

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

- 1 The Wisconsin department of agriculture, trade and consumer protection proposes the
- 2 following order to amend ATCP 40.14 (1) (c) and (3), relating to the manufacture and
- 3 distribution of fertilizer.

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

This rule amends s. ATCP 40.14 (1) and (3), Wis. Admin. Code, relating to fertilizer content deficiencies. The Wisconsin Department of Agriculture, Trade and Consumer Protection (DATCP) 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 standards for the nutrient content of fertilizer.

Statutes Interpreted

Statutes interpreted: s. 94.64, Stats.

Statutory Authority

Statutory authority: ss. 93.07 (1), and 94.64 (9), Stats.

Explanation of Agency Authority

DATCP has authority under s. 93.07 (1), Stats., to make regulations as necessary for the proper enforcement of Chapters 93 to 100, Stats., including the administration of the fertilizer program under s. 94.64, Stats. DATCP has express authority to promulgate rules regulating the sale and labeling of fertilizer, governing methods of sampling, testing and analyzing fertilizer and prescribing the manner in which grade and guaranteed analysis are declared on the product label. See s. 94.64 (9), Stats.

Related Statutes and Rules

Wisconsin statutes and rules relating to the manufacture, distribution, and use of fertilizer are set forth in ss. 94.64 to 94.645, Stats., and ch. ATCP 40, Wis. Admin. Code.

Plain Language Analysis

Under current fertilizer rules, a manufacturer or distributor that labels fertilizer is required to list percent guarantees of primary nutrients on the fertilizer's label. Primary nutrients consist of nitrogen ("N"), phosphorus ("P"), and potassium ("K"). Current rules also require that DATCP collect and analyze various samples of fertilizers.

The department analyzes fertilizer samples to determine if the content of the sample meets the guarantees of N, P, and K listed on the label. If the sample tested is found to be deficient in content of N, P, or K because it fails to meet one or more of the three standards in the rule, then the fertilizer is considered "mislabeled" under s. ATCP 40.14 (1), Wis. Admin. Code.

After convening a group of representatives of the fertilizer industry and agricultural associations, and reviewing recent data concerning the wholesale prices of primary nutrients, the group concluded that the existing rule contains an outdated formula for the economic value of fertilizer. That formula was based on average wholesale prices of primary plant nutrients prior to its enactment in the 1970s.

Rule Content

This rule amends s. ATCP 40.14 (1) and (3), Wis. Admin. Code, relating to fertilizer content deficiencies.

This rule will do the following:

1. Replace the term "economic value" with "combined nutrient index" wherever it appears in s. ATCP 40.14, Wis. Admin. Code. The proposed new term represents a more accurate description of the index used in developing the multipliers within the formula.
2. In place of the 2:2:1 ratio of N, P, and K, in the current s. ATCP 40.14 (3), Wis. Admin. Code, the proposed rule substitutes 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 amended formula more accurately reflects the value of fertilizer ingredients sold in the marketplace than the current formula, which was developed over forty years ago.

3. The proposed rule changes the standard in s. ATCP 40.14 (1) (c), Wis. Admin. Code, for the economic value (proposed combined nutrient index) formula, so that the guarantee percentage, which currently is listed in the rule as 98%, is reduced to 97%. This conforms to the department's prior guarantee percentage in the rule, and is consistent with the percentage used by other states, such as Minnesota and Illinois.

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 it considers a fertilizer deficient if the overall economic value is below 97% of the guaranteed value.

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 that the current pricing structure has on the labeling of fertilizer content, when compared with how prior pricing models had 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 that were 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 Effect on Small Business or in Preparation of an Economic Impact Analysis

DATCP considered data on wholesale nutrient prices obtained from USDA reports referenced in the listening session (See Summary of Data and Analytical Methodologies, above), and later considered data from statistics of regional prices of fertilizer in our area of the country, published in the Wisconsin Agricultural Statistics Bulletin. No comments

were received through the economic impact analysis comment period.

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.

Effects on Small Business

DATCP anticipates that this rule revision will have no negative economic impact on small business. The proposed rule will continue to benefit certain small businesses such as farmers, landscape and lawncare companies, farm supply stores, and cooperatives. This rule revision 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.

DATCP Contact Information

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

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1 **SECTION 1.** ATCP 40.14 (1) (c) is amended to read:

2 ATCP 40.14 (1) (c) The ~~economic value~~ combined nutrient index of primary
3 nutrients actually present is less than ~~98%~~ 97% of the ~~economic value~~ combined nutrient
4 index of the amounts guaranteed, where ~~economic value~~ the combined nutrient index is
5 calculated according to sub. (3).

6 **SECTION 2.** ATCP 40.14 (3) is amended to read:

7 ATCP 40.14 (3) ~~ECONOMIC VALUE~~ **COMBINED NUTRIENT INDEX**. ~~Economic~~
8 ~~value~~ Combined nutrient index, for purposes of sub. (1) (c), equals $\{ \{ \text{total nitrogen (N)}$
9 $\text{guarantee} \times 2 \} + \{ \text{available phosphate (P}_2\text{O}_5 \text{) guarantee} \times 2 \} + \{ \text{soluble potash (K}_2\text{O)}$
10 $\text{guarantee} \}$.

11 **SECTION 3. EFFECTIVE DATE.** This rule takes effect on the first day of the month
12 following publication in the Wisconsin administrative register, as provided under s.
13 227.22 (2) (intro.)

Dated this _____ day of _____, 2015

WISCONSIN DEPARTMENT OF AGRICULTURE,
TRADE AND CONSUMER PROTECTION

By _____
Ben Brancel
Secretary