



State of Wisconsin
Governor Tony Evers

Department of Agriculture, Trade and Consumer Protection
Bradley M. Pfaff, Secretary

DATE: April 12, 2019

TO: The Honorable Roger Roth
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Room 220 South, State Capitol
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The Honorable Robin Vos
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FROM: Bradley M. Pfaff, Secretary
Department of Agriculture, Trade and Consumer Protection

SUBJECT: Flammable, Combustible and Hazardous Liquids, ch. ATCP 93; Final Draft Rule (Clearinghouse Rule #17-092)

Introduction

The Department of Agriculture, Trade and Consumer Protection (“DATCP”) is transmitting this rule for legislative committee review, as provided in Wis. Stat. § 227.19 (2) and (3). DATCP will publish notice of this referral in the Wisconsin Administrative Register, as provided in Wis. Stat. § 227.19 (2). This rule repeals and recreates Wis. Admin. Code ch. ATCP 93, which regulates flammable, combustible, and hazardous liquids in Wisconsin.

Background

The proposed rule repeals and recreates ATCP 93, thereby updating an administrative rule that has not been significantly updated since 2008.¹ The content of the rule reflects input from various sources, including: recommendations made by the Department of Safety and Professional Services prior to the program’s transfer to DATCP in 2013; feedback provided by stakeholders and businesses regulated under ATCP 93; and agency concerns about the responsibilities of Class A, B, and C operators.

The substance of the changes to ATCP 93 fall into six broad categories:

¹ Although no substantive changes to the rule have been made since the 2008 update, DATCP has periodically made minor revisions to rule language pertaining to forms and hyperlinks over the years.

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- Harmonizing the rule with current federal standards, especially those required by the Environmental Protection Agency;
- Addressing the necessary changes arising from the inter-departmental transfer of the storage tank program from DSPS to DATCP in 2013;
- Updating technical standards incorporated by reference;
- Eliminating provisions that are no longer in effect, as well as unnecessary explanatory notes;
- Modifying outdated terminology; and
- Clarifying ambiguous language.

Additional changes include the correction of typographical errors, form number changes, name changes to certain documents, and changed information concerning the availability of documents (hyperlinks or through Document Sales).

Rule Content

This rule will, if approved, repeal and recreate Wis. Admin. Code ch. ATCP 93, Flammable, Combustible and Hazardous Liquids, in its entirety.

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

DATCP incorporated new federal requirements and regulations from the U.S. Environmental Protection Agency (EPA). The federal government relies on many of the industry standards that DATCP proposes to adopt in the tables listed in ATCP 93.200. The EPA made a number of changes that went into effect in October 2018. The new ATCP 93 harmonizes with the 2015 and 2018 requirements set by the EPA.

Federal regulations for both aboveground and underground storage tanks address groundwater and surface water protection. The planned rule changes are consistent with these federal regulations.

The new rule maintains the requirement that if a substance release must be reported under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), such release be reported.

All federal financial requirements in the previous subchapter VII (Financial Responsibility) have been maintained.

Comparison with Rules in Adjacent States

In Minnesota, administrative rules governing a similar program are found in the Minnesota Pollution Control Agency section (Minnesota rules part 7105, Underground Storage Tanks; Training; part 7150, Underground Storage Tanks; Program; and part 7151, Aboveground Storage of Liquid Substances). To a limited degree, the State Fire Marshal, working out of the Minnesota Department of Public Safety, promulgates other rules dealing with the safety of storage tanks. Minnesota is currently undergoing rule revision and plans to complete their revision this year.

Illinois has a similar program reflected in administrative rules found in the Illinois Fire Protection code section (Title 41), particularly 41 Ill. Adm. Code 172 to 180.

Iowa has a similar program in administrative rules found in code sections pertaining to the State Fire Marshal, particularly 661 Iowa Administrative Code sections 221 to 228. Other rules governing underground storage tanks appear in 567 Iowa Administrative Code sections 134 to 136, which pertain to the Iowa Department of Natural Resources. Revisions to the Natural Resources rules have been published for public comment, and Iowa expects to finalize this rulemaking in the spring of 2019.

Michigan has a similar program in rules within the administrative code sections pertaining to the Michigan Department of Licensing and Regulatory Affairs, particularly Mich. Administrative Code R 29.2101 to 29.2174, R 29.5601 to R 29.5917, and R29.6101 to R 29.6156.

Summary of Factual Data and Analytical Methodologies

To develop this rule, DATCP considered multiple changes recommended by the Wisconsin Department of Safety and Professional Services before the program transfer. An internal committee made a number of recommendations that were shared and then modified in three stages: a September 2011 meeting with the Wisconsin Petroleum Marketers and Convenience Store Association and the Cooperative Network; after a November 2011 *Federal Register* notice of proposed changes by the EPA; and other changes suggested before the program transferred to DATCP in 2013.

Due to the size and complexity of this rule and the tanks inspection program, DATCP shared the draft of the proposed Wis. Admin. Code ch. ATCP 93 with numerous stakeholders in three stages: subchapters zero through three were shared in June 2015; subchapters zero through six were shared in July 2016; and the entire rule, in draft, was shared in March 2017. Stakeholders who received the draft rule in three increments included the Wisconsin Petroleum Council, the Wisconsin Petroleum Equipment Contractors Association, Wisconsin Petroleum Marketers and Convenience Store Association, Cooperative Network, Kwik Trip, and WE Energies.

DATCP stressed that the drafts were preliminary and subject to change both from internal and external input. DATCP pointed out that the ability to comment on these drafts would not circumvent any aspect of the formal rulemaking process required by statute. DATCP emphasized that an opportunity to comment would continue up to and including this proposed order to adopt the rule. Consequently, DATCP received comments throughout the promulgation process, considered the suggested changes or requests for clarifications, made changes to the draft language based upon stakeholder comments, and responded to the stakeholders before release of the public hearing draft rule.

Where applicable, DATCP compared Wisconsin law and procedures with those of neighboring states. DATCP discussed possible changes at various conferences and training activities over the past five years throughout Wisconsin and shared the final informal draft with local program operators.

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

The analysis of the potential effect of the rule on small business included internal discussions regarding whether any changes would require equipment changes or any significant expansion in labor costs for affected businesses. In the course of three successive releases of the draft rule to potentially affected parties, DATCP encouraged those parties to report if certain proposed requirements would impact their business practices either financially or administratively. In cases where stakeholders expressed financial concerns about certain provisions, DATCP elected not to pursue those provisions.

Effect on Small Business

Although many of the businesses affected by this rule are “small businesses,” the proposed rule changes will generally have a minimal impact on small businesses in the state. Conforming to standards may have an economic impact on certain businesses within the regulated industries. However, the majority of the proposed rule simply updates and reorganizes provisions in current rules; therefore, adoption should have minimal, if any, economic impact on small businesses.

Small Business Regulatory Review Report

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

Hearings

DATCP held four hearings on the draft rule in March 2018:

- Lee Dreyfus State Office Building in Waukesha on March 1, 2018;
- Prairie Oaks State Office Building in Madison on March 5, 2018;
- Green Bay State Office Building on March 15, 2018; and
- Chippewa Valley Technical College in Eau Claire on March 19, 2018.

After the final hearing, DATCP accepted formal written comments for an additional four weeks. An internal committee considered all internal and external recommended changes.

List of Comments and Department Response

The following is a list of the persons who submitted written comments on the proposed rule during the public comment period, the position taken and/or comments submitted by the commenter, and the Department’s response.

<i>Comments: Oral, Written, or Letter</i>	<i>Presenter and Group Represented</i>	<i>Comments or Recommendations</i>	<i>Agency Response</i>
Letter	Raghu Singh, O M Enterprises	I believe that it is a visible conflict of interest if an employed TSSA of a Tank Specialty Firm conducts site assessment for his/her employer under the supervision of his/her firm's excavation contractor.	93.240 (14); This has been an industry practice for years and changing the practice would result in undue burdens to industry.
Letter	Raghu Singh, O M Enterprises	Employees of Tank Specialty Firms as Tank-System Site Assessor OM believe that there is a conflict of interest if an employee of the WDATCP registered tank specialty firm works as a site assessor for his/her own tank contractor firm.	93.240 (15); This has been an industry practice for years and changing the practice would result in undue burdens to industry.
Letter	Raghu Singh, O M Enterprises	Summary I believe that a "Tank-System Site Assessor" must have the professional liability insurance. The TSSA should not be a contractor because of the conflict of interest. Since OM is not a contractor firm, I believe that the contractor pollution liability coverage should not be required. The annual insurance amount increased from \$1,377.00 to \$2,997.30.	93.240 (14) and 93.240 (15); This has been established policy for decades, and the agency sees no need to change at this time.
E-Mail	Terri Lovicott, DATCP	Can language in the change of ownership be added that the department does not recognize a land contract purchase as a final sale and that we list the purchaser as a lessee until the sale is final?	Changes were made to 93.150 to reflect this policy.
E-Mail	Melissa Schultz, WE Energies	Page 177 Line 13 the link for the form doesn't work. I didn't check the other links but I wanted to review the form and it says "page is not found"	Staff emailed and addressed this issue for the final draft.

E-Mail	Melissa Schultz, WE Energies	Page 45 line 26 – the definition of tank system. For a hazardous chemical tank that doesn't have a dispenser where does the tank system end? We've been under the impression that once the product reaches a pump it's no longer in the tank system. Could you clarify that for me?	93.050 (115); This does not require a change in the rule, but DATCP will follow up with commenter.
E-Mail	Melissa Schultz, WE Energies	Page 144 line 33 – Testing of emergency shutoffs. The functionality verification form seems to ask for verification that the shear valves are tested annually. The emergency electrical shutoff indicates to me that the emergency stop button by the dispensers needs to be tested. Will the TR-WM-139 form have an additional question or verification? Or will another agency form be required? That kind of goes into 93.440 (11) (a) (7) – is that referencing shear valves or emergency shut off switches that shut down the power to the pump and dispenser?	93.370; The electrical emergency stop button needs to be tested under this section. Staff will add this to TR-WM-139. Staff added a 93.400 (11) (a) 7m. to reflect the requirement to document the test of the emergency electrical shutoff. This specifically references the shear valves (the impact and emergency shutoff valves). Commenter meant to reference 93.400 (11) (a) 7.
Internal	EPA Consultation	ATCP 93.510 (3) (b) and (4) (a) 4. did not meet criteria that the EPA would accept.	Amended text in both locations.

Changes from Hearing Draft

Few public comments were received either at the hearings or in writing, probably because DATCP staff had already considered hundreds of stakeholder comments at earlier points within a multi-year process. An internal DATCP committee considered all internal and external recommended changes. At this stage, changes from the hearing draft to the final draft were mainly clarifications of existing language. In two cases, DATCP staff discovered errors from earlier “redline” versions sent to stakeholders that had not been reflected in the hearing draft.

DATCP received a number of comments from the Wisconsin Legislative Council Rules Clearinghouse and considered them. Some of the comments addressed errors that had been in the rule previously; others led to additional clarification of proposed changes.

Standards Incorporated by Reference

The Department requested approval from the Attorney General to incorporate by reference a number of nationally-recognized standards relating to flammable, combustible, and hazardous liquids into ATCP Chapter

93 of the Wisconsin Administrative Code. In a letter on October 22, 2018, pursuant to the authority under Wis. Stat. § 227.21, the Attorney General approved the Department's request for incorporation by reference the requested standards into Wisconsin Administrative Code, § ATCP Chapter 93.

DATCP Contact

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

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