



State of Wisconsin
Governor Scott Walker

Department of Agriculture, Trade and Consumer Protection
Ben Brancel, Secretary

Report From Agency

DATE: November 23, 2015

TO: The Honorable Mary Lazich
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The Honorable Robin Vos
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FROM: Ben Brancel, Secretary
Department of Agriculture, Trade and Consumer Protection

**SUBJECT: Fertilizer and related products, ch. ATCP 40; Final Draft Rule
(Clearinghouse Rule #15-045)**

Introduction

The Department of Agriculture, Trade and Consumer Protection (“DATCP”) is transmitting this rule for legislative committee review, as provided in s. 227.19(2) and (3), Stats. DATCP will publish notice of this referral in the Wisconsin Administrative Register, as provided in s. 227.19(2), Stats. This rule makes revisions to ch. ATCP 40 related to the standards for the nutrient content of fertilizer.

Background

This rule amends s. ATCP 40.14(1) and (3), Wis. Admin. Code, relating to fertilizer content deficiencies. The Department of Agriculture, Trade and Consumer Protection (“DATCP” or “Department”) regulates the manufacture and sale of fertilizer, pursuant to s. 94.64, Stats. DATCP regulates fertilizer to protect farmers and consumers against unfair and deceptive sales practices. Regulation is designed to prevent fraudulent sales of products, deceptive ingredient and performance claims, and latent safety hazards.

This rule:

- Updates the standards that are used for verifying the nutrient content of a fertilizer product.

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- Revises the title of one standard to reflect the type of index that is currently used for determining the formulation multiplier of the nutrient content of a fertilizer product.

Rule Content

This rule amends s. ATCP 40.14(1) and (3), relating to fertilizer content deficiencies. The following is a summary of the rule changes in order by section. The rule does the following:

Economic Value Guarantee Percentage

The rule reduces the guarantee percentage in s. ATCP 40.14(1)(c), from the current requirement of 98%, to 97%. In a prior rule, the Department utilized the guarantee of 97%. Additionally, this makes our requirements consistent with the percentage used by other states, such as Minnesota and Illinois.

“Economic Value” Title

The formula referenced in s. ATCP 40.14(1)(c), and the title of the formula in s. ATCP 40.14(3) is changed from “economic value” to “combined nutrient index.” This change will aid industry in recognizing that their product value is based on an index rather than a specific pricing model.

Economic Value Formula

In place of the 2:2:1 ratio of N, P, and K in the current s. ATCP 40.14(3), the rule will update the current ratio with a ratio 1:1:1 of N, P, and K:

Current formula: Economic value = {[total nitrogen (N) guarantee] x 2} +
{[available phosphate (P₂O₅) guarantee] x 2} + {soluble potash (K₂O) guarantee}

to

Amended formula: Combined Nutrient Index = {total nitrogen (N) guarantee} +
{available phosphate (P₂O₅) guarantee} + {soluble potash (K₂O) guarantee}

The formula change in the rule more accurately reflects the actual value of fertilizer ingredients in the marketplace than the current formula, which was developed over forty years ago.

Summary of Factual Data and Analytical Methodologies

DATCP developed this rule in consultation with an industry working group that included representative members from agricultural associations and fertilizer manufacturers and distributors. A listening session was held with representatives of multiple agrichemical associations, fertilizer manufacturers, and suppliers. Some members of this group previously had brought to the Department its concerns over the economic value calculation that has been in use by the Department since the 1970s. They questioned the effects the current pricing structure has on the labeling of fertilizer content, when compared with how prior pricing models affected the calculation of the economic value on numerous fertilizer blends over recent years.

The Department reviewed the current relative average wholesale prices for primary plant nutrients N, P, and K, using statistics and information gathered from the United States Department of Agriculture (USDA) regarding fertilizer ingredient pricing. The Department later considered data from statistics and information specific to the regional pricing of fertilizer ingredients as published within the annual Wisconsin Agricultural Statistics Bulletin. The formula used to determine the economic value of the fertilizers was no longer found to be accurate in relation to the multipliers used in the formula for the primary nutrients N and P. Additionally, it was found that the prices for these primary nutrients, as well as that of K, were similar to one another.

The Department heard concerns over the value used in calculating the threshold percentage of the economic value guarantee, which addressed variations such as granular size, overall availability of nutrients, and the lack of consistency between lots of primary nutrients. The Department reviewed sample results of the past years to show that a change from 98% to 97% would be a change taking into account the variation in granular size and the lack of consistency between lots of primary nutrients, while continuing to ensure that the fertilizer contains the nutrients guaranteed on the product label.

Analysis and Supporting Documents Used to Determine Effects on Small Business

To determine the economic value of the primary nutrients, DATCP considered data on wholesale nutrient prices obtained from USDA reports referenced in the listening session, and later considered the regional pricing of fertilizer ingredients as published in the Wisconsin Agricultural Statistics Bulletin.

Fiscal Impact

This rule will have no fiscal impact on DATCP or local units of government. This rule will clarify existing regulations and improve program administration. DATCP does not anticipate any additional costs or staffing needs. A complete fiscal estimate and economic impact analysis is attached.

Business Impact

The rule will continue to benefit certain small businesses such as farmers, landscape and lawncare companies, farm supply stores, and cooperatives. This rule is designed to update the formulas used in analyzing fertilizer for its economic value and content deficiencies. This rule will continue to prevent unfair and deceptive sales practices, while adjusting formulas used to reflect updated fertilizer ingredient costs.

There are approximately 700 persons licensed to manufacture or distribute fertilizers in Wisconsin. Up to 30% of these license holders may be small businesses. Affected businesses include farm centers and cooperatives, lawncare businesses, and manufacturers of nonagricultural and specialty fertilizers.

The fertilizer industry serves about 30,000 Wisconsin farmers, many of whom are small businesses. This rule will benefit farmers by continuing to prevent unfair and deceptive sales practices, while adjusting formulas used to reflect current fertilizer ingredient costs.

Because this rule will not have a significant adverse impact on small business, it is not subject to the delayed small business effective date provision in s. 227.22(2)(e), Stats. A business analysis (“final regulatory flexibility analysis”) is attached.

Environmental Assessment

The rule changes are administrative in nature and will not affect the environment. An environmental assessment was not needed for the rule proposal.

Comparison with Existing or Proposed Federal Statutes and Regulation

There are no established federal laws regulating the content deficiencies for fertilizer, although there is regulation by other states (see below).

Comparison with Rules in Adjacent States

State fertilizer regulators have organized a national Association of American Plant Food Control Officials (AAPFCO) to promote uniform state laws related to fertilizer. Most surrounding states follow AAPFCO principles and have similar basic laws which benefit consumers, fertilizer manufacturers, and distributors doing business in multiple states. However, there are minor variations in fertilizer regulations between states.

Illinois

Illinois requirements look at the total combined value of the fertilizer as well as the value for each fertilizer ingredient, and the product is deficient if the actual amount is 97% or less than the guarantee for both the individual ingredient and the total combined value.

Iowa

Iowa uses a combined nutrient index value (called relative value) which is determined based on a formula that is identical to the current Wisconsin requirements, with a formula of relative value equal to $2N + 2P + K$ and a 98% deficiency threshold allowed between the actual and guaranteed relative values.

Michigan

Michigan has adopted the AAPFCO requirements that deem fertilizer deficient if the overall index value of the fertilizer is below 98%. The overall index value is calculated by comparing the guarantee of the nutrients to the actual value found within the sample. Michigan uses unit values for each of the fertilizer nutrients. These values vary and are based on annual publications of the annual values per unit of each primary nutrient.

Minnesota

Minnesota uses the same formula and multipliers as the current Wisconsin requirements, but considers a fertilizer deficient if the overall economic value is below 97% of the guaranteed value.

Public Hearing

DATCP held one public hearing on the original rule on June 30, 2015, in Madison. DATCP accepted written comments until July 21, 2015. A total of four people attended and registered at the public hearing, two of whom spoke and submitted written comments. No other written comments were submitted. Additionally, no comments were received when the economic impact analysis was posted. The Department received both general comments related to the rule and specific comments related to certain provisions within the rule. The general comments were supportive of the rule revision. Specific comments were also in support of the rule revision with a suggestion to include an additional percentage of variance for bagged fertilizer.

The Department heard a suggestion expressed at the public hearing for a separate threshold value of 96% for bagged fertilizer products. However, the Department did not incorporate this suggestion into the rule revision. An analysis of the sample results from bagged and bulk fertilizer, setting a 96% threshold did not show a significant decrease in bagged fertilizer failure rates than that of bulk or liquid set at the same threshold. The Department maintains that a decrease of the overall threshold variance to 97% addresses the concerns relating to bagged fertilizer.

DATCP's Rule Changes in Response to Public Hearings, Rules Clearinghouse, and DATCP Board Comments

DATCP considered all comments received through the DATCP board presentation, Legislative Council Rules Clearinghouse (Clearinghouse), and public hearing. The changes recommended by the Clearinghouse were made. As suggested by the DATCP Board, the title of the formula being revised in this rule did not accurately represent the information used for the formula. The title "combined nutrient index" provides for a better description of the information used within the formula. Accordingly, the term "combined nutrient index" will replace economic value in the rule in s. ATCP 40.14.