

Clearinghouse Rule 97-043

STATE OF WISCONSIN)
) ss.
DEPARTMENT OF AGRICULTURE,)
TRADE AND CONSUMER PROTECTION)

Clearinghouse Rule
No. 97-043

CERTIFICATION:

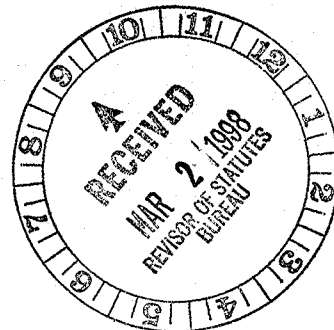
I, Ben Brancel, Secretary of the State of Wisconsin Department of Agriculture, Trade and Consumer Protection, and custodian of the department's official records, hereby certify that the attached rulemaking order relating to groundwater protection was signed and adopted by the department on December 9, 1997.

I further certify that I have compared the attached copy to the original on file in the department, and that the attached copy is a complete and accurate copy of the original.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the official seal of the Department at the Department offices in the city of Madison, this 8 day of December, 1997.

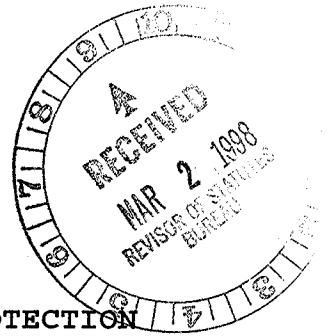


Ben Brancel
Secretary



4-1-98

Final Draft
12/5/97



ORDER OF THE STATE OF WISCONSIN
DEPARTMENT OF AGRICULTURE, TRADE AND CONSUMER PROTECTION
ADOPTING, AMENDING OR REPEALING RULES

1 The state of Wisconsin department of agriculture, trade and
2 consumer protection hereby adopts the following order to create
3 ATCP 31.03(1)(d) and 31.08(4), relating to standards for repealing
4 site-specific prohibitions against the use of pesticides found in
5 groundwater.

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

Statutory authority: ss. 93.07(1) and (9), 94.69(9),
160.19(2) and 160.21(1), Stats.

Statutes interpreted: ss. 94.69, 160.19(2) and 160.21(1),
Stats.

This rule amends current groundwater protection rules under ch. ATCP 31, Wis. Adm. Code. This rule clarifies current standards for repealing pesticide use prohibitions which the department has imposed in response to groundwater contamination findings.

Background

The department of agriculture, trade and consumer protection ("DATCP") regulates the use of pesticides to protect public health and the environment. Under the state groundwater law, DATCP regulates pesticides to prevent groundwater contamination and maintain compliance with groundwater standards adopted by the department of natural resources ("DNR").

Under the groundwater law, DNR adopts numerical standards for groundwater contaminants including pesticides. For each contaminant, DNR adopts a preventive action limit and an enforcement standard. The preventive action limit is a "yellow light" which normally requires some management action (e.g., reduced application rates), but not necessarily a ban on use. The enforcement standard is a "red light" which presumptively calls for a local ban on use. Current DNR standards are contained in ch. NR 140, Wis. Adm. Code.

Current Rule

Chapter ATCP 31, Wis. Adm. Code, establishes general standards for DATCP's groundwater protection program. ATCP 31 identifies actions which DATCP may take in response to findings of groundwater contamination, and spells out "generic" criteria for choosing among those alternative actions.

Subject to the "generic" criteria in ATCP 31, DATCP may develop substance-specific groundwater protection strategies for pesticides such as atrazine. DATCP's current atrazine rule under ch. ATCP 30, Wis. Adm. Code, reflects the "generic" criteria contained in ATCP 31.

Currently, under ATCP 31, if a reliable well test shows that a pesticide concentration in groundwater attains or exceeds the DNR enforcement standard ("red light") for that pesticide:

- DATCP must prohibit the use of that pesticide in that local area unless DATCP is shown, and determines to a reasonable certainty by the greater weight of credible evidence, that an alternative response will achieve compliance with the enforcement standard. The fact that contemporaneous tests of other wells show lower concentrations does not, by itself, relieve DATCP of the obligation to impose a local prohibition.
- The scope and duration of the prohibition must be reasonably designed to restore and maintain compliance with the enforcement standard at the initial test site, and at other downgradient points to which the pesticide contamination may migrate.
- The prohibition may remain in effect indefinitely unless DATCP is shown, and determines, that resumption of the pesticide use is not likely to cause a renewed or continued violation of the enforcement standard.

Repealing Pesticide Use Prohibitions; Proposed Rule

Under this rule, the department may repeal or modify a site-specific prohibition against pesticide use if all of the following conditions are met:

- Tests on at least 3 consecutive groundwater samples, drawn from each well site in the prohibition area at which the pesticide concentration previously attained or exceeded the enforcement standard, show that the pesticide concentration

at that well site has fallen to and remains at or below a level specified by the department in a substance-specific rule (see below). The 3 consecutive samples must be collected at each well site at intervals of at least 6 months, with the first sample being collected at least 6 months after the effective date of the prohibition. A monitoring well approved by the department may be substituted for any well site which is no longer available for testing.

- Tests conducted at other well sites in the prohibition area, during the same retesting period, reveal no other concentrations of the pesticide that exceed the level specified by the department by substance-specific rule (see below).
- The department determines, based on credible scientific evidence, that renewed use of the pesticide in the prohibition area is not likely to cause a renewed violation of the enforcement standard.

Under this rule, the department may do any of the following as a condition to repealing a site-specific prohibition:

- Provide for continued groundwater monitoring at well sites in the prohibition area (or at monitoring wells substituted for those well sites which are no longer available for testing). At a minimum, well sites which previously tested at or above the enforcement standard must be tested during the second and fifth years after the department repeals the site-specific prohibition.
- Impose pesticide use modifications (e.g., lower use rates or different application methods) which are reasonably designed to achieve and maintain compliance with the preventive action limit at all well sites in the prohibition area which previously tested at or above the preventive action limit, and at all downgradient points to which the pesticide contamination may migrate from those points. DATCP may continue to prohibit pesticide use in smaller areas where, because of special local conditions (e.g., susceptible soils), a continued ban is needed to maintain compliance with the enforcement standard.

This rule requires the department to specify, by substance-specific rule (e.g., for atrazine), a level to which concentrations of a pesticide substance must fall before the department may repeal a site-specific prohibition against the use of that pesticide. The specified level must be sufficiently below the enforcement standard so that, when groundwater test results reach the specified level, the department can reasonably conclude

that concentrations in the prohibition area are below and can be expected to remain below the enforcement standard.

1 **SECTION 1.** ATCP 31.03(1)(d) is created to read:

2 ATCP 31.03(1)(d) A monitoring well approved by the
3 department under s. ATCP 31.08(4)(a)1. as a substitute for another
4 point of standards application which is no longer available for
5 testing.

6 **SECTION 2.** ATCP 31.08(4) is created to read:

7 ATCP 31.08(4) **REPEALING A SITE-SPECIFIC PROHIBITION.** (a)

8 The department may repeal or modify a site-specific prohibition
9 under sub. (1) if all of the following conditions are met:

10 1. Tests on at least 3 consecutive groundwater samples,
11 drawn from each point of standards application in the prohibition
12 area at which the concentration of the pesticide substance
13 previously attained or exceeded the enforcement standard, show
14 that the concentration of that pesticide substance at that point
15 of standards application has fallen to and remains at a level
16 which is at or below the level specified by the department under
17 par. (c). The 3 consecutive samples shall be collected from each
18 point of standards application at intervals of at least 6 months,
19 with the first sample being collected at least 6 months after the
20 effective date of the site-specific prohibition. A monitoring
21 well approved by the department may be substituted for any point
22 of standards application which is no longer available for testing,
23 provided that the monitoring well qualifies as a point of

1 standards application under s. ATCP 31.03.

2 2. Tests of groundwater samples drawn from other points of
3 standards application in the prohibition area during the retesting
4 period under subd. 1., if any, reveal no other concentrations of
5 the pesticide substance that exceed the level specified by the
6 department under par. (c).

7 3. The department determines, based on credible scientific
8 evidence, that renewed use of the pesticide in that prohibition
9 area is not likely to cause a renewed violation of the enforcement
10 standard.

11 NOTE: If a site-specific prohibition is created by rule, it
12 can only be repealed or modified by rule. If a site-
13 specific prohibition is created by special order under
14 s. 94.71(3)(c), Stats., it can only be repealed or
15 modified by special order. This subsection establishes
16 conditions which must be met before the department
17 adopts a rule or issues a special order repealing or
18 modifying a site-specific prohibition. The subsection
19 does not, by itself, repeal or modify any site-specific
20 prohibition.

21
22 The department plans to continue its program of
23 groundwater research, and will continue to monitor
24 groundwater in areas where there is significant
25 potential for repealing or modifying a prohibition.
26 However, the department is not legally obligated to
27 conduct specific groundwater research or perform
28 specific groundwater tests at the request of a person
29 who wishes to have a site-specific prohibition repealed
30 or modified.

31
32 The department may accept test results from other
33 sources if the department considers those test results
34 reliable. Persons who question the reliability of test
35 results used to maintain, modify or repeal a
36 prohibition may submit information showing why the test
37 results are unreliable. If the department finds that
38 there are reasonable grounds to question the
39 reliability of any test result, the department will
40 attempt to perform additional sampling and testing to

1 verify the test result.

2
3 (b) As a condition to repealing or modifying a site-specific
4 prohibition under par. (a), the department may do any of the
5 following:

6 1. Provide for continued groundwater monitoring at points of
7 standards application where the concentration of the pesticide
8 substance previously attained or exceeded the enforcement
9 standard, or at monitoring wells substituted for those points of
10 standards application under par. (a)1. At a minimum, groundwater
11 from those points of standards application or monitoring wells
12 shall be sampled and tested during the second and fifth years
13 after the department repeals a site-specific prohibition.

14 2. Impose pesticide use modifications that are reasonably
15 designed to achieve and maintain compliance with the preventive
16 action limit at all points of standards application in the
17 prohibition area where concentrations of the pesticide substance
18 attained or exceeded that limit, and at all downgradient points to
19 which that pesticide substance may migrate from those points of
20 standards application. The department may continue to prohibit
21 pesticide use in portions of the original prohibition area where,
22 because of conditions unique to those smaller areas, a prohibition
23 is justified under sub. (2).

24 NOTE: For example, as a condition to repealing a pesticide
25 use prohibition, the department may limit pesticide
26 application rates and methods of application where
27 appropriate, to achieve and maintain compliance with
28 the preventive action limit. The department may
29 continue to prohibit pesticide use in portions of the

1 original prohibition area where, because of conditions
2 unique to those smaller areas (e.g., unique soil
3 types), nothing short of a prohibition will prevent a
4 renewed violation of the enforcement standard.
5

6 The repeal of a prohibition area does not affect any
7 responsibility which the department has under s. ATCP
8 31.07 to take other appropriate action to minimize the
9 concentration of the pesticide substance where
10 technically and economically feasible, and to restore
11 and maintain compliance with the preventive action
12 limit. The department may also reinstate a repealed
13 prohibition area if groundwater testing at a point of
14 standards application shows an increasing trend of
15 pesticide contamination, suggesting that contamination
16 may again attain or exceed the enforcement standard.
17

18 (c) The department shall by rule specify a level to which
19 concentrations of a pesticide substance must fall before the
20 department may repeal or modify a site-specific prohibition under
21 par. (a). The specified level shall be sufficiently below the
22 enforcement standard so that, when groundwater test results under
23 par. (a)1. and 2. fall at or below the specified level, the
24 department can reasonably conclude that groundwater concentrations
25 in the prohibition area are below and can be expected to remain
26 below the enforcement standard.

27 **EFFECTIVE DATE.** The rules contained in this order shall take
28 effect on the first day of the month following publication in the
29 Wisconsin administrative register, as provided under s.
30 227.22(2)(intro.), Stats.

Dated this 8 day of Dec, 1997

STATE OF WISCONSIN,
DEPARTMENT OF AGRICULTURE,
TRADE AND CONSUMER PROTECTION

By Ben Brancel
Ben Brancel,
Secretary