

STATEMENT OF SCOPE

Department of Agriculture, Trade and Consumer Protection

Rule No.: Ch. ATCP 94

Relating

to: Petroleum and Other Liquid Fuel Products (Permanent)

1. Description of the objectives of the rule:

The Department of Agriculture, Trade and Consumer Protection (DATCP) seeks approval of a new and revised scope statement for Wis. Admin. Code ch. ATCP 94. In the paragraphs that follow, DATCP addresses the objectives of the new rule, some background history of the petroleum inspection program, and events prompting DATCP to seek approval of a new and revised ATCP 94 scope statement, rather than continuing to proceed under the ATCP 94 scope statement that was approved by the DATCP Board in November 2019.

With the enactment of 2013 Wisconsin Act 20 (the biennial budget bill), the state of Wisconsin transferred the Petroleum and Other Liquid Fuel Products program (petroleum inspection program) from the Department of Safety and Professional Services (DSPS) to DATCP. *See* 2013 Wis. Act 20, ss. 1950-67 and 9138 (4) (f). The statutes applicable to petroleum product inspections are now set forth in Wis. Stat. ch. 168, subch. I, ss. 168.01 through 168.17. The corresponding administrative rules are set forth in Wis. Admin. Code ch. ATCP 94.

When the petroleum inspection program was transferred to DATCP in July 2013, s. 9138 (3) (fm) and (4) (f) of 2013 Wis. Act 20 authorized the transfer of the existing administrative rule for petroleum inspections from ch. SPS 348 to ch. ATCP 94. At the time that the transfer occurred, the rules concerning collecting fees for conducting petroleum inspections referenced ch. SPS 302. As a result, Wis. Admin. Code s. ATCP 94.110 (2) still reads, "Fees for inspections shall be assessed in accordance with ch. SPS 302." Likewise, Wis. Admin. Code s. ATCP 94.410 (1) and (2) still refer to paying DATCP "any fees assessed under ch. SPS 302." Because 2013 Wis. Act 20, s. 9138 (4) (f) provided that all DSPS rules related to the inspection of petroleum products would remain in effect until amended or repealed by DATCP, there was an apparent legislative expectation that DATCP would address such issues in future rules promulgation. To date, DATCP has not yet done so, and ch. ATCP 94 rules concerning petroleum inspection fees therefore continue to refer to ch. SPS 302. Among the objectives of the new ch. ATCP 94 is setting forth all information concerning fees for petroleum inspections entirely within Wis. Admin. Code ch. ATCP 94. By making that information available in one location, reviewing the rules governing fees for petroleum inspections should be easier.

Another objective of the new rule is updating the prescribed minimum product grade specifications for gasoline, automotive gasoline, gasoline-alcohol fuel blends, gasoline-ethanol fuel blends, reformulated gasoline, kerosene, aviation gasoline, fuel oils, and diesel fuels. Wis. Stat. s. 168.04 explicitly grants

DATCP authority to promulgate rules that prescribe minimum product specifications for such petroleum products. Subsection (3) of that statute also requires that all such rules "... be in conformity with nationally recognized standards, specifications, and classifications, such as those published by ASTM International, the Society of Automotive Engineers, and the U.S. Environmental Protection Agency."

2013 Wisconsin Act 20 also referenced the transfer of ch. SPS 310 to ch. ATCP 93, which is the rule that governs the tank system inspection program. DATCP finalized substantial rule revisions to ch. ATCP 93 in November 2019. In 2013, after receiving responsibility for both the tank system inspection program and the petroleum inspection program, DATCP drafted a joint scope statement that covered both chs. ATCP 93 and 94, which effectively replaced the prior joint scope statement developed by DPCS for the no longer existent chs. SPS 310 and 348. However, DATCP's ensuing work on ch. ATCP 93 was completed long before the work on ch. ATCP 94 could be finished, and DATCP's joint scope statement for chs. ATCP 93 and 94 was set to expire in February 2020 per Wis. Stat. s. 227.135 (5). As a result, DATCP prepared another scope statement exclusively for ch. ATCP 94, which was approved by the DATCP Board in November 2019. That scope statement will expire in February 2022.

In the ch. ATCP 94 scope statement that the Board approved in November 2019, DATCP asked for a new scope statement because "the nature of the industry has changed." During the ensuing rulemaking discussions, proposed amendments, and informal sharing of those revisions with industry stakeholders, DATCP staff discovered that so much in the industry had changed that the ch. ATCP 94 scope statement might arguably be insufficient to encompass all the revisions that might be needed to make ch. ATCP 94 better address the respective needs and interests of those in the petroleum products industry, the consumers of those products, and the broader public. For example, that proved to be the case during the ongoing COVID-19 crisis with the Reid Vapor Pressure (RVP) relief that DATCP provided by enforcement discretion and the recent proposed expansion of E15 in neighboring states. Neither of those developments could be predicted before adoption of the scope statement in November 2019. Therefore, the agency requests that a new and revised scope statement be adopted that clearly encompasses addressing such changes as well as others. Because departments cannot withdraw prior scope statements, DATCP intends to abandon the ch. ATCP 94 scope statement approved by the Board in November 2019, and instead pursue the objectives of this new and revised scope statement if it is approved.

Additional matters of deep concern are the various new provisions of ch. ATCP 93 adopted in November 2019. Chapter ATCP 93 now has provisions that conflict with ch. ATCP 94, and ch. ATCP 94 has increasingly become out-of-date due to changes in fuel technology. Because ch. ATCP 93 refers to ch. ATCP 94 and the department enforces both rules, it makes sense to harmonize the two rules with one another so they interact properly and do not conflict. During the ch. ATCP 93 informal commentary period, a stakeholder who represents numerous businesses sought clarification on the interaction and asked that it be addressed in both chs. ATCP 93 and ATCP 94. The existing conflicts demonstrably confuse Wisconsin industry.

As previously addressed, the current ch. ATCP 94 refers to ch. SPS 302. It also refers to ch. SPS 303. Whether DATCP should refer to another agency's rules or adopt the SPS language into its own rules should receive discussion and investigation. The state legislature indicated in 2013 Wisconsin Act 20, s. 9138 (4) (f) that DATCP should incorporate the necessary SPS provisions into ch. ATCP 94. Still, the department must engage in rulemaking in order for that to occur. Wis. Stat. s 168.16(4) grants DATCP authority to "promulgate reasonable rules relating to the administration and enforcement of this subchapter."

Chapter ATCP 94 also incorporates by reference ASTM standards for fuel specifications and testing procedures. ASTM standards change on a regular basis, and any changes to this rule would likely update these standards to the most recently adopted ones. In addition, DATCP could take alternative approaches to adopting rules in conformity with nationally recognized industry standards, such as adopting NIST Handbook 130 or incorporating portions of the adopted standards into the actual rule itself. Rather than adopting NIST Handbook 130, another option is adopting the individual ASTM standards that have been incorporated into NIST Handbook 130, which is what DATCP currently does. That approach, however, would slow future adoption of national guidelines. It would also leave DATCP more dependent on future technical rule revision processes, which has caused prior problems for DATCP.

2. Description of existing policies relevant to the rule and of new policies proposed to be included in the rule and an analysis of policy alternatives; the history, background and justification for the proposed rule:

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 were transferred to the Department of Commerce (Commerce) in 1996. They were transferred from Commerce to DSPS as part of the 2011-13 biennial budget (2011 Wisconsin Act 32). Chapter SPS 348 was previously titled ch. LHR 48 and ch. COMM 48 before becoming the current ch. ATCP 94. Chapter SPS 310 became the current ch. ATCP 93.

In January 2011, DSPS approved a joint scope statement for the two rules, but the programs transferred before action was taken. The DATCP Board approved a joint scope statement for chs. ATCP 93 and ATCP 94 in September 2013, and DATCP initially considered some changes to ch. ATCP 94. However, DATCP did not formally present any changes to its Board and never held a public hearing on the proposed changes. In the interim, DATCP successfully made required changes to ch. ATCP 93, and the Legislature promulgated the rule effective November 1, 2019. The DATCP Board approved a new scope statement for ch. ATCP 94 in November 2019, and DATCP subsequently considered substantial changes to ch. ATCP 94.

During late 2019 and through 2020, an internal rulemaking committee had informal consultations with various industry stakeholders about several possible changes to ch. ATCP 94. Based on those informal consultations, DATCP concluded that at least some of the proposed rule changes might arguably exceed the breadth of the scope statement adopted in November 2019. Therefore, DATCP decided to pursue a new and revised scope statement that would clearly encompass the numerous recommended changes made by industry stakeholders and DATCP staff.

During the decade that has passed since DSPS drafted the scope statement to change ch. SPS 348 in 2011, much has changed in the petroleum fuel products industry. For instance, the current ch. ATCP 94 does not define emerging fuels such as E15 and E85, but instead merely refers to them in passing. Likewise, biofuels receive little consideration under the current ch. ATCP 94. Due to the effects of leaded fuels on the environment and the resulting laws, Wisconsin consumers decreased their collective reliance upon such fuels over the past decade. Nevertheless, leaded fuels must still be regulated under DATCP's authority to regulate fuel in the state. Other than relying on ASTM standards, ch. ATCP 94 does not directly address racing fuel. Chapter ATCP 94 mentions aviation fuel, but the rule does not address some recent trends.

Similarly, as with any rule that has not been reviewed for more than a decade, there are certain provisions that ought to be repealed because they are out of date. Among other provisions, the rule refers to now non-existent district inspection offices.

As already mentioned, DATCP might evaluate adopting by reference or by direct inclusion the engine fuel quality and other standards or definitions published in NIST Handbook 130. Other states (including Illinois) have adopted this model regulation. A number of definitions that appear in the current ch. ATCP 94 conflict with definitions in NIST Handbook 130 and with other definitions regularly used throughout industry. At the very least, resolving those conflicts will need to be considered with due weight given to rejecting anything that conflicts with what is best for Wisconsin residents. Regardless of which approach DATCP takes, DATCP will likely continue to incorporate standards by reference and will therefore need to petition the Attorney General under Wis. Stat. s. 227.21 (2) for approval of those standards.

In the many years since the last revision of the rule, the fuel industry has significantly increased the use of renewable fuels, such as gasoline-ethanol fuel blends. Gasoline-ethanol fuel blends have intrinsically higher RVP due to the volatility of ethanol. As a result, RVP relief is needed for winter-grade fuels. Granting RVP relief outside of the EPA regulated summer volatility season is standard practice in surrounding states. DATCP will consider whether to make the change permanent through administrative rule.

DATCP plans to make a number of stylistic changes in phrasing as well to seek updating, clarification, or conformity. For example, the rule uses the phrase “volume percent” in a number of places where national standards instead use the phrase “percent by volume.” The rule also refers to district inspection offices where they do not exist in DATCP.

DATCP will also consider whether to promulgate a rule requiring that both gasoline-ethanol fuel blend and the gasoline base stock from which the gasoline-ethanol fuel blend is produced must meet the requirements of ASTM D4814-17 or the most current version of testing methods adopted by DATCP. Per s. 1680M of 2017 Wisconsin Act 59, any such gasoline-ethanol fuel blend rule had to be delayed until at least July 1, 2019:

SECTION 1680M. 168.04 (4) of the statutes is created to read:

168.04 (4) (a) In this subsection, “gasoline-ethanol fuel blend” includes such a fuel blend for both automotive and nonautomotive uses.

(b) Except as provided under par. (c), compliance with the requirements, established by the department by rule under sub. (1), of ASTM D4814-17 or the most current version of testing methods adopted by the department may be demonstrated by testing a gasoline-ethanol fuel blend or testing the gasoline base stock from which the gasoline-ethanol fuel blend is produced.

(c) The department may promulgate rules that require that a gasoline-ethanol fuel blend and the gasoline base stock from which the gasoline-ethanol fuel blend is produced meet the

requirements of ASTM D4814-17, or the most current version of testing methods adopted by the department. A rule promulgated under this paragraph may not take effect sooner than July 1, 2019.

3. Statutory authority for the rule (including the statutory citation and language):

Wis. Stat. ss. 168.04 and 168.16 (4).

168.04 Standards.

(1) The department by rule shall prescribe minimum product grade specifications for gasoline, automotive gasoline, gasoline-alcohol fuel blends, reformulated gasoline, as defined in s. 285.37 (1), and kerosene and may prescribe product grade specifications for aviation gasoline, fuel oils, and diesel fuels.

(2) (a) Except as provided in par. (b), the rules required under sub. (1) shall prohibit gasoline, automotive gasoline, gasoline-alcohol fuel blends, and reformulated gasoline, as defined in s. 285.37 (1), beginning on August 1, 2004, from containing more than 0.5 percent, by volume, of methyl tertiary-butyl ether.

(b) The rules required under sub. (1) shall not prohibit racing fuel used at racing events or in preparation for racing events from containing any amount of methyl tertiary-butyl ether.

(3) Except as otherwise provided in this section, rules promulgated under this section shall be in conformity with nationally recognized standards, specifications, and classifications, such as those published by ASTM International, the Society of Automotive Engineers, and the U.S. Environmental Protection Agency. The department may not promulgate or enforce a rule prohibiting the placement of additional information on the dispensing device.

168.16 Standards.

(4) The department may promulgate reasonable rules relating to the administration and enforcement of this subchapter.

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

DATCP estimates that it will use approximately 0.50 FTE staff to develop this rule. That includes time required for investigation and analysis, rule drafting, preparing related documents, coordinating formal and informal input from stakeholders, holding public hearings, and extensive communication with affected

persons and groups. DATCP has used and will continue to use existing staff, legal counsel, and an internal rulemaking committee to develop this rule.

5. Description of all entities that may be impacted by the rule:

This rule will affect businesses that sell or distribute petroleum and other liquid fuel products at wholesale or at retail. It will also affect businesses that manufacture, sell, or distribute chemical liquids regulated under the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). These businesses are already regulated under the existing rule, but there will likely be changes to the specific requirements if the rule is amended.

If DATCP adopts the model regulations published in NIST Handbook 130, businesses that sell or distribute engine lubricants will be affected. The current rule contains technical specifications and requirements for fuel but not for lubricant.

DATCP contacted stakeholders on multiple occasions both formally and informally in the rewrite of ch. ATCP 93, and DATCP conducted similar extensive outreach about potential changes to ch. ATCP 94 after the prior ch. ATCP 94 scope statement was approved in November 2019. DATCP's current list includes over 50 stakeholders and will be adjusted accordingly as additional interested parties self-identify or withdraw.

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

The Environmental Protection Agency (EPA) regulates standards for gasoline in a number of ways. EPA regulates the amount of sulfur in gasoline and certain toxic substances that can be emitted when fuel is burned. EPA also mandates reformulated gasoline (RFG) in certain metropolitan areas. EPA mandates that fuels sold during the summer meet certain Reid vapor pressure standards to reduce emissions that contribute to smog.

The federal Clean Air Act (CAA) authorizes the EPA to establish emissions standards for motor vehicles to address air pollution that may reasonably be anticipated to endanger public health or welfare. EPA also has authority to establish fuel controls to address such air pollution. 40 CFR Parts 79, 80, 85 and 86 establish fuel quality and emissions standards by rule, which are enforced by EPA. These rules incorporate by reference ASTM International standards and test methods.

EPA regulates the vapor pressure of gasoline sold at retail stations during the summer ozone season to reduce evaporative emissions from gasoline that contribute to ground-level ozone and diminish the effects of ozone-related health problems.

42 U.S.C. s. 7545 regulates fuels and allows for a temporary waiver of a control or prohibition respecting the use of a fuel or fuel additive. By this authority, EPA may grant partial waivers allowing for gasoline-

ethanol blends greater than 10 percent up to 15 percent (E15) for use in MY2001 and newer light-duty vehicles. 40 CFR Part 80 establishes E15 labeling and survey requirements, and transfer document requirements for gasoline-oxygenate blends.

Finally, the EPA opened a docket in the January 19, 2021 *Federal Register* on E15 Fuel Dispenser Labeling and Compatibility with Underground Storage Tanks. Changes to ch. ATCP 94 will need to consider any changes with labeling and compatibility that the EPA may require as a result of the federal rulemaking. During the most recent scope statement period, the Code of Federal Regulations made some changes, and the Department plans to address these changes in regulatory citation.

7. Anticipated economic impact

The proposed rule should have minimal economic impact statewide and locally. Adopting more recent fuel quality standards might have a moderate economic impact on certain businesses within the petroleum industry.

The proposed rule moves the fee structure from DSPS rules to DATCP rules as suggested in s. 9138 (3) (fm) and (4) (f) of 2013 Wisconsin Act 20, but DATCP does not intend to increase those fees in the transfer.

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