



State of Wisconsin
Governor Scott Walker

Department of Agriculture, Trade and Consumer Protection
Sheila E. Harsdorf, Secretary

DATE: January 4, 2019

TO: The Honorable Roger Roth
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FROM: Sheila Harsdorf, Secretary
Department of Agriculture, Trade and Consumer Protection

**SUBJECT: Definition of Veterinary Medical Surgery, Ch. VE 1; Final Draft Rule
(Clearinghouse Rule #16-068)**

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.

Background

The Wisconsin Veterinary Examining Board (VEB) proposes a rule revision in Wis. Admin. Code ch. VE 1 to broaden the definition of surgery, removing the limitation in Wis. Admin. Code § VE 1.02 (9) to procedures that are for therapeutic purposes. This rule revision also specifies additional procedures exempted from the definition. In addition, the VEB proposes a rule revision in Wis. Admin. Code § VE 7.02(4) to include those additional exemptions added to the definition, still defined as the practice of veterinary medicine, but which are services a veterinarian may delegate to a certified veterinary technician (“CVT”) to provide. The veterinarian may do so while the CVT is under the direct supervision of the veterinarian who remains personally present on the premises where the CVT provides those services. The VEB has specific authority to adopt rules establishing the scope of practice permitted for veterinarians and veterinary technicians.

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Rule Content

Currently, in Wis. Admin. Code § VE 1.02 (9), the definition of “surgery” for veterinary medical practice is limited to procedures that are for therapeutic purposes. This leaves uncertainty for the profession and the VEB as to whether surgeries for other purposes, including reproduction and cosmetic changes, are included. A change to the definition is important to clarify that surgical procedures are broader than for therapeutic purposes, only, but also identifying additional procedures not considered surgery. The rule clarifies that some procedures not considered surgery also do not fall within the definition of the practice of veterinary medicine, under Wis. Admin. Code § VE 1.02(6).

Additionally, the rule clarifies that other procedures, not falling within the definition of surgery, remain within the practice of veterinary medicine. Finally, in Wis. Admin. Code § VE 7.02(4), the rule creates additional veterinary medical acts, not considered surgery but still within the practice of veterinary medicine, that a veterinarian may delegate to a certified veterinary technician (“CVT”) to provide while under the direct supervision of the veterinarian who remains personally present on the premises where the CVT is providing the services.

Public Hearings

The Department held a public hearing on November 30th, 2016 in Madison, WI. Following the public hearing, the hearing record remained open until December 30, 2016 for additional written comments. The VEB held multiple meetings with presentations from the public at the regularly scheduled meetings on the following dates: July 26th, 2017, October 25th, 2017, and July 25th, 2018.

DATCP’s Rule Changes in Response to Public Hearings and Rules Clearinghouse Comments

In response to stakeholder comments, the VEB amended the rule to list additional items as exempt because they are not considered the practice of veterinary medicine. Additional items were also added to the list of activities that are considered the practice of veterinary medicine but which a veterinarian may delegate to a certified veterinary technician. The VEB also made minor editorial changes suggested by the Legislative Council Rules Clearinghouse.

No comments were received in response either to the posting on the Department external website or the statewide administrative rules website. As noted above, other comments were received at the public hearings and during the period for written comments, and all were considered by the VEB. In addition, there was an objection made to the VEB, as a whole, and the matter received adequate consideration, with notice and opportunities for persons to speak to the VEB on the issue, at a regular VEB meeting, pursuant to Wis. Stat. s. 227.18(3). Information presented at the hearing led the VEB to make further changes to the rule, to accommodate the concerns of this stakeholder. Even after these changes were made, additional written comments were received from other stakeholders followed by comments taken at the next VEB meeting. The VEB gave consideration to these additional comments as it made limitations to its decision from the previous meeting before voting to approve the final rule draft.

The VEB sent the rule to the Governor for approval, only later to withdraw the rule draft to gather more information and engage in further consideration of the impact of the rule. There were discussions by stakeholder groups, and the VEB decided to implement further language modifications that will assist in

ensuring all stakeholders are able to practice veterinary medicine in the best way for their own business models, while still assuring safety in the practice of veterinary medicine.

Small Business Regulatory Review Board Report

The Small Business Regulatory Review Board did not issue a report on this rule.

Fiscal Impact

This proposed rule change is anticipated to affect all licensed veterinarians. This rule change is anticipated to have an effect on small business, as many veterinarian practices that will be subject to this definition change, are small businesses. However, the proposed rule makes minor changes to current rules and is expected to have no economic and fiscal impact. Local governmental units will not be impacted by this rule.

Environmental Impact

This rule does not have an environmental impact.

Analysis and Supporting Documents Used to Determine Effect on Small Business or in Preparation of an Economic Impact Analysis.

The VEB held discussions with stakeholder groups regarding the impact of the proposed rule on small business. The VEB also carefully considered comments from attendees at the public hearing and presentations at regularly scheduled VEB meetings. The VEB directed staff to make changes, based upon the presentations at the hearing and meetings. After the VEB responded to the initial version of the rule draft, many small business stakeholders presented their concerns in writing and at VEB meetings, so the VEB took these additional comments into consideration and made further modifications to the rule draft.

Effect on Small Business

The rule change will impact small business, as many veterinary practices that will be subject to this definition change are small businesses. However, the proposed rule will clarify exclusions from the practice of veterinary medicine, as well as inclusions in the practice that a veterinarian may delegate to a CVT. This will provide certainty to veterinarians concerning the regulation of surgery for reproductive, cosmetic, and other purposes that do not fall clearly within the notion of "therapeutic." The rule includes several additional procedures that a veterinarian may delegate to a CVT, while under the direct supervision of the veterinarian who remains personally present on the premises. These improvements will facilitate the best use of the veterinarian's skills and those of his or her staff in a practice. All entities subject to these rules will receive notice as to practice conduct falling within the VEB's jurisdiction.

This rule will not have a significant adverse economic effect on small business, so it is not subject to the delayed "small business" effective date provided in Wis. Stat. § 227.22(2) (e).

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

There are no federal regulations governing the practice of veterinary medical surgeries.

Comparison with Rules in Adjacent States

None of the surrounding states of Illinois, Indiana, Iowa, Michigan, or Minnesota have their own definition of surgery in practicing veterinary medicine. Illinois does include animal reproductive services in the definition of the practice of veterinary medicine. Iowa does include cosmetic surgery in the practice of the veterinary medicine definition.

Summary of Factual Data and Analytical Methodologies

The VEB developed this rule after consultation with veterinary medical groups and review of other state rules related to veterinary surgery. After the public hearing and meetings, a stakeholder objected to the rule. The stakeholder was concerned about assisted reproductive techniques and the use of certified veterinary technicians, instead of veterinarians, to perform these techniques.

The VEB exercised its jurisdiction, pursuant to Wis. Stat. § 227.18(3), to hear arguments before the entire VEB at a regularly scheduled meeting. The VEB invited presenters, listened to the presentations, and made certain changes to the text of the proposed rule, based upon the presentations. However, after changes were made, many additional stakeholders presented their concerns with the proposed change that would accommodate this particular stakeholder's business model. This feedback was received in writing and at a VEB meeting. The draft of the rule received further modifications. The VEB sent this rule draft to the Governor's office for approval, but the VEB then decided to withdraw the rule to invite further consideration. These discussions between the VEB and stakeholder groups resulted in further language modifications that ensures that all stakeholders will be able to practice veterinary medicine in the best way for their own business models, while still ensuring safety in the practice of veterinary medicine.

Standards Incorporated by Reference

None.

Comments from Stakeholders

Hearing on November 30th, 2016

1. Dr. John Borzillo, DVM, Central Wisconsin Ag Services, submitted written and oral testimony. He expressed concern that the definition of “surgery” might implicate practices performed by livestock owners, who might be suturing the skin of their animals in an emergency situation and giving intravenous injections and IVs to their own animals. In addition, he was not sure that making clear that “surgery” included reproductive and cosmetic, as well as therapeutic procedures, was necessary.

Dr. Borzillo also spoke to the need to clarify procedures, particularly in the reproductive area, as well as other issues that occur in the practice of livestock veterinary medicine, that should not be considered the practice of veterinary medicine.

VEB Response: The VEB believes that, as to the issue of veterinary practices, the new rule is clear as to the demarcation between those surgical procedures that may be delegated by a veterinarian to a certified veterinary technician (CVT), under the direct supervision of a veterinarian while personally present on the premises, and those surgery procedures that are required to be performed by a veterinarian. The rule clarifies those procedures that are not surgical because they are not considered the practice of veterinary medicine, either by statute or long-standing interpretation of the veterinary medical community.

The rule does not address issues, within the Legislative statutory authority, including any changes that could be made in the statute to clarify the definition of the “practice of veterinary medicine” in Wis. Stat. § 89.02(6) and those practices that would not be required to be performed by a licensed veterinary, pursuant to Wis. Stat. § 89.05, but now are required to be, such as pregnancy examinations, pursuant to Wis. Stat. § 89.05(2) (a).

2. The Wisconsin Veterinary Medical Association (WVMA), through Legal Counsel Jordan Lamb, submitted written and oral testimony supporting the change in the definition of “surgery” to clarify that “cosmetic” or “reproductive” veterinary surgical procedures are veterinary surgery, as well as to their position favoring a clear demarcation as to procedures that may be performed by a veterinarian and those that may be delegated to a CVT.

In addition, the WVMA suggested a few additional items, such as tattooing and the insertion of ear tags, which WVMA believes should be included as items not considered “surgery” because they are not the practice of veterinary medicine.

VEB Response: The VEB amended the rule to include the additional items listed above as exempt from the “surgery” rule because they are not considered the practice of veterinary medicine.

3. Dr. Gregg BeVier, DVM, the chief operating officer of Sexing Technologies, generally spoke of the changes in the livestock industry that rules, such as VEB’s current proposal, do not keep pace with. Sexing Technologies, an Assisted Reproductive Techniques (“ART”) provider with facilities in Wisconsin, believes that the VEB should be facilitating the advancement of the most

efficient technologies, especially regarding livestock veterinary practices. Sexing Technologies believes the VEB should not try to use administrative rules to hamper that effort.

VEB Response: The VEB considered the issues raised by Dr. BeVier, in conjunction with other significant input from industry stakeholders statewide. The VEB believes that the listed services are within the practice of veterinary medicine, by its statutory definition, and that clarification of the definition, in rule, is a transparent method to give certainty, uniformity, and consistency to licensees.

Written Comments Received during VE 1 Revising Process Pre-July 26th, 2017 VEB Meeting

4. On March 7, 2017, the VEB received an e-mail from CVT Teri Raffel, an instructor in the Madison College CVT program. Ms. Raffel commented that euthanasia by injection should not be considered surgery because it is not considered a practice of veterinary medicine. In addition, there are other surgical-type procedures, including: Arterial as well as IV catheterization, purse string and butterfly sutures, and fine needle aspirate of a mass, all of which are currently being performed by CVTs and should be included in the list of delegable tasks.

VEB Response: The VEB agreed that these items should all be made a part of the rule.

5. On April 7, 2017, Dr. Gregg BeVier, DVM, of Sexing Technologies, wrote a letter to the VEB re-iterating the company's position that the rule draft under consideration at that time would broaden the current definition of veterinary medical surgery to include numerous ART procedures, currently performed by certified veterinary technicians at their facilities, that would need to be performed by veterinarians, whom he described as difficult to recruit and in need of higher pay.

VEB Response: The VEB, at its April 26, 2017 meeting, decided that the Board could not yet make an informed decision as to whether these ART procedures should be performed by a certified veterinary technician or a veterinarian. For that reason, the VEB scheduled an additional public meeting to receive oral testimony during its July 26, 2017 meeting to gather additional information and input concerning the Board's decision to deny an exemption for bovine embryo transfer under the definition of "surgery" as enumerated in Wis. Admin. Code § VE 1.02(9). Because Dr. Greg BeVier of Sexing Technologies lodged objections, the VEB invited Dr. BeVier, or another Sexing Technologies representative, to present its position before the entire Board. The VEB invited WVMA experts to present testimony as well.

July 26th, 2017 VEB Meeting

6. Dr. BeVier and Michelle Kussow, on behalf of Sexing Technologies, appeared before the VEB Board in favor of a bovine embryo transfer exemption. Dr. Jon Schmidt of Trans-Ova Genetics and WVMA Legal Counsel Jordan Lamb appeared to provide further testimony on an exemption.

VEB Response: The Board directed Board Legal Counsel Cheryl Daniels to draft rule language for possible consideration at the October meeting stating that the piercing of reproductive tissues

for the performance of reproductive technologies, including amniocentesis, embryo collection and transfer, follicular aspiration, and transvaginal oocyte collection and recovery, is an activity exempt from the definition of “surgery” but considered the practice of veterinary medicine, which may be delegated to certified veterinary technicians under the direct supervision of a licensed veterinarian.

Written Comments Prior to October 25th, 2017 VEB Meeting

7. Prior to the meeting, several individuals wrote e-mails and letters attached to e-mails. All of these e-mails and letters expressed opposition to the draft of language that would allow ART techniques to be performed by certified veterinary technicians. The commenters felt strongly that, for the health and welfare of the animals involved, these procedures are generally techniques that require the skills of veterinarians.
 - a) Dr. Robert Rowe, DVM, of Verona, WI on October 18th. Dr. Rowe stated that ART techniques are almost all non-surgical, but he indicated that the skills needed to perform these procedures were ones that require being performed by a veterinarian, for the health and safety of the animals involved.
 - b) Dr. John Schneller, DVM, of Thousand Hills Embryo Transfer in Plain, WI on October 20th.
 - c) Dr. Chester Rawson, DVM, from Markesan, Wisconsin on October 22nd.
 - d) Dr. David Duxbury, DVM, of Midwest Embryo Transfer Service, LLC, in Osceola, WI, on October 22nd.
 - e) Dr. Robert Steiner, DVM, of Lodi, Wisconsin on October 22nd.
 - f) Dr. Byron Williams, DVM, of EmQuest ET Service in Plymouth, Wisconsin, on October 23rd.
 - g) Dr. Dagmara Schroeder, DVM, of Stateline Veterinary Service in Darien, Wisconsin on October 23rd.
 - h) Mitch Breunig, dairy producer for Mystic Valley Dairy, LLC, in Sauk City, Wisconsin on October 23rd.
 - i) Dr. John Prosocki, DVM, VP of the American Embryo Transfer Association, of Wittenburg Embryo Transfer in Wittenburg, Wisconsin on October 23rd.
 - j) Gary Janssen, dairy producer for Illinois-based Golden Oaks Farm using a Wisconsin ET company, on October 23rd.
 - k) Tom Kestell, dairy producer for Ever-Green-View Farms in Waldo, Wisconsin, on October 23rd.
 - l) Dr. Greg Schueller, DVM, of Sunshine Genetics in Whitewater, Wisconsin, on October 23rd.
 - m) Dr. Scott Armbruster, DVM, of Paradocs Embryo Transfer, Inc. in Green Bay, WI, on October 24th.
 - n) Dr. Dan Gander, DVM, of Stateline Veterinary Service in Darien, Wisconsin, on October 24th.
 - o) Dr. Brent Beck, DVM, Beck Embryo Transfer LLC of Cashton, Wisconsin, on October 25th.
 - p) Dr. Ashley Swenson, DVM, of Midwest Embryo Transfer in Osceola, Wisconsin on October 25th.

October 25th, 2017 VEB Meeting

8. At this VEB meeting, several additional comments were received by the VEB Board concerning the proposed drafted language provision that would allow ART techniques to be performed by certified veterinary technicians.

- a) Jordan Lamb, representing the WVMA, stated that although the WVMA would not oppose a change to the administrative code that would allow delegation of certain ART to Wisconsin licensed veterinary technicians who are acting under the direct supervision of a Wisconsin licensed veterinarian who is on the premises with the veterinary technician, the WVMA did request the following amendments be made:

VE 1.02 (9) (b) 7: “7. Performing assisted reproductive technologies on livestock, including amniocentesis limited to, embryo collection and transfer, follicular aspiration, and transvaginal oocyte collection and recovery.

VE 7.02 (4) (h): “(h) Performing assisted reproductive technologies on livestock, including amniocentesis limited to, embryo collection and transfer, follicular aspiration, and transvaginal oocyte collection and recovery.

- b) Dr. Greg Schueller, DVM, representing Sunshine Genetics and the American Embryo Transfer Association, discussed VE 1 and VE 7 – Final Draft to amend Wis. Admin. Code VE 1.02 (9), relating to the definition of veterinary medical surgery and VE 7.02 (4), relating to delegation of veterinary medical acts. Dr. Schueller expressed strong opposition to the proposed ART draft language. He advised that when he talked to a farmer from Oklahoma, a state that currently does not require veterinarians to complete embryo transfers, he learned the reason CVTs were allowed to perform ART procedures was due to a lack of veterinarians in Oklahoma. However, that is not the case in Wisconsin. Dr. Schueller cautioned that it is very difficult to know what is happening inside of the animals.
- c) Dr. Harry Momont, DVM, representing the School of Veterinary Medicine at the University of Wisconsin - Madison as the Chief of Services for the Large Animal Hospital, advised that the clinical training program for UW deals with ART issues. Dr. Momont stated that there is a fear that the proposed ART changes will discourage people from entering the practice of veterinary medicine. VEB Board member Phillip Johnson inquired on foreign students who are getting a US credential.
- d) Craig Carncross, representing his farm as a dairy producer, spoke regarding the proposed changes to IVF work. He is opposed to the changes to the rule. VEB Board member, Dr. Robert Forbes, discussed the role of the VEB to protect the public.
- e) VEB Chair, Dr. Phillip Johnson, requested additional information from Dr. Schueller. Dr. Schueller advised that these ART procedures are currently almost exclusively non-surgical. He stated that amniocentesis is not performed. Dr. Schueller also advised that veterinarians are readily available for hire by practices performing ART.

VEB Response: The VEB discussed the additional information received. The VEB found the additional testimony and written comments helped clarify the issue. The VEB emphasized the presence of several livestock operator consumers of these services, who opposed allowing a blanket exemption for ART procedures to be performed by CVTs.

Having taken into consideration all of the stakeholder input and feedback, the VEB voted unanimously to strike the proposed ART draft language in Wis. Admin. Code § VE 1.02 (9) (b) 7 in its entirety. The VEB indicated their understanding that the assisted reproductive techniques are not surgical procedures. In addition, the VEB amended Wis. Admin. Code § VE 7.02(4) (h) to include “Performing embryo implantation on livestock” as the only ART procedure that may be performed by a certified veterinary technician (CVT) under the direct supervision of a veterinarian while personally present on the premises.

July 25th, 2018 VEB meeting

- a) Jordan Lamb, representing the WVMA, stated that although the WVMA would not oppose a change to the administrative code that would allow delegation of certain ART to Wisconsin licensed veterinary technicians who are acting under the direct supervision of a Wisconsin licensed veterinarian who is on the premises with the veterinary technician, the WVMA did request the following amendments be made:

“VE 1.02(9) is amended to read: (b) Activities considered the practice of veterinary medicine, but which a veterinarian may delegate to a certified veterinary technician, as specified in s. VE 7.02(4), as follows.

7. Performing amniocentesis, embryo, collection and transfer, follicular aspiration, and transvaginal oocyte collection and recovery on livestock.

VE 7.02(4) (h) is created to read: (h) Performing amniocentesis, embryo collection and transfer, follicular aspiration, and transvaginal oocyte collection and recovery on livestock.

- b) John Prosaski, President of the American Embryo Transfer Association and owner of a dairy farm, voiced support for the original rule language regarding embryo transfer requirements.
- c) Aaron Prosaski, Sunshine Genetics, voiced support for the original rule language regarding embryo transfer requirements.
- d) Ashley Swenson, representing herself, supported the original rule language regarding embryo transfer requirements.
- e) Jordan Lamb, Representing the WVMA, supported the changes to surgery rule and the definition.
- f) David Duxbury, Representing Midwest Embryo Transfer Service, supported the original rule language regarding embryo transfer by a Certified Veterinary Technician.