



State of Wisconsin
Governor Scott Walker

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

DATE: March 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; Final Draft Rule

PRESENTED BY: Karley Downing

REQUESTED ACTION:

At the March 22, 2016, Board meeting, the Department will ask the Board to approve a final draft rule (copy attached) 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 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.

SUMMARY:

Background

The Department administers a wide range of statutes, including chs. 88, 91 to 100, 126 and 136, Stats. In the administration of these statutes, the Department 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 that limits, in large part, the Secretary's roles as appellate decisionmaker harmonizing final decisions with public policies.

Rule Content

The proposed rule allows special orders to be issued by the 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.

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 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.

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.

Public Hearings

The Department held a public hearing on this rule on February 17, 2016, in Madison, Wisconsin. Written comments were accepted until February 24, 2016. No one attended the hearing and no one submitted written comments.

Changes from the Hearing Draft

No changes were made based on public comment as no comments were received. Minor changes were made based on Legislative Council Clearinghouse comments. All of the Clearinghouse's recommended changes were made.

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.

Next Steps

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) (a) and (b); and *to amend* ATCP 1.03(2) (intro.) and
3 1.05(1); *relating to* who may issue a special order within the department.

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

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 Department’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

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

Related Statutes and Rules

The Department administers a wide range of statutes, including chs. 88, 91 to 100, 126 and 136, Stats. In the administration of these statutes, the Department 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 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 that 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 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.

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

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Where and When Comments May Be Submitted

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

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1 (2) WHO MAY ISSUE A SPECIAL ORDER. ~~Except as provided under par. (b) or by~~
2 ~~department rule, no person other than the~~ The secretary or final decisionmaker may issue a
3 special order on behalf of the department. Except for any order described in sub. (1) (a) 4., the
4 secretary, in writing, may designate any division administrator, or other employee in a specified
5 position in the department, to issue any order described in par. (1) (a).

6 SECTION 2. ATCP 1.03(2) (a) and (b) are repealed.

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

8 (1) DIVISION COMPLAINTS. To obtain a special order from the secretary or final
9 decisionmaker, other than in a recovery proceeding, a division shall file a written complaint with
10 the secretary. The complaint shall be signed by the division administrator or designee, or other
11 employee in a specified position in the division when the division administrator or designee is
12 designated to sign the final order, and shall comply with sub. (3).

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

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

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1 **SECTION 5. EFFECTIVE DATE AND INITIAL APPLICABILITY.** This rule takes effect on
2 the first day of the month following publication in the Wisconsin administrative register, as
3 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

Final Regulatory Flexibility Analysis

Rule Subject: Administrative Orders and Contested Cases
Adm. Code Reference: ATCP 1
Rules Clearinghouse #: 16-013
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 Department’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.

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 that 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.

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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 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.

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.

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.

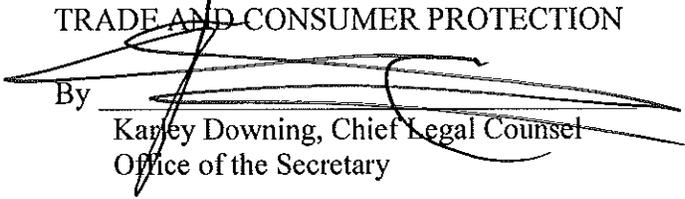
Conclusion

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 23rd day of February, 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

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

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.

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.

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.

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. No comments were received either at the public hearing or while the comment period was open.

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| 17. Contact Name | 18. Contact Phone Number |
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