14), 48.08(3)(a), 48.12(2), 48.14(1)(b), 48.20(1)(a)3, 48.21(2)(a)2., (2)(b)1., (4)(a)1., and (Note), 48.22(5) and (Note), 48.28(Note), and 48.60 are unauthorized due to 2007 Wisconsin Act 20 and 2017 Wisconsin Act 115. Sections 189 and 2258 of 2007 Wisconsin Act 20 repealed Wis. Stat. ss. 20.115(7)(d) and 88.15, which authorized and appropriated funds for grants to county drainage boards and directed the Department to make grants to county drainage boards to aid compliance. 2017 Wisconsin Act 115 made additional changes to Wis. Stat. ch. 88, relating to drainage districts and regulating the removal of material from certain drainage ditches. This rule was identified in the Department's March 31, 2021, report. The Department plans to undertake rulemaking to update the rule.

**Rules Reportable Under Wis. Stat. s. 227.29(1)(b)—Restricted Rules**

Sections ATCP 72.145(7) and 73.145(7) are restricted by 2017 Wisconsin Act 330. The Act repealed Wis. Stat. s. 97.625(1)(am), ("Promulgate rules, in consultation with the department of safety and professional services, under which the department shall conduct regular inspections of sealed combustion units, as required under s. 101.149 (5) (c), for carbon monoxide emissions in hotels, tourist rooming houses, and bed and breakfast establishments. The rules shall specify conditions under which it may issue orders as specified under s. 101.149 (8) (a). The rules 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.") The repeal became effective November 1, 2019. ATCP 72.145(7) was identified in the Department's March 31, 2021, report and is currently in rule revision. The Department plans to undertake rulemaking to update ch. ATCP 73.

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

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Section ATCP 1.06(3)(a) conflicts with Wis. Stat. s. 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. s. 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. This rule was identified in the Department's March 21, 2021, report. Chapter ATCP 1 is currently in rule revision.

Section ATCP 10.80(2)(a) conflicts with Wis. Stat. s. 95.21(2)(a) regarding rabies vaccination of dogs. The rule requires a rabies vaccination of dogs prior to import. The statute allows for rabies vaccination of dogs within 30 days after import. The statute applies to cats and dogs but does not conflict with the rule requirement as it applies to vaccination of cats, but only to dogs. This rule was identified in the Department's March 31, 2021, report. Chapter 10 is currently in rule revision.

Sections ATCP 29.11, 29.15(4), 29.20(6), 29.25(5), and 29.25(5)2. conflict with Wis. Stat. ss. 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, ch. ATCP 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. This rule was identified in the Department's March 31, 2021, report. Chapter ATCP 29 is currently in rule revision.

Section ATCP 35.22 conflicts with Wis. Stat. s. 94.73(6)(b) and (c) as 2017 Wisconsin Act 59 increased the maximum eligible reimbursement costs for eligible sites under the Agricultural Chemical Cleanup Program. The Department has fully implemented these changes, but not yet updated the rule. This rule was identified in the Department's March 31, 2021, report. Chapter ATCP 35 is currently in rule revision.

Chapter ATCP 50 is reported as potentially in conflict, duplicative or superseded as a result of Clearinghouse Rule 17-062, which in part created s. NR 151.075, which sets Silurian bedrock performance standards, including the technical standard for depth to bedrock. Chapter ATCP 50 is reported as potentially in conflict, duplicative or superseded by Wis. Stat. s. 281.16(3)(e), which requires that farmers be provided adequate cost-sharing if required to comply with the ch. NR 151 performance standards. This rule was identified in the Department's March 31, 2021, report. Chapter ATCP 50 is currently in rule revision.

Chapter ATCP 51 standards for nutrient management, waste facility storage, and process wastewater are in conflict, and not consistent with similar provisions in chs. ATCP 50 and NR 151. Section 93.90(2)(a), of the statutes requires that siting standards in ch. ATCP 51 not conflict with "rules promulgated under s. 92.05(3)(c) or (k), 92.14(8), 92.16, or 281.16(3) or ch. 283." This rule was identified in the Department's March 31, 2021, report. The Department plans to undertake a rulemaking to align the rule with statute.

Sections ATCP 51.30(4)(a) and (b) are reportable as potentially in conflict pending a ruling in *Michael Byl et. al v. Town of Laketown*, No. 22-CV-274 (Wis. Cir. Ct. Polk County). Section ATCP 51.30(4)(a) provides that a political subdivision may charge an application fee established by local ordinance, not to exceed \$1,000, to offset the political subdivision's costs to review and process a livestock siting permit application under sub. (1). A note in that section provides: Under s. 66.0628, Stats, any fee imposed by a political subdivision must bear a reasonable relationship to the service for which the fee is imposed. The rule is promulgated under s. 93.90(2)(a) and (b), Stats. Neither that rulemaking statute nor any other statute provides authority for the Department to set a maximum fee that a political subdivision may charge to review and process a livestock siting application. Section ATCP 51.30(4)(b) states that a political subdivision may not require an applicant to pay any fee or post any bond or security with the political subdivision except as provided in par. (a). A note in that section provides: If a waste

storage facility is abandoned or not properly closed, a political subdivision may seek redress under Wis. Stat. ss. 66.0627 or 254.59 and other law as appropriate. However, a political subdivision may not require an applicant for local approval to post any bond or security with the application. The rule is promulgated under Wis. Stat. s. 93.90(2)(a) and (b). No statute authorizes the Department to prohibit a political subdivision from requiring a livestock siting permit applicant to pay any fee or post any bond or security with the political subdivision. These rules were identified in the Department's March 31, 2021, report. The Department believes the rules are reportable under Wis. Stat. s. 227.29(1)(d) until the pending litigation is resolved.

Chapter ATCP 57 is reportable as conflicting with Wis. Stat. s. 95.72(2)(b), specifying exemptions from licensing for grease processors. Section ATCP 57.01(17)(g) exempts from the definition of "grease processing," an operator that is solely engaged in the production of biodiesel or other biofuels and does not produce either grease or other products for human or animal consumption. The statute does not include that same exemption. This rule was identified in the Department's March 31, 2021, report. Chapter ATCP 57 is currently in rule revision.

Chapters ATCP 70 and 75 are reportable as potentially in conflict with two rulings of a court of competent jurisdiction that the law is unconstitutional as applied to the plaintiffs who sell home-baked goods directly to Wisconsin consumers. Specifically, *Lisa Kivirist et al. v. DATCP*, No. 16-CV-06 (Wis. Cir. Ct. Lafayette County Sept. 29, 2017), held in part:

The Court declares that Wisconsin's food processing plant and retail food establishment licensing requirements set forth in Wis. Stat. s. 97.29(2)(a), Wis. Stat. s. 97.30(2)(a), Wis. Admin Code s. ATCP 70.03(1), and Wis. Admin Code s. ATCP 75.03(1), as well as the statutes and regulations governing such licensees set forth at Wis. Stat. s. 97.29, Wis. Stat. s. 97.30, Wis. Admin Code ch. ATCP 70, and Wis. Admin Code s. 75 (sic) are unconstitutional as applied to Plaintiffs and all other similarly situated individuals.

Additionally, *Wisconsin Cottage Food Association et al. v DATCP*, N. 21-CV-13 (Wis. Cir. Ct. Lafayette County December 28, 2022) expanded the ruling in *Kivirist* to apply to all similarly situated individuals producing foods that are not potentially hazardous, ordering:

...[T]his Court GRANTS Plaintiffs' Motion for Summary Judgment and ENJOINS Defendants from enforcing Wisconsin's food processing plant and retail food establishment licensing requirements set forth at Wis. Stat. § 97.29(2)(a), Wis. Stats. § 97.30(2)(a), Wis. Admin. Code § ATCP 70.03(1), and Wis. Admin. Code § ATCP 75.03(1), as well as the statutes and regulations governing such licensees set forth at Wis. Stat. § 97.29, Wis. Stat. § 97.30, Wis. Admin. Code § ATCP 70, and Wis. Admin. Code § ATCP 75 against the Plaintiffs and all other similarly-situated individuals.

Previously, in applying the court's orders, the Department considered that Wis. Stat. ss. 97.29(2)(a) and 97.30(2)(a) set forth to whom the license requirement applies. While the rules articulate exemptions to the licensing requirements, those exemptions are first set forth in statute. In other words, the statute governs the exemptions; the rules do not. For that reason, rulemaking by the Department cannot reconcile a statute held unconstitutional in its application. Because rulemaking is not an effective tool to reconcile the court orders with the statute, the Department did not previously initiate a rulemaking in response to the order, nor did it identify rulemaking as a proposed solution in its March 31, 2021, report. As of February 2023, the Department is seeking a stay and appeal of the *Cottage Foods* decision. While chapter 227 does not provide direction for a department to address this particular situation, the Department believes the rules are reportable under Wis. Stat. s. 227.29(1)(d) unless and until the conflict between the statute's application and court order are resolved.

Sections ATCP 93.020(6)(b), 93.050(1), 93.400(1)(c) and (7)(b)2. regulate above ground storage tanks less than 5,000 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.”). Neither the Department nor its agents have enforced ch. ATCP 93 for above ground storage tanks less than 5,000 gallons since October 2019. This rule was identified in the Department’s March 31, 2021, report. Chapter ATCP 93 is currently in rule revision. Attempts to have the legislature amend Wis. Stat. s. 168.22(3) have been unsuccessful.

Section ATCP 93.110(1)(a) permits a private entity to enforce ch. ATCP 93. That rule conflicts with Wis. Stat. s. 168.25(1)’s directive that “[t]he Department shall enforce this subchapter,” meaning subch. II of Wis. Stat ch. 168 and the rules promulgated thereunder. The rule also conflicts with Wis. Stat. s. 93.06(11)(a). That statute authorizes the Department to enter into an agreement with political subdivisions of this state or other governmental agencies to enforce the laws and regulations administered by the Department. But no statute authorizes the Department to delegate its ch. ATCP 93 inspection authority to a private entity. This rule was identified in the Department’s March 31, 2021, report. Chapter ATCP 93 is currently in rule revision.

### **Rules Reportable Under Wis. Stat. s. 227.29(1)(c)—Obsolete or Unnecessary Rules**

Section ATCP 21.12 is no longer necessary, as the entire state was added to the federal pine shoot beetle quarantine in 2006; s. ATCP 21.17 is no longer necessary, as the entire state was added to the federal emerald ash borer quarantine in 2018. This rule was identified in the Department’s March 31, 2021, report. Chapter ATCP 21 is currently in rule revision.

Section ATCP 21.13 contains portions that are reportable as obsolete. Specifically, s. ATCP 21.13(2)(c)1. and 2. refer to outdated methods to certify that honeybees are European honeybees. The outdated methods are the Fast Africanized Bee Identification System (FABIS) and morphometric methods. Section ATCP 21.13(3) is outdated because it requires a Varroa mite certification that hives are free of this pest. That certification is no longer realistic due to the ubiquitous presence and established Varroa mites throughout honeybee hives in Wisconsin and across the country. This rule is promulgated under Wis. Stat. s. 94.76(1), which allows the Department to issue such rules or orders or adopt such control measures which in its judgment may be necessary to prevent, suppress or control the introduction, spread or dissemination of honeybee diseases and pests in this state. This rule was identified in the Department’s March 31, 2021, report. Chapter ATCP 21 is currently in rule revision.

Section 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, for the preceding year, the application derived from its sale or distribution of each pesticide product for use in this state. 2017 Wisconsin Act 59 removed this requirement from Wis. Stat. s. 94.68(2)(bm). This rule was identified in the Department’s March 31, 2021, report. Chapter ATCP 29 is currently in rule revision.

Sections ATCP 72.145(3)(a) and 73.145(3)(a) are reportable as obsolete due to the enactment of 2017 Wisconsin Act 330 on April 16, 2018. The Act created changes to the required placement of carbon monoxide detectors in Wis. Stat. s. 101.149(2) and (3). The rules cite to Wis. Stat. s. 101.149(2), and Wis. Admin. Code ss. SPS 321.097 or 362.0915 but do not reflect the changed requirements. Section ATCP 72.145(3)(a) was identified in the Department’s March 31, 2021, report. Chapter ATCP 72 is currently in rule revision. The Department plans to undertake rulemaking to update ch. ATCP 73.

Section ATCP 82.04(1) is reportable as obsolete by 2019 Wisconsin Act 152, as applied to persons licensed by an equivalent regulatory agency in another state. With the creation of Wis. Stat. s. 98.146(1), bulk milk weigher and sampler licenses are no longer required for persons who are licensed by an equivalent regulatory agency in another state. This rule was identified in the Department's March 31, 2021, report. Chapter ATCP 82 is currently in rule revision.

Section ATCP 100.20(2)(e) has been rendered unnecessary by the passage of time. The rule applied to certain disclosures made by milk contractors "on or before April 30, 2007." By its own language, the rule was rendered unnecessary on May 1, 2007. The Department plans to undertake rulemaking to update ch. ATCP 100.

Chapter 151 is reportable as obsolete because the Potato Marketing Agreement does not exist. Removal or deletion of this rule would require legislative action.

### **Resolved Rules Reported on the Department's March 31, 2021 report**

Section ATCP 93.240(11) sets forth substantive and procedural rules for denying, suspending, or revoking a certification or registration under ch. ATCP 93. The rule is authorized by Wis. Stat. s. 168.23(3). Moreover, nothing in s. ATCP 93.240(11) conflicts with Wis. Stat. s. 93.06(7). This rule was erroneously identified in the Department's March 31, 2021, report.

Section ATCP 94.310(1)(a) was erroneously identified in the Department's March 31, 2021, report as conflicting. The rule reads, "All petroleum and other liquid fuel products imported into and received in this state shall be subject to sampling by the department prior to being unloaded, sold, offered for sale, or used." Upon review, this rule is entirely consistent with Wis. Stat. ss. 168.06(1) and 168.16(4). Nevertheless, chapter ATCP 94 is currently in rule revision.

Chapter ATCP 99 was initially identified in the Department's March 29, 2019, report as conflicting with Wis. Stat. s. 126.88(1)(b) as amended by Section 74 of 2017 Wisconsin Act 155, which modified the statute to combine grain dealers and warehouse keepers' minimum and maximum fund balances. In response to that statutory amendment, the Department completed rulemaking and the new ch. ATCP 99 became effective March 1, 2020. *See* Wis. Admin. Reg. No. 770B (Feb. 24, 2020). Therefore, the Department erroneously identified this conflict in our March 31, 2021, report.

The Department's March 31, 2021 report identified s. ATCP 134.05(4)(a) — which then permitted a landlord to require a prospective tenant to pay the landlord's actual cost, up to \$20, of obtaining a consumer credit report — as conflicting with Wis. Stat. s. 704.085(1)(a) created by Section 41 of 2017 Wisconsin Act 317, which allows a landlord to require a prospective tenant to pay the landlord's actual costs, up to \$25, to obtain a consumer credit report on a prospective tenant. The Department completed rulemaking and s. ATCP 134.05(4)(a) became effective November 1, 2021. *See* Wis. Admin. Reg. No. 790B (Oct. 25, 2021).

Section ATCP 149.10 is unnecessary as 1991 Wisconsin Act 39 repealed the Potato Industry Act, Wis. Stat. s. 100.39, (establishing operations applicable to the potato industry and allowing the Potato Industry Board, with consent of the Department Secretary, to suspend those operations under the Potato Industry Act when in the public interest). The Department completed rulemaking and the new rule became effective May 1, 2022.

Section 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 completed rulemaking and the new rule became effective October 1, 2022.

Chapter ATCP 163 is unauthorized due to 2019 Wisconsin Act 54. The Act repealed Wis. Stat. ss. 93.535, 93.54, 93.545, and 93.547, which authorized the Department to implement programs to certify taxpayers as eligible for the dairy manufacturing facility investment credit. The Act repealed several obsolete refundable tax credits, including this tax credit, and repealed the authorization for the Department to implement programs to certify eligible taxpayers. This Rule was repealed and became effective as of October 1, 2021.

Chapter ATCP 164 is unauthorized due to 2019 Wisconsin Act 54. The Act repealed Wis. Stat. ss. 93.535, 93.54, 93.545, and 93.547, which authorized the Department to implement programs to certify taxpayers as eligible for the meat processing tax credit. The Act repealed several obsolete refundable tax credits, including this tax credit, and repealed the authorization for the Department to implement programs to certify eligible taxpayers. This Rule was repealed and became effective as of October 1, 2021.

Chapter ATCP 165 is unauthorized due to the passage of 2019 Wisconsin Act 54. The Act repealed Wis. Stat. ss. 93.535, 93.54, 93.545, and 93.547, which authorized the Department to implement programs to certify taxpayers as eligible for the food processing plant and food warehouse investment credit. The Act repealed several obsolete refundable tax credits, including this tax credit, and repealed the authorization for the Department to implement programs to certify eligible taxpayers. This Rule was repealed and became effective as of October 1, 2021.

Chapter ATCP 166 is unauthorized due to the passage of 2019 Wisconsin Act 54. The Act repealed Wis. Stat. ss. 93.535, 93.54, 93.545, and 93.547, which authorized the Department to implement programs to certify taxpayers as eligible for the woody biomass harvesting and processing credit. The Act repealed several obsolete refundable tax credits, including this tax credit, and repealed the authorization for the Department to implement programs to certify eligible taxpayers. This Rule was repealed and became effective as of October 1, 2021.