



State of Wisconsin  
Jim Doyle, Governor

Department of Agriculture, Trade and Consumer Protection  
Rod Nilsestuen, Secretary

**DATE:** April 7, 2010

**TO:** The Honorable Fred Risser  
President, Wisconsin State Senate  
Room 220, South, State Capitol  
PO Box 7882  
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The Honorable Michael Sheridan  
Speaker, Wisconsin State Assembly  
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**FROM:** Rodney J. Nilsestuen, Secretary  
Department of Agriculture, Trade and Consumer Protection

**SUBJECT: Administrative Orders and Contested Cases**  
*(Clearinghouse Rule #09-054)*

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 amends current procedural rules under ch. ATCP 1, Wis. Adm. Code, related to DATCP administrative orders and contested cases.

### ***Background***

The Department of Agriculture, Trade and Consumer Protection (DATCP) administers a wide range of laws related to food safety, disease control, trade regulation, consumer protection, agricultural resource management and other matters (see chs. 88, 91 to 100, and chs. 126 and 136, Stats.) Under these laws, DATCP may issue various kinds of administrative orders and take other administrative actions that have the force of law.

Persons adversely affected by these orders and actions may request a trial-type “contested case” hearing under ch. 227, Stats., and ATCP 1. This rule updates and clarifies current “contested case” procedures under ATCP 1.

An impartial administrative law judge (ALJ) presides over a “contested case” hearing. The DATCP Secretary or designee typically makes the final decision in a “contested case,” after

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reviewing the ALJ's proposed decision. The final decision is subject to judicial review, as provided in ch. 227, Stats.

DATCP has transferred its ALJ functions to the Department of Administration, Division of Hearings and Appeals. ALJs from the Division of Hearings and Appeals will conduct DATCP "contested case" hearings, according to procedures spelled out in ch. 227, Stats., and ATCP 1. DATCP will pay the Division of Hearings and Appeals for the ALJ services. This rule will help DATCP coordinate "contested case" processing with the Division of Hearings and Appeals.

### ***Rule Content***

#### **Administrative Law Judge**

Under current rules, the DATCP secretary may appoint an ALJ to hear a DATCP "contested case." This rule clarifies that the secretary may appoint an ALJ from the department of administration (division of hearings and appeals) or another state agency, with the agreement of that agency. An administrative law judge must conduct a DATCP "contested case" according to ATCP 1.

#### **Producer Security; Recovery Proceedings**

DATCP currently administers an agricultural producer security program under ch. 126, Stats., to protect agricultural producers against financial defaults by grain warehouse keepers, grain dealers, milk contractors and vegetable contractors. In the event of a default, DATCP may initiate a recovery proceeding to determine the amount of producer claims allowed under the producer security program. The recovery proceeding is conducted as a "contested case" according to ch. 126, Stats., and ATCP 1. This rule updates ATCP 1 to incorporate current procedures and terminology from ch. 126, Stats., including how recovery proceedings are commenced, how default claims are audited, and what is to be contained in a proposed decision determining claims in a recovery proceeding.

#### **"Contested Case" Hearing Requests and ALJ Assignments**

This rule clarifies current procedures for requesting a "contested case" hearing, and for granting or denying a hearing request, consistent with current standards under ch. 227, Stats. The clarified procedures will help DATCP coordinate ALJ assignments and "contested case" processing with the department of administration (division of hearings and appeals).

Under this rule, as under current rules, the DATCP Secretary will make the initial decision to grant or deny a "contested case" hearing request, and will issue a written notice to the parties. Under this rule, the Secretary must grant or deny a "contested case" hearing request within 30 days after a complete request is filed with the Secretary (compared to 20 days under current rules).

If the Secretary issues a notice granting a “contested case” hearing request, the notice will assign an ALJ and set a date for hearing or for a pre-hearing conference with the ALJ. If the notice sets an actual hearing date, the hearing date may be not sooner than 30 days after the notice is issued (compared to 10 days under current rules). The ALJ may schedule or reschedule a hearing date, as necessary.

### **Hearing on Summary Special Orders**

Under many of its programs, DATCP may issue summary special orders to named persons (without prior notice or hearing) to protect public health, safety or welfare. These may include on-site food holding orders, animal disease control orders, invasive pest control orders, and a variety of other summary special orders. The recipient of a summary special order may request a hearing on that order.

This rule clarifies that the recipient of a summary special order may request an immediate informal hearing or a formal “contested case” hearing, or both. Many cases are resolved with an informal hearing, without the need for a formal “contested case” hearing. Under this rule, an informal hearing must be conducted as soon as reasonably possible, but not more than 20 days after the hearing request (compared to 10 days under current rules). A requester may agree to a later informal hearing date.

Informal hearings are conducted by DATCP managers or staff who have had no prior involvement in the case, and who are authorized to initiate remedial action as necessary. This rule clarifies that informal hearings are not governed by formal “contested case” procedures. If a matter is not successfully resolved by informal hearing, the affected party may request a formal “contested case” hearing.

### **Parties Represented by Attorney**

Under current rules, a party to a formal “contested case” hearing may appear on his or her own behalf or may have a legal representative. Under this rule, the representative must be an attorney who is authorized to practice law in this state. As under current rules, the attorney’s actions are binding on the represented party.

### **ALJ Authority**

This rule clarifies, but does not substantially alter, the authority exercised by an ALJ (including an ALJ from the department of administration, division of hearings and appeals) in a DATCP “contested case.”

Under current rules, only certain DATCP personnel are authorized to issue DATCP subpoenas. Under this rule, if an ALJ from the department of administration (division of hearings and appeals) is appointed by the DATCP Secretary to hear a DATCP contested case, that ALJ may issue DATCP subpoenas to compel the production of testimony and evidence in that case with

the approval of the DATCP Secretary. Under the current rule, any party may ask the ALJ to issue a subpoena on behalf of the requesting party. This rule clarifies that an opposing party may object and request a hearing on the subpoena request.

### **Disclosure of Witnesses and Evidence; Discovery**

Under current rules and this rule, parties must generally disclose (to opposing parties) the witnesses and evidence that they intend to call or offer in a “contested case hearing.” Under this rule, the parties must disclose their witnesses and evidence at least 10 days prior to hearing (current rule requires 7 days).

Under current rules and this rule, parties may have a right to “discover” (via pre-hearing depositions, interrogatories, etc.) relevant information possessed by opposing parties. Under this rule, “discovery” must be completed at least 10 days prior to hearing.

### **Hearing Transcripts**

Under current rules, hearings in DATCP “contested cases” may be electronically recorded or transcribed in writing. This rule clarifies that hearings will be electronically recorded (the normal method used by the department of administration, division of hearings and appeals) unless the ALJ orders a written transcript with the approval of DATCP.

- Under current rules and this rule, any party may request a written transcript.
- Under current rules and this rule, if a written transcript is prepared in response to a request from any party, that party must pay the transcription and copying cost. Under this rule, the party must pay the actual per-page transcription cost (compared to a standard per-page charge of \$1.75 under current rules) plus a copying cost of 25 cents per page. Other parties may obtain copies by paying a copying cost of 25 cents per page.
- Under current rules and this rule, if DATCP orders a written transcript for its own purposes, or for purposes of judicial review, DATCP must pay the transcription cost. Other parties may obtain copies for 25 cents per page.
- Persons who are not parties to a contested case may make public records requests to obtain copies of the contested case transcript or recording.

### **Videoconferencing**

Under this rule, an ALJ may conduct a “contested case” hearing by videoconferencing if current statutory standards for videoconference court proceedings are met.

### **Order of Proof**

This rule clarifies, but does not substantially alter, current rules related to the order of proof in “contested cases.” Generally speaking, the party bringing the case has the initial burden of going forward.

### **Proposed ALJ Decision; Objections**

Under current DATCP rules, the DATCP Secretary is normally the final decisionmaker in a “contested case” unless the Secretary delegates that authority to the ALJ or another official. If the ALJ is not the final decisionmaker, the ALJ must prepare a proposed decision for consideration by the final decisionmaker. The ALJ must provide copies of the proposed decision to the parties. Under this rule, parties have at least 30 days to file objections to the proposed decision (compared to 15 days under current rules).

### **Settlement**

This rule clarifies, but does not substantially alter, current procedures for settling “contested cases.” Parties may settle a “contested case” at any time, subject to the approval of the final decisionmaker. Among other things, the parties may stipulate to a DATCP order resolving the disputed matter.

### **Frivolous Claims; Cost Award**

Under s. 227.485, Stats., and current DATCP rules, if an individual or small business prevails in a “contested case” against DATCP, the ALJ may order DATCP to pay costs and attorney fees to the prevailing individual or small business unless the ALJ finds that DATCP’s losing position was substantially justified. This rule does not change these current rule provisions.

Under s. 227.483, Stats., if an ALJ finds that any party (including a private party or DATCP) has asserted a “frivolous” claim in a contested case, the ALJ may order the party to reimburse another party (including a private party or DATCP) for reasonable costs and attorney fees incurred in defending that claim. This rule incorporates the provisions of s. 227.483, Stats., into ATCP 1. Under this rule, as under s. 227.483, Stats., an ALJ may not find that a claim is “frivolous” unless the ALJ finds at least one of the following:

- The action, claim or defense was initiated or pursued in bad faith, solely for the purpose of harassing or maliciously injuring another.
- The party or party’s attorney knew or should have known that the action, claim or defense was without any reasonable basis in law or equity, and could not be supported by a good faith argument for an extension, modification, or reversal of existing law.

### ***Public Hearings***

DATCP held one public hearing on this rule. DATCP held the hearing on August 27, 2009 in Madison and accepted written comments until September 15, 2009. No persons attended the hearing. No persons offered written hearing comments.

### ***Changes from Hearing Draft***

DATCP made minor editorial changes to the final draft rule in response to comments from the Legislative Council Rules Clearinghouse.

### ***Response to Rules Clearinghouse Comments***

DATCP modified the final draft rule to address the comments from the Legislative Council Rules Clearinghouse.

### ***Fiscal Impact***

This rule will have no significant fiscal impact on DATCP or local units of government. A complete *fiscal estimate* is attached.

### ***Business Impact***

This rule will have no significant effect on business. A complete *business impact analysis* is attached.

### ***Federal Regulations***

A variety of federal regulations govern procedures in federal “contested cases.” However, none of those regulations has a direct bearing on this rule.

### ***Comparison with Adjacent States***

Surrounding states, including Illinois, Indiana, Iowa, Michigan and Minnesota, have their own procedural regulations related to administrative “contested cases” in those states. None of those regulations has a direct bearing on this rule. Wisconsin is generally regarded as having more well-developed “contested case” procedures and standards than most other states.