



State of Wisconsin
Governor Scott Walker

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

Date: May 4, 2016

To: Board of Agriculture, Trade, and Consumer Protection

From: Ben Brancel, Secretary *Ben Brancel*
Steve Ingham, Administrator, Division of Food Safety *Steve Ingham*

Subject: **Emergency Rulemaking Scope Statement for Ch. ATCP 75 which involves Ch. ATCP 75 (Retail Food Establishments), and Ch. ATCP 75 Appendix (Wisconsin Food Code)**

Presented by: Steve Ingham, Division of Food Safety.

Requested Action:

At the May 17, 2016, Board meeting, the Department of Agriculture, Trade and Consumer Protection (DATCP) will ask the Board to approve a "Statement of Scope" (copy attached) to allow DATCP to begin emergency revision of ch. ATCP 75. This emergency revision is necessary to assure that all mobile retail food establishment service bases are equitably licensed and inspected once the license year begins on July 1, 2016. The preparation for renewing retail food establishment licenses on July 1, 2016 is underway. The permanent rule revision process cannot be done rapidly enough to prevent confusion associated with the advent of the 2016 outdoor-events season and the pending merger of restaurant and retail food establishment regulatory programs.

This scope statement spells out the general purpose and scope of the proposed emergency rule revision. DATCP may not begin drafting the emergency rule until the Governor approves a scope statement for the proposed rule and the DATCP Board approves the scope statement. In accordance with 2011 Wisconsin Act 21 (s.227.135(2), Stats.), the Governor approved this scope statement for emergency rulemaking on April 22, 2016, thereby allowing DATCP to submit this scope statement for publication and to seek its approval by the DATCP Board.

DATCP must publish a draft scope statement in the Wisconsin Administrative Register, and file a copy with the Department of Administration (DOA), at least 10 days before the Board approves the scope statement. DATCP filed the attached statement of scope with the Legislative Reference Bureau for publication in the May 2, 2016 issue of the Wisconsin Administrative Register. DATCP has also filed a copy with the DOA.

On July 1, 2016, the Department's Division of Food Safety (DFS) and the Department of Health Services' (DHS) Food Safety and Recreational Licensing Section (FSRL) will merge. With this merger, all restaurants, including mobile restaurants, will be deemed retail food establishments for purposes of licensing and inspection by DATCP. Both restaurants and current retail food establishments are already required to follow the standards set forth in the Wisconsin Food Code, which is an Appendix to both ATCP 75 (Retail Food Establishments) and DHS 196 (Restaurants). Although this Appendix requires all mobile retail food establishments, including restaurants, to have a service base, as defined in Part 1-201.10 (B) of the Appendix to ch. ATCP 75 and ch. DHS 196,

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Wis. Admin. Code, only DHS 196 at this time specifically authorizes the licensing and inspection of bases for mobile restaurants. Chapter ATCP 75 is silent on the licensing and inspection of service bases for all other types of mobile retail food establishments. While ch. DHS 196 will merge into ch. ATCP 75 on July 1, 2016, it will still be a separate subchapter, applying only to restaurants, until further modifications are completed for ch. ATCP 75.

In order to assure, with the merger, that all service bases for mobile retail food establishments will be similarly licensed and inspected, as intended by the Legislature, the proposed emergency rule will create language that ensures all mobile retail food establishment service bases are licensed and inspected. The emergency rule is necessary because the license year for mobile retail food establishments is July 1-June 30 of each year, and a new licensing year would begin before the completion of the regular rule-making process, which is expected to be approximately June 1, 2017. While there is already an approved scope statement allowing the Department and DHS to begin consolidating ch. DHS 196 into ch. ATCP 75 and make all associated modifications, the work on the permanent rule amendments will not be completed before the license year beginning July 1, 2016.

The proposed emergency rule will create language in ATCP 75 to assure similar licensing and inspection for all mobile retail food establishments that will be under the Department's jurisdiction on July 1, 2016. The emergency rule language is expected to be proposed as part of the permanent rule provisions under the currently approved scope statement for ch. ATCP 75 and Appendix, Wisconsin Food Code. The Department intends to complete this permanent rulemaking process before the license year beginning July 1, 2017 so there will be no gap between the language proposed in the emergency rule and the language in the permanent rule.

If the Board approves this scope statement, DATCP will prepare the emergency rule, and the rule and associated documents approved by the Secretary will be submitted to the Governor for approval. A copy of the emergency rule will be sent to the Board for informational purposes. If the Governor approves the emergency rule, it will be signed, docketed, published, and then in effect for 150 days. DATCP must hold a hearing on the emergency rule within 45 days after its adoption or later in conjunction with hearings occurring as part of the permanent rule-making process. The Legislature's Joint Committee for Review of Administrative Rules may grant up to two 60-day extensions of the emergency rule.

STATEMENT OF SCOPE

Department of Agriculture, Trade and Consumer Protection

(DATCP)

Rule No: ATCP 75 (Retail Food Establishments)

Relating to: Mobile Retail Food Establishments

1. Description of the objective of the emergency rule:

On July 1, 2016, the Department of Agriculture, Trade and Consumer Protection's (Department) Division of Food Safety (DFS) and the Department of Health Service (DHS) Food Safety and Recreational Licensing Section (FSRL) will merge. With this merger, all restaurants, including mobile restaurants, will be deemed retail food establishments for purposes of licensing and inspection by the Department. The new legislation has the expectation that all of these retail food establishments, restaurants and those currently titled retail food establishments, will follow the same licensing and inspection standards. To accomplish this, on July 1, 2016, ch. DHS 196 (Restaurants) will be consolidated with ch. ATCP 75 (Retail Food Establishments). In addition, both restaurants and current retail food establishments are already required to follow the standards set forth in the Wisconsin Food Code, which is an Appendix to both ATCP 75 (Retail Food Establishments) and DHS 196 (Restaurants).

Although this Appendix requires all mobile retail food establishments, including restaurants, to have a service base, as defined in Part 1-201.10 (B) of the Appendix to ch. ATCP 75 and ch. DHS 196, Wis. Admin. Code, only ch. DHS 196 at this time specifically authorizes the licensing and inspection of bases for mobile restaurants. Chapter ATCP 75 is silent on the licensing and inspection of service bases for all other types of mobile retail food establishments. While ch. DHS 196 will merge into ch. ATCP 75 on July 1, 2016, it will still be a separate subchapter, applying only to restaurants, until further modifications are completed for ch. ATCP 75.

In order to assure, with the merger, that all service bases for mobile retail food establishments will be similarly licensed and inspected, as intended by the Legislature, the proposed emergency rule will create language that ensures all mobile retail food establishment service bases are licensed and inspected. The emergency rule is necessary because the license year for mobile retail food establishments is July 1-June 30 of each year, and a new licensing year would begin before the completion of the regular rule-making process, which is expected to be approximately June 1, 2017. While there is already an approved scope statement allowing the Department and DHS to begin consolidating ch. DHS 196 into ch. ATCP 75 and make all associated modifications, the work on the permanent rule amendments will not be completed before the license year beginning July 1, 2016.

The proposed emergency rule will create language in ATCP 75 to assure similar licensing and inspection for all mobile retail food establishments that will be under the Department's

jurisdiction on July 1, 2016. The emergency rule language is expected to be proposed as part of the permanent rule provisions under the currently approved scope statement for ch. ATCP 75 and Appendix, Wisconsin Food Code. The Department intends to complete this permanent rulemaking process before the license year beginning July 1, 2017 so there will be no gap between the language proposed in the emergency rule and the language in the permanent rule.

2. Description of existing policies relevant to the rule and of new policies proposed to be included in the rule and an analysis of policy alternatives; the history, background and justification for the proposed rule:

History and Background

Under current law, the Department and DHS divide regulatory authority over food safety. In ch. ATCP 75, the Department regulates food safety in retail food establishments such as grocery stores, supermarkets, mobile retail food establishments, and most convenience stores. In ch. DHS 196, DHS regulates food safety in restaurants, including mobile restaurants. 2015 Wisconsin Act 55 transferred regulatory authority over food safety in restaurants from DHS to the Department, effective July 1, 2016. From statutory and regulatory perspectives, restaurants will be considered a category of retail food establishment at the time the transfer goes into effect.

Nature of the Emergency

An emergency rule is necessary to immediately address the need for consistent licensing and inspection of all mobile retail food establishment service bases. It will allow the Department to put the procedures in place to license and provide inspection services to ensure that all of these establishments comply with the Wisconsin Food Code.

If the Department is not able to take this action now, it will delay the Legislature's mandate to simplify and streamline regulatory oversight of all Wisconsin mobile retail food establishments. Without adoption of this emergency rule there will be an immediate impact on industry at the time of the merger – inconsistent licensing requirements and inspection for service bases. The proposed emergency rule will benefit industry by “leveling the playing field” through consistent licensing and oversight to ensure food safety.

Consolidation with Division of Food Safety. The transfer of the DHS's FSRL Section to the Department's Division of Food Safety will improve services for Wisconsin's food and recreational industries. It will create a "one-stop" contact point for retail food establishments, including restaurants, making it much easier for them to quickly get licensed and have their questions answered. Most significantly for this proposed rule revision, it will allow continued consistent oversight of restaurants and other retail food establishments in Wisconsin. All retail food establishments, including restaurants, must comply with requirements of the Wisconsin Food Code. Having one department interpret one set of rules and the Wisconsin Food Code will encourage consistency.

Related Rulemaking Activities

In addition to this scope statement, DHS has prepared a scope statement related to the consolidation of DHS 196 (Restaurants) and DHS 196 Appendix (Wisconsin Food Code), with ATCP 75 and ATCP 75 Appendix (Wisconsin Food Code). The goal of this rulemaking activity will be to work with operators of restaurants and other retail food establishments, along with other stakeholders, to update provisions of the Wisconsin Food Code and the consolidated DHS 196 and ATCP 75.

Policy Alternative. Do nothing. If DATCP does nothing, similar types of retail food establishments will not be licensed and inspected the same, as intended by the Legislature. If the Department and DHS do not identify and remove inconsistent approaches in regulations, it will delay implementation of a simplified, streamlined regulatory system for Wisconsin's retail food establishments.

3. Statutory authority for the rule (including the statutory citation and language): Statutory Authority: ss. 93.07 (1), 97.09 (4), 97.30 (5), and 227.14 (1s), Stats.

93.07 Department duties. It shall be the duty of the department:

(1) REGULATIONS. To make and enforce such regulations, not inconsistent with law, as it may deem necessary for the exercise and discharge of all the powers and duties of the department, and to adopt such measures and make such regulations as are necessary and proper for the enforcement by the state of chs. 93 to 100, Stats., which regulations shall have the force of law.

97.09 Rules.

(4) The department may, by rule, establish and enforce standards governing the production, processing, packaging, labeling, transportation, storage, handling, display, sale, including retail sale, and distribution of foods that are needed to protect the public from the sale of adulterated or misbranded foods.

97.30 Retail food establishments.

(5) Rule making. The department may promulgate rules to establish the fees required under sub. (3) or to govern the operation of retail food establishments. Rules may include standards for the construction and maintenance of facilities; the design, installation, cleaning and maintenance of equipment and utensils; personnel sanitation; food handling, display and storage; and food sources and food labeling.

227.14 Preparation of proposed rules.

(1s) Exception; preparation of certain rules based on federal food code.

Notwithstanding sub. (1), if the department of agriculture, trade and consumer protection or the department of health services prepares a proposed rule based on the model food code published by the federal food and drug administration, the proposed rule may be in the format of the model food code.

4. Summary and preliminary comparison of any existing or proposed federal regulation that is intended to address the activities to be regulated by the rule:

There is no federal law related to retail food establishments, including restaurants. The Federal Food and Drug Administration (FDA) publishes the Federal Model Food Code as a model for states to use in developing its food safety regulations for retail food establishments.

5. Description of all entities that may be impacted by the rule:

This rule will clarify that licensing and inspection apply to all mobile retail food establishment service bases, not just to service bases of mobile restaurants currently licensed and inspected by DHS or its local city and county agents. Some retail food establishment operators will bear an additional small cost for the service base license and associated inspection. Depending on the complexity of the washing, sanitizing, or food preparation done at an establishment's service base, some establishments may need to add or modify procedures; or add, repair or change equipment, to ensure compliance with these rules. However, the consistent application of these licensing and inspection rules will mean that the Department provides consistent oversight of all mobile retail food establishment service bases.

6. Estimate of the amount of time that state employees will spend to develop the rule and of other resources necessary to develop the rule:

The Department estimates that it will use approximately 0.10 FTE staff time to develop this emergency rule. This includes research, drafting, preparing related documents, holding public hearings, and communication with affected persons and groups. The Department will assign existing staff to develop this rule. The Department will also work jointly with DHS staff to facilitate seamless consolidation of ch. DHS 196 with ch. ATCP 75.

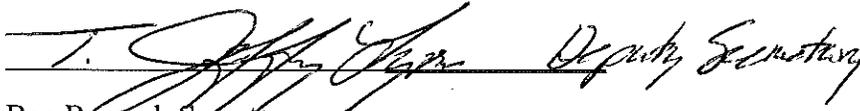
7. Anticipated economic impact

The proposed emergency rule is not expected to have any major economic impact. It will eliminate unequal regulatory requirements for entities that operate in a very similar fashion under the Wisconsin Food Code. By adopting equal licensing and food safety provisions, the proposed emergency rule will ensure Wisconsin's food regulations uniformly impose provisions for protecting public health. If adopted, the proposed emergency and permanent rule will be part of the larger initiative to consolidate and streamline Wisconsin's food safety programs. The overall goal is to remove confusing inconsistency in regulatory requirements and ensure consistent application of retail food establishment regulations. The development of the proposed emergency and permanent rules will make it easier for mobile retail food establishments, including mobile restaurants, to know which regulations apply to them, and to contact the Department for licensing and regulatory questions.

The emergency rule is not cost-neutral, but it will achieve industry-wide equity in the mobile retail food establishment category. While requiring licensing and inspection for all mobile retail food establishment service bases, the small increase in cost for some licensees is matched by the

ability of the Department to provide mandated food safety inspections at all of the locations where mobile retail food establishments clean, sanitize, process, and store food and equipment.

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_____ Deputy Secretary

for

Ben Brancel, Secretary

Department of Agriculture, Trade and Consumer Protection

3/31/16

Date Submitted