



State of Wisconsin  
Governor Scott Walker

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**Department of Agriculture, Trade and Consumer Protection**  
Ben Brancel, Secretary

**DATE:** January 8, 2016

**TO:** Board of Agriculture, Trade and Consumer Protection

**FROM:** Ben Brancel, Secretary *Ben Brancel*  
Karley Downing, Office of Legal Counsel *Karley Downing*

**SUBJECT:** ATCP 1 – Issuing administrative special orders; Hearing Draft Rule

**PRESENTED BY:** Karley Downing

**REQUESTED ACTION:**

At the January 19, 2016, Board meeting, the Department will ask the Board to authorize public hearings on a proposed rule to modify ch. ATCP 1 (Administrative Orders and Contested Cases). The proposed rule allows division administrators or staff to issue most of the special orders under s. ATCP 1.03(2), Wis. Adm. Code. This will allow for clarification of the Secretary's responsibility to hear any appeal of a special order under s. ATCP 1.06, Wis. Adm. Code. The proposed rule also amends s. ATCP 1.05(1) and (3)(f) to clarify that, if a division administrator is designated to sign a special order, then the complaint seeking the special order must be signed by a different designee within the division.

**SUMMARY:**

*Background*

The Department administers a wide range of statutes, including chs. 88, 91 to 100, 126 and 136, Wis. Stats. In the administration of these statutes, DATCP may issue administrative orders such as license suspensions, administrative injunctions (e.g., orders prohibiting unfair business practices), hazardous product bans, holding orders to prohibit the distribution of adulterated food or commodities, plant and animal quarantine orders, orders condemning adulterated food or diseased animals, and a variety of other orders specified by statute.

Currently, under s. ATCP 1.03(2), Wis. Adm. Code, some types of orders may be issued by the Department's division administrators or staff, while others may only be issued by the Department's Secretary or designee. Generally, all of these orders may be appealed under s. ATCP 1.06, Wis. Adm. Code.

The authority to grant or deny a request for hearing rests with the Secretary, under s. ATCP 1.06(3), Wis. Adm. Code. The Secretary may choose to be the decisionmaker in an informal hearing. In addition, the final decisionmaker for any contested case is either the Secretary, or a designated final decisionmaker appointed by the Secretary, as defined in s. ATCP 1.01(13), Wis. Adm. Code. If the Secretary, or other appointed final decisionmaker, is the only person who may issue an initial special order, the Secretary is precluded from exercising appellate jurisdiction which is a specific statutory duty of the Secretary. The Secretary has this appellate jurisdiction to ensure that decisions in individual cases, while conforming to the law, are consistent

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with similar past cases and harmonized with broader, important public policies also within the Secretary's jurisdiction. These authorities granted to the Secretary should not be abrogated by a rule which limits, in large part, the Secretary's roles as a consistent appellate decisionmaker harmonizing final decisions with public policies.

### *Rule Content*

The proposed rule allows special orders to be issued by a division administrator so that the Secretary may then exercise the duty to oversee any division's action by granting and deciding an informal hearing or contested case hearing, if the special order is appealed.

In addition, if a division administrator may be designated to sign an initial special order, the division administrator must also designate another person to sign the complaint seeking the special order. The proposed rule makes this amendment to the rule on division complaints.

The one special order that will continue to be signed by the Secretary or his designee, and not by a division, is an order determining claims in a recovery proceeding, under s. ATCP 1.08, Wis. Adm. Code. Pursuant to subch. VII of ch. 126, Wis. Stats., the Division of Trade and Consumer Protection initiates the proceeding and drafts a proposed order. Only the Secretary or appointed final decisionmaker may sign the final order in these cases, even where a contested case hearing is not needed. These claims determination orders are always a final order of DATCP, as are all decisions in other contested case proceedings and all are issued by the Secretary or final decisionmaker, pursuant to § 227.47(1), Stats.

### *Comparison with Rules in Adjacent States*

Surrounding states, including Illinois, Indiana, Iowa, Michigan, and Minnesota, have their own procedural regulations related to administrative "contested cases." 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.

### *Next Steps*

If the Board authorizes public hearings on this rule, the Department will refer a copy of the rule to the Legislative Council Rules Clearinghouse and publish a hearing notice in the Wisconsin Administrative Register. The Department plans to hold a hearing in Madison in February 2016.

Following the public hearings, the Department will evaluate all comments received at the hearings and prepare a final draft rule for the Board's consideration. If the Board approves a final draft rule, the Department will transmit the final draft rule for the Governor's approval. After the Governor's approval, the final draft will be submitted for legislative committee review. If the Legislature has no objections to the rule, the Secretary will

sign the final rulemaking order and transmit it for publication. The rule will take effect upon publication in the Wisconsin Administrative Register unless the final draft rule specifies a later effective date.

**PROPOSED ORDER  
OF THE WISCONSIN DEPARTMENT OF AGRICULTURE,  
TRADE AND CONSUMER PROTECTION  
ADOPTING RULES**

- 1 The Wisconsin department of agriculture, trade and consumer protection hereby proposes the  
2 following rule *to repeal* ATCP 1.03(2) (b) 1., 2. and (Note), and 3.; and *to amend* ATCP 1.03(2)  
3 (b) and 1.05(1); *relating to* who may issue a special order within the department.

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

The Department of Agriculture, Trade and Consumer Protection (DATCP) proposes a rule revision for ch. ATCP 1, Wis. Adm. Code, to allow division administrators or staff to issue most of the special orders under s. ATCP 1.03(2), Wis. Adm. Code. This will allow for clarification of DATCP's Secretary's responsibility to hear any appeal of a special order under s. ATCP 1.06, Wis. Adm. Code. The proposed rule also amends s. ATCP 1.05(1) and (3) (f) to clarify that, if the division administrator is designated to sign a special order, then the complaint seeking the special order must be signed by a different designee within the division.

***Statutes Interpreted***

Statute Interpreted: ss. 88.11(7), 93.06(7) and (8), 93.18, 94.645(4), 94.71(3) (c), 94.73(2), 97.12(3) (a), 100.19(3), 100.20(3), 100.201(9) (b), 100.21(4), 100.22(4) (a), 100.30(5) (a) or 126.85, Stats.

***Statutory Authority***

Statutory Authority: s. 93.07 (1), 227.10 and 227.11, Stats.

***Explanation of Statutory Authority***

DATCP has broad authority under s. 93.07(1), Stats., to adopt rules needed to implement laws under its jurisdiction. DATCP has specific authority, under the provisions cited above, to adopt rules related to administrative orders and contested cases.

***Related Statutes and Rules***

DATCP administers a wide range of statutes, including chs. 88, 91 to 100, 126 and 136, Stats. In the administration of these statutes, DATCP may issue administrative orders such as license

suspensions, administrative injunctions (e.g., orders prohibiting unfair business practices), hazardous product bans, holding orders to prohibit the distribution of adulterated food or commodities, plant and animal quarantine orders, orders condemning adulterated food or diseased animals, and a variety of other orders specified by statute.

### *Plain Language Analysis*

Currently, under s. ATCP 1.03(2), Wis. Adm. Code, some types of orders may be issued by DATCP's division administrators or staff, while others may only be issued by DATCP's Secretary or designee. Generally, all of these orders may be appealed under s. ATCP 1.06, Wis. Adm. Code.

The authority to grant or deny a request for hearing rests with the Secretary, under s. ATCP 1.06(3), Wis. Adm. Code. The Secretary may choose to be the decisionmaker in an informal hearing. In addition, the final decisionmaker for any contested case is either the Secretary, or a designated final decisionmaker appointed by the Secretary, as defined in s. ATCP 1.01(13), Wis. Adm. Code. If the Secretary, or other appointed final decisionmaker, is the only person who may issue an initial special order, the Secretary is precluded from exercising appellate jurisdiction that is a specific statutory duty of the Secretary. The Secretary has this appellate jurisdiction to ensure that decisions in individual cases, while conforming to the law, are consistent with similar past cases and harmonized with broader, important public policies also within the Secretary's jurisdiction. These authorities granted to the Secretary should not be abrogated by a rule which limits, in large part, the Secretary's roles as appellate decisionmaker harmonizing final decisions with public policies. If the rule is amended, allowing special orders to be issued by the division administrator, the Secretary may then exercise the duty to oversee any division's action by granting and deciding an informal hearing or contested case hearing, if the special order is appealed.

The one special order that will continue to be signed by the Secretary or his designee, and not by the division, is an order determining claims in a recovery proceeding, under s. ATCP 1.08, Wis. Adm. Code. Pursuant to subch. VII of ch. 126, Wis. Stats., the Division of Trade and Consumer Protection initiates the proceeding and drafts a proposed order. Only the Secretary or appointed final decisionmaker may sign the final order in these cases, even where a contested case hearing is not needed. These claims determination orders are always a final order of DATCP, as are all decisions in other contested case proceedings and all are issued by the Secretary or final decisionmaker, pursuant to § 227.47(1), Stats.

In addition, if the division administrator may be designated to sign an initial special order, the division administrator must also designate another person to sign the complaint seeking the special order. The proposed rule makes this amendment to the rule on division complaints.

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

A variety of federal regulations govern procedures for federal administrative orders. However, none of those regulations has a direct bearing on this rule.

### *Comparison with Rules in 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.

### *Summary of Factual Data and Analytical Methodologies*

This rule does not depend on any complex analysis of data. This rule makes minor changes to current rules.

### *Effect on Small Business*

This rule change is anticipated to have no effect on small business. To the extent that the proposed rule allows the Secretary to fully exercise his or her appellate jurisdiction, this may have a positive impact in having the Secretary be able to review special orders in light of harmonizing, within the law, a final decision in a case, involving a small business, with broader public policies on issues involving small businesses.

### *DATCP Contact*

Cheryl Daniels, Assistant Legal Counsel  
Office of the Secretary  
Department of Agriculture, Trade and Consumer Protection  
P.O. Box 8911  
Madison, WI 53708-8911  
Telephone: (608) 224-5026 E-Mail: [Cheryl.Daniels@Wisconsin.gov](mailto:Cheryl.Daniels@Wisconsin.gov)

### *Where and When Comments May Be Submitted*

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

Kelly Monaghan, Office Management Specialist  
Office of the Secretary  
Department of Agriculture, Trade and Consumer Protection  
P.O. Box 8911  
Madison, WI 53708-8911  
Telephone: (608) 224-5023  
E-Mail: [Kelly.Monaghan@Wisconsin.gov](mailto:Kelly.Monaghan@Wisconsin.gov)

Rule comments will be accepted up to two weeks after the last public hearing is held on this rule. Hearing dates will be scheduled after this rule is approved by the Board of Agriculture, Trade and Consumer Protection.

1           **SECTION 1.** ATCP 1.03(2) (b) is amended to read:

2           (b) ~~Paragraph (a) does not apply to any of the following: Except for any order described~~  
3 in sub. (1) (a) 4., the secretary, in writing, may designate any division administrator, or other  
4 employee in a specified position in the department, to issue any order described in par. (1) (a).

5           **SECTION 2.** ATCP 1.03(2) (b) 1., 2. and (Note) and 3. are repealed.

6           **SECTION 3.** ATCP 1.05(1) is amended to read:

7           **(1) DIVISION COMPLAINTS.** To obtain a special order from the secretary or final  
8 decisionmaker, other than in a recovery proceeding, a division shall file a written complaint with  
9 the secretary. The complaint shall be signed by the division administrator, or designee, and shall  
10 comply with sub. (3).

11           **SECTION 4.** ATCP 1.05(3) (f) is amended to read:

12           (f) A concise statement describing the order requested of the secretary, designee, or final  
13 decisionmaker, and the department's authority to issue that order.

14           **SECTION 5. EFFECTIVE DATE AND INITIAL APPLICABILITY.** This rule takes effect on  
15 the first day of the month following publication in the Wisconsin administrative register, as  
16 provided under s. 227.22(2)(intro.).

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 2016.

WISCONSIN DEPARTMENT OF AGRICULTURE,  
TRADE AND CONSUMER PROTECTION

By \_\_\_\_\_  
Ben Brancel, Secretary

Wisconsin Department of Agriculture, Trade and Consumer Protection

**Regulatory Flexibility Analysis**

**Rule Subject:** Administrative Orders and Contested Cases  
**Adm. Code Reference:** ATCP 1  
**Rules Clearinghouse #:** Not assigned  
**DATCP Docket #:** 15-R-11

*Rule Summary*

The Department of Agriculture, Trade and Consumer Protection (Department) proposes a rule revision for ch. ATCP 1, Wis. Adm. Code, to allow division administrators or staff to issue most of the special orders under s. ATCP 1.03(2), Wis. Adm. Code. This will allow for clarification of the Secretary's responsibility to hear any appeal of a special order under s. ATCP 1.06, Wis. Adm. Code. The proposed rule also amends s. ATCP 1.05(1) and (3)(f) to clarify that, if a division administrator is designated to sign a special order, then the complaint seeking the special order must be signed by a different designee within the division.

Currently, under s. ATCP 1.03(2), Wis. Adm. Code, some types of orders may be issued by the Department's division administrators or staff, while others may only be issued by the Department's Secretary or designee. Generally, all of these orders may be appealed under s. ATCP 1.06, Wis. Adm. Code.

The authority to grant or deny a request for hearing rests with the Secretary, under s. ATCP 1.06(3), Wis. Adm. Code. The Secretary may choose to be the decisionmaker in an informal hearing. In addition, the final decisionmaker for any contested case is either the Secretary, or a designated final decisionmaker appointed by the Secretary, as defined in s. ATCP 1.01(13), Wis. Adm. Code. If the Secretary, or other appointed final decisionmaker, is the only person who may issue an initial special order, the Secretary is precluded from exercising appellate jurisdiction which is a specific statutory duty of the Secretary. The Secretary has this appellate jurisdiction to ensure that decisions in individual cases, while conforming to the law, are consistent with similar past cases and harmonized with broader, important public policies also within the Secretary's jurisdiction. These authorities granted to the Secretary should not be abrogated by a rule which limits, in large part, the Secretary's roles as appellate decisionmaker harmonizing final decisions with public policies. If the rule is amended, allowing special orders to be issued by a division administrator, the Secretary may then exercise the duty to oversee any division's action by granting and deciding an informal hearing or contested case hearing, if the special order is appealed.

In addition, if a division administrator may be designated to sign an initial special order, the division administrator must also designate another person to sign the complaint

seeking the special order. The proposed rule makes this amendment to the rule on division complaints.

The one special order that will continue to be signed by the Secretary or his designee, and not by a division, is an order determining claims in a recovery proceeding, under s. ATCP 1.08, Wis. Adm. Code. Pursuant to subch. VII of ch. 126, Wis. Stats., the Division of Trade and Consumer Protection initiates the proceeding and drafts a proposed order. Only the Secretary or appointed final decisionmaker may sign the final order in these cases, even where a contested case hearing is not needed. These claims determination orders are always a final order of the Department, as are all decisions in other contested case proceedings and all are issued by the Secretary or final decisionmaker, pursuant to § 227.47(1), Stats.

#### ***Small Businesses Affected***

This rule change is anticipated to have no effect on small business. To the extent that the proposed rule allows the Secretary to fully exercise his or her appellate jurisdiction, this may have a positive impact in having the Secretary be able to review special orders in light of harmonizing, within the law, a final decision in a case, involving a small business, with broader public policies on issues involving small businesses.

#### ***Reporting, Bookkeeping and other Procedures***

The rule would not require any additional reporting, bookkeeping, or other procedures.

#### ***Professional Skills Required***

The proposed rule does not require any new professional skills.

#### ***Accommodation for Small Business***

This rule change is anticipated to have no effect on small business.

#### ***Conclusion***

The provisions in this proposed rule will benefit those affected by a special order issued by the Department. By allowing the Secretary to fully exercise his or her appellate jurisdiction, these changes may have a positive impact in having the Secretary be able to review special orders in light of harmonizing, within the law, a final decision in a case, involving a small business, with broader public policies on issues involving small businesses.

This rule will not have a significant adverse effect on “small business” and is not subject to the delayed “small business” effective date provided in s. 227.22(2)(e), Stats.

Dated this 10th day of January 2016.

STATE OF WISCONSIN  
DEPARTMENT OF AGRICULTURE,  
TRADE AND CONSUMER PROTECTION

By

  
Karley Downing, Chief Legal Counsel  
Office of the Secretary

## ADMINISTRATIVE RULES Fiscal Estimate & Economic Impact Analysis

1. Type of Estimate and Analysis

Original    Updated    Corrected

2. Administrative Rule Chapter, Title and Number

ATCP 1, Administrative Orders and Contested Cases

3. Subject

Allowing division administrators or staff to issue most special orders under s. ATCP 1.03(2), Wis. Adm. Code

4. Fund Sources Affected

GPR    FED    PRO    PRS    SEG    SEG-S

5. Chapter 20, Stats. Appropriations Affected

20.115(1)(a)

6. Fiscal Effect of Implementing the Rule

No Fiscal Effect       Increase Existing Revenues       Increase Costs  
 Indeterminate       Decrease Existing Revenues       Could Absorb Within Agency's Budget  
 Decrease Cost

7. The Rule Will Impact the Following (Check All That Apply)

State's Economy       Specific Businesses/Sectors  
 Local Government Units       Public Utility Rate Payers  
 Small Businesses (if checked, complete Attachment A)

8. Would Implementation and Compliance Costs Be Greater Than \$20 million?

Yes       No

9. Policy Problem Addressed by the Rule

The Department of Agriculture, Trade and Consumer Protection (Department) proposes a rule revision for ch. ATCP 1, Wis. Adm. Code, to allow division administrators or staff to issue most of the special orders under s. ATCP 1.03(2), Wis. Adm. Code. This will allow for clarification of the Secretary's responsibility to hear any appeal of a special order under s. ATCP 1.06, Wis. Adm. Code. The proposed rule also amends s. ATCP 1.05(1) and (3)(f) to clarify that, if a division administrator is designated to sign a special order, then the complaint seeking the special order must be signed by a different designee within the division.

10. Summary of the businesses, business sectors, associations representing business, local governmental units, and individuals that may be affected by the proposed rule that were contacted for comments.

This proposed rule change is anticipated to affect all licensees—businesses and individuals. To the extent that the proposed rule allows the Secretary to fully exercise his or her appellate jurisdiction, this may have a positive impact in having the Secretary be able to review special orders in light of harmonizing, within the law, a final decision in a case, involving a business or individual, with broader public policies on issues involving licensees.

11. Identify the local governmental units that participated in the development of this EIA.

Special orders are issued directly by the State of Wisconsin's Department of Agriculture, Trade and Consumer Protection. Local governmental units are not impacted by this rule and did not participate in development of this EIA.

12. Summary of Rule's Economic and Fiscal Impact on Specific Businesses, Business Sectors, Public Utility Rate Payers, Local Governmental Units and the State's Economy as a Whole (Include Implementation and Compliance Costs Expected to be Incurred)

The proposed rule makes minor changes to current rules and is expected to have no economic and fiscal impact.

13. Benefits of Implementing the Rule and Alternative(s) to Implementing the Rule

The Secretary has appellate jurisdiction to ensure that decisions in individual cases, while conforming to the law, are harmonized with broader, important public policies also within the Secretary's jurisdiction. Failure to make the rule change means that these authorities granted to the Secretary continue to be abrogated by a rule which limits, in large part, the Secretary's roles as appellate decisionmaker harmonizing final decisions with public policies. If the rule is amended, allowing special orders to be issued by the division administrator, the Secretary may then exercise the duty to oversee

## ADMINISTRATIVE RULES Fiscal Estimate & Economic Impact Analysis

any division's action by granting and deciding an informal hearing or contested case hearing, if the special order is appealed.

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**14. Long Range Implications of Implementing the Rule**

Implementing this rule may have a positive impact in having the Secretary be able to review special orders in light of harmonizing, within the law, a final decision in a case, involving a business or individual, with broader public policies on issues involving licensees.

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**15. Compare With Approaches Being Used by Federal Government**

A variety of federal regulations govern procedures for federal administrative orders. However, none of those regulations has a direct bearing on this rule.

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**16. Compare With Approaches Being Used by Neighboring States (Illinois, Iowa, Michigan and Minnesota)**

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.

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**17. Comments Received in Response to Web Posting and DATCP Response**

No comments were received in response either to the posting on the Department external website or the statewide administrative rules website.

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**17. Contact Name**

Cheryl Daniels, Assistant Legal Counsel - Office of the Secretary

**18. Contact Phone Number**

(608) 224-5026

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