

Clearinghouse Rule 15-094

DATCP Docket No. 15-R-07
Rules Clearinghouse No. ____

Proposed Hearing Draft
October 30, 2015

**PROPOSED ORDER
OF THE WISCONSIN DEPARTMENT OF AGRICULTURE,
TRADE AND CONSUMER PROTECTION
ADOPTING RULES**

The Wisconsin department of agriculture, trade and consumer protection hereby proposes the following rule *to repeal* ATCP 82.02 (1), ATCP 82.02 (4), and ATCP 82.02 (7) (b) and (c); *to renumber and amend* ATCP 82.02 (7)(a); *to amend* ATCP 82.02 (title), ATCP 82.02 (2) (intro.) and (e), ATCP 82.02 (3), ATCP 82.02 (6) (title), (a), (b), and (c), ATCP 82.02 (7) (title), and ATCP 82.02 (7) (d) (intro.); and *to create* ATCP 82.02 (2) (dm) and ATCP 82.02 (5); *relating to* bulk milk tanker licensing regulations, and affecting small business.

**Analysis Prepared by the Department
of Agriculture, Trade and Consumer Protection**

The Department of Agriculture, Trade and Consumer Protection (“department”) regulates bulk milk tanker licensing and permitting, construction, maintenance, cleaning and sanitizing requirements; bulk milk weigher and sampler requirements, and mandatory procedures for collecting milk from dairy farms and delivering milk to a dairy plant and collecting milk samples for testing through ch. ATCP 82 (Bulk Milk Collection, Sampling, and Transportation). This rule revision will incorporate recent statutory changes eliminating licensing requirements for bulk milk tankers.

Statutes Interpreted

Statute Interpreted: s. 97.21, Stats. (Milk haulers and milk distributors).

Statutory Authority

Statutory Authority: ss. 93.07 (1), 97.09 (4), and 97.21 (6), Stats.

Explanation of Statutory Authority

The department has broad general authority, under s. 93.07 (1), Stats., to adopt rules to implement programs under its jurisdiction. The department also has general authority under s. 97.09 (4), Stats., to adopt rules specifying standards to protect the public from the sale of

adulterated or misbranded foods. The department has specific authority to promulgate rules related to milk haulers in s. 97.21(6), Stats., which allows the department to establish rules related to the following: fees and regulations for bulk milk tanker operators and milk distributors; standards for the construction, maintenance and sanitary operation of bulk milk tankers, milk distribution vehicles and milk distribution facilities; the design, installation, cleaning and maintenance of equipment and utensils; personnel sanitation; storage and handling of milk and fluid milk products; identification of bulk milk tankers and milk distribution vehicles; and record keeping.

Related Statutes and Rules

Wisconsin's milk haulers are governed by ch. 97, Stats. (Food Regulation). Milk haulers and milk distributors are regulated under s. 97.21, Stats., (Milk haulers and milk distributors). Chapter 82, Wis. Adm. Code, interprets ch. 97, Stats., as it relates to milk haulers and milk distributors.

Plain Language Analysis

In the past, Wisconsin required the owner of a bulk milk tanker used to transport grade "A" milk and milk products to hold both a license and a Grade "A" permit for that tanker. The department charged a licensing fee of \$45 and issued a Grade "A" permit as an endorsement on the license. 2015 Wisconsin Act 55 revised s. 97.21, Stats., eliminating bulk milk tanker licensing and license fee requirements and aligned Wisconsin with most other states by removing the requirement that bulk milk tanker operators hold both a tanker license and a grade "A" permit. The proposed rule continues the alignment with other states by maintaining the requirement that a grade "A" permit cannot be issued to a bulk milk tanker unless that tanker has passed an inspection by the department, a Wisconsin certified industry inspector, or a regulator from the relevant agency in another state within the preceding year. Reciprocity of the Grade "A" bulk milk tanker permit is required by the US Food and Drug Administration's Pasteurized Milk Ordinance (PMO), a cooperative agreement that governs the interstate shipment of Grade "A" milk and milk products, and is the basis of each state's Grade "A" milk requirements. The department proposes to incorporate these revisions into ATCP 82 to reflect these recent statutory changes and remain consistent with the PMO.

As part of this rule revision, the department also proposes to remove a confusing provision related to employees of companies that own bulk milk tankers. The current rule states that an employee who drives a bulk milk tanker is not required to obtain a separate Grade "A" permit to drive the truck, if the owner of the bulk milk tanker owner already has a Grade "A" permit for the tanker. However, this provision is unnecessary as an employee who drives a bulk milk tanker already bearing a Grade "A" permit would never be expected to acquire a separate Grade "A" permit. The original intent of the rule was to exempt an employee who drives a bulk milk tanker transporting and holding Grade "A" milk from the requirement to hold a bulk milk weigher and sampler license if the employee does not weigh or sample the milk. This requirement is implicitly stated in s. ATCP 82.04(1).

The rule also adopts a modest increase in the reinspection fee, so that it covers department costs. Reinspections are conducted by the department to verify that appropriate corrective actions have

been taken, after an initial inspection indicates a bulk milk tanker does not meet one or more regulatory requirements. In the past year, only 13 tankers required reinspection. The proposed rule increases the reinspection fee from \$45 to \$60.

Summary of, and Comparison with Existing or Proposed Federal Statutes and Regulations

The PMO establishes minimum standards for regulation of Grade “A” milk and milk products. States must set regulatory standards equivalent to, or more stringent than, those in the PMO to be allowed to ship Grade “A” milk and milk products in interstate commerce.

Comparison with Rules in Adjacent States

Michigan, Minnesota, Iowa and Illinois base their dairy regulations on the PMO. The proposed rule will align Wisconsin’s regulations with the PMO and these neighboring states for licensing and permitting of grade “A” tankers and bulk milk weighers and samplers. Each of these states inspects bulk milk tankers, and issues a grade “A” permit after inspection. Some states charge a fee associated with these grade “A” inspections.

Summary of Factual Data and Analytical Methodologies

Proposed rule changes were developed in response to recent statutory change after a review of PMO requirements and a review of practices in neighboring states.

Analysis and Supporting Documents used to Determine Effect on Small Business

The PMO makes no distinction between large and small businesses in establishing requirements for collection, sampling and transport of grade “A” milk and milk products.

Effect on Small Business

By eliminating licensing fees, the proposed rule changes will benefit those dairy producers, dairy plants, and companies that operate bulk milk tankers, many of which are small businesses. The proposed rule includes a modest increase in the reinspection fee from \$45 to \$60, to cover the current cost of reinspection. This fee would only be charged if the department finds a regulatory violation necessitating corrective action and a reinspection. In the past year, only 13 owners of bulk milk tankers were charged a reinspection fee. All grade “A” dairy businesses, whether large or small, must meet regulations that are substantially in compliance with the FDA’s PMO in order to collect, sample, and transport grade “A” dairy products. The PMO allows for no special accommodations for small businesses.

DATCP Contact

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Where and When Comments May Be Submitted

Questions and comments related to this rule may be directed to:

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Rule comments will be accepted up to two weeks after the last public hearing is held on this rule. Hearing dates will be scheduled after this rule is approved by the Board of Agriculture, Trade and Consumer Protection.

1 **SECTION 1.** ATCP 82.02 (title) is amended to read:

2 ATCP 82.02 (title) **Bulk milk tanker; license; grade A permit.**

3 **SECTION 2.** ATCP 82.02 (1) is repealed.

4 **SECTION 3.** ATCP 82.02 (2) (intro.) is amended to read:

5 ATCP 82.02 (2) (intro.) An application for a ~~license~~ grade A permit under sub. ~~(4)~~ (1m)
6 shall be made on a form provided by the department. An application shall include all of the
7 following:

8 **SECTION 4.** ATCP 82.02 (2) (dm) is created to read:

9 ATCP 82.02 (2) (dm) Proof of an inspection of the bulk milk tanker conducted within the
10 preceding 12 months by the department, another state's agency responsible for issuing grade A
11 bulk milk tanker permits, or a certified industry inspector as allowed under sub. (8).

12 **SECTION 5.** ATCP 82.02 (2) (e) is amended to read:

13 ATCP 82.02 (2) (e) All applicable fees and surcharges required under subs. ~~(4) to (5)~~
14 and (6).

1 **SECTION 6.** ATCP 82.02 (3) is amended to read:

2 ATCP 82.02 (3) ACTION ON ~~LICENSE~~ PERMIT APPLICATION. (a) The department shall grant
3 or deny a ~~license~~ permit application under sub. (2) within ~~40~~ 30 days after the department
4 receives a completed application.

5 (b) The department shall not issue or renew a ~~license~~ permit until the applicant has paid
6 all applicable fees and surcharges, set forth in a statement from the department, that are due and
7 payable by the applicant under this section. The department shall refund a fee paid under protest
8 if, upon review, the department determines that the fee is not due and payable.

9 **SECTION 7.** ATCP 82.02 (4) is repealed.

10 **SECTION 8.** ATCP 82.02 (5) is amended to read

11 ATCP 82.02 (5) REINSPECTION FEE. (a) If the department reinspects a bulk milk tanker
12 because the department finds a violation of ch. 97, Stats., or this chapter, the department shall
13 charge the bulk milk tanker operator a reinspection fee. The reinspection fee is payable when the
14 reinspection is completed, and is due upon written demand from the department. The department
15 may issue a demand for payment when it issues a ~~license~~ permit renewal application to the bulk
16 milk tanker operator, or at any other time after the fee becomes effective.

17 (b) The reinspection fee under par. (a) is ~~\$45~~ \$60.

18 **SECTION 9.** ATCP 82.02 (6) is amended to read:

19 ATCP 82.02 (6) (title) SURCHARGE FOR OPERATING WITHOUT A ~~LICENSE~~ PERMIT. (a) An
20 applicant for a bulk milk tanker ~~license-fee~~ permit shall pay a ~~license-permit~~ surcharge of \$100 if
21 the department determines that, within 365 days prior to submitting the ~~license~~ permit
22 application, the applicant operated a bulk milk tanker without a ~~license~~-~~or~~ grade A permit in
23 violation of sub. ~~(4)~~ (1m) or (7).

1 (b) In addition to paying the ~~license fee~~ permit surcharge under par. (a), an applicant who
2 violated sub. ~~(1)~~ (1m).or (7).shall pay all fees, set forth in a statement from the department, that
3 are due and payable for the ~~license~~ permit year in which the applicant violated sub. ~~(1)~~ (1m) or
4 (7).

5 (c) Payment of the ~~license~~ permit surcharge and past fees under pars. (a) and (b) does not
6 relieve the applicant of any other civil or criminal liability which results from a violation of sub.
7 ~~(1)~~ (1m) or (7), but does not constitute evidence of any violation of law.

8 **SECTION 10.** ATCP 82.02 (7) (title) is amended to read:

9 ATCP 82.02 (7) (title) GRADE A PERMIT DISPLAY.

10 **SECTION 11.** ATCP 82.02 (7) (a) is renumbered ATCP 82.02 (1m) and amended to read:

11 ATCP 82.02 (1m) ~~Except as provided under par. (c), no~~ PERMIT REQUIRED. No person
12 may operate a bulk milk tanker to transport milk or fluid milk products for sale or use as grade A
13 milk or grade A dairy products ~~unless that person holds~~ the department, or an equivalent
14 regulatory agency in another state, has issued a valid grade A permit for that bulk milk tanker ~~by~~
15 ~~the department or an equivalent regulatory agency in another state where that bulk milk tanker is~~
16 ~~normally based~~ and the information required under sub. (7) (d) is displayed on the bulk milk
17 tanker as required under sub. (7) (e). A grade A permit is not transferable between ~~persons or~~
18 bulk milk tankers.

19 **SECTION 12.** ATCP 82.02 (7) (b) and (c) are repealed.

20 **SECTION 13.** ATCP 82.07 (7) (d) (intro.) is amended to read:

21 ATCP 82.02 (7) (d) (intro.) The holder of a grade A permit under ~~par. (a)~~ sub. (1m) shall
22 display all of the following information, in the manner required under par. (e), on both sides of
23 the bulk milk tanker to which the permit applies:

1 **SECTION 10. EFFECTIVE DATE AND INITIAL APPLICABILITY.** This rule takes effect on
2 the first day of the month following publication in the Wisconsin administrative register, as
3 provided under s. 227.22(2)(intro.).

Dated this _____ day of _____, 2016.

WISCONSIN DEPARTMENT OF AGRICULTURE,
TRADE AND CONSUMER PROTECTION

By _____
Ben Brancel, Secretary