

ORDER OF THE STATE OF WISCONSIN NATURAL RESOURCES BOARD
CREATING RULES

The Wisconsin Natural Resources Board proposes an order to create NR 45.075 relating to declaring natural emergencies on forested lands owned by the state and under the jurisdiction of the department.

FR-09-07

Analysis Prepared by the Department of Natural Resources

1. **Statutes interpreted:** Section 23.114, Stats.

2. **Statutory authority:** Sections 23.114 (1) (b), Stats.

3. **Explanation of agency authority to promulgate the proposed rule under statutory authority:** Section 23.114 (b) Stats., states that the department shall promulgate rules specifying those emergencies over which the chief state forester shall have management responsibility on state forest land under the jurisdiction of the department. The statute requires that emergencies specified in the rules shall include invasive species or pest infestation, disease, and damage to timber from fire, snow, hail, ice or wind.

4. **Related statute or rule:** This proposed permanent rule replaces emergency rule FR-11-07(E). Section NR 30.06, Wis. Adm Code, which relates to emergency use restrictions relating to forest fire control, gives the department secretary authority to declare a forest fire emergency and order use restrictions on all lands managed by the department or to close or modify hunting, trapping or fishing regulations. Section NR 30.06 also states that the secretary shall act only after consideration of department personnel in the area affected and includes a process by which the orders shall become effective by public notice. The proposed permanent rule does not exempt the actions of the chief state forester in response to an emergency from public review or Environment Assessment if required by s. NR 150.03, Wis. Adm Code. The proposed permanent rule also does not apply to a state of emergency declared by the governor under s. 166.03, Stats., and does not supersede the authority of the department of agriculture, trade and consumer protection under ch. 94, Stats.

5. **Plain language analysis:** Proposed s. NR 45.075 specifies those emergencies on forested land under the jurisdiction of the department over which the chief state forester shall have management authority. The proposed permanent rule replaces emergency rule FR-11-07(E) but does not differ from it. The proposed permanent rule describes causes of unforeseen damage or threat of damage to trees that could lead the chief state forester to declare an emergency and assume management authority. Included in the list of damaging agents that could lead to the declaration of an emergency are those required by the legislature: invasive species, pest infestation, disease, and damage to timber from fire, snow, hail, ice, or wind. The rule states that when declaring and responding to an emergency, the chief state forester shall consider the purpose of and management plan for the affected property in his or her decisions. The rule allows the chief state forester to take actions not described in the management plan for a property if that were the most appropriate response to the emergency. Finally, the rule describes the processes by which the declaration of the state of emergency shall be made effective, canceled or modified.

6. **Summary of, and comparison with, existing or proposed federal regulation:** Federal Forest Supervisors may close or restrict the use of described areas, roads or trails within their area of jurisdiction on National Forests (36 CFR Ch.11, subpart B, 261.50). There is, though, no requirement that the situation causing the closure be an emergency as there is in the Department's rule.

7. **Comparison with rules in adjacent states:** There are no similar rules in adjacent states.

8. **Summary of factual data and analytical methodologies:** Unforeseen damage to state forest land is a rare situation that may require a rapid response if further damage is to be prevented. State property managers have tried to predict possible emergencies and appropriate actions in their property management plans to allow for a timely response. Not all situations can be predicted, however, and even if they are, when the event occurs it may become obvious that the plan for handling it may no longer be appropriate. In such a situation under existing processes, it may take up to a month to bring the request for an exception to the management plan to the Natural Resources Board for approval. In addition to relatively common disturbances such as fire or wind damage, we now are dealing with increasing problems with invasive species of forest lands. There may be situations in the near future where a response within a week will be critical to preventing the spread of a newly found invasive species colony that could threaten both the forests on department lands and private property. This rule will allow the chief state forester to declare an emergency in response to damage or threatened damage to forested department land and to manage that time sensitive emergency free of delays associated with normal processes for actions on department lands. The list of detrimental forest disturbances where an emergency could be declared is limited and the chief state forester must decide whether an emergency will be declared. Not all situations where these disturbances have occurred will be declared an emergency. On some properties the management plan may provide adequate guidance. The chief state forester must also consider the purpose of the property in deciding on the action to take to manage the emergency to avoid compromising the primary purpose of the property and possibly the federal financial support for that property or others. This rule does not exempt the actions of the chief state forester in response to an emergency from public review or Environment Assessment if required by s. NR 150.03, Wis. Adm. Code. The length of public review is not set, however, and an Environmental Assessment would only be needed as required by rule, such as if a pesticide were applied over more than 160 acres. This would be an unusual situation even when responding to a colony of an invasive species.

In preparing this analysis, property managers were asked when this rule might have been used in the past on their property. They responded that this rule could have been used in the past only rarely, in response to catastrophic wind or hail damage once or twice in the past 10 years, a notable example being the Brule River State Forest hail damage in 2000. Property managers did recognize that this rule could be very helpful in the future event of a find of emerald ash borer, Asian long-horned beetle or other invasive that has a particularly high potential for damaging forests.

The cost of managing emergencies declared under this rule would vary depending on the situation. In cases where a salvage harvest was appropriate, such as with damage from weather events, management would result in revenue to the state. Removal of host trees as a part of eradication of an invasive pest could also provide revenue, though the amount collected would depend on limitations on use of the timber. Pesticide treatments would result in a cost, though federal cost sharing may be available for treatments depending on the species being controlled or eradicated.

9. **Analysis and supporting documents used to determine effect on small business or in preparation of economic impact report:** This rule is designed to allow management of forest emergencies that need to be addressed more quickly than current processes allow. In those situations, the rule should prevent additional damage or losses that would otherwise occur as a result of a delay in action. It should thus provide a benefit to the state as a whole in reducing losses from forest emergencies. Each emergency may have different effects on small businesses, however, some small businesses may benefit from management actions while others may be hurt. In either case, the effect should be short-term as the management decision will be made with consideration of the purpose of the property and therefore recovering the property to normal operation.

10. **Effect on small business:** Both the situation that leads to the declaration of an emergency and the actions taken to manage the emergency may have impacts on businesses dependent on the normal activities on the property or those involved in the management actions. Whether these impacts are positive or negative will be determined by the nature of the emergency and management activities. For example, a blow-down of trees in a campground could lead campers to make more or less use of other public or private recreational opportunities nearby.

SECTION 1. NR 45.075 is created to read:

NR 45.075 Natural emergencies. (1) The chief state forester may declare, and shall manage, emergencies that threaten forested lands owned by the state and under the jurisdiction of the department. When declaring and responding to an emergency, the chief state forester shall consider the purpose of and management plan for the affected property in his or her decisions. Emergencies include unforeseen damage or threat of damage to trees from various causes including:

- (a) Fire.
- (b) Invasive species including insects, plants, animals and disease-causing organisms.
- (c) Pest infestation.
- (d) Disease.
- (e) Vertebrates.
- (f) Extreme weather including:
 - 1. Wind or tornados.
 - 2. Snow, hail, or ice.
 - 3. Flooding.
 - 4. Drought.
 - 5. Lightning.
 - 6. Freeze or heat injury.
- (g) Deliberate or accidental damage by human activity.

(2) The declaration of a forest health emergency by the chief state forester, including findings of fact supporting it, shall become effective upon the publication of the declaration in the official state newspaper. As soon after the effective date as is feasible and reasonable, the department shall publish the order in one newspaper in the area affected which is likely to give notice to residents in that area, file copies of the emergency declaration within one week of its effective date with clerks of all counties affected by the declaration and take other steps as it deems necessary to convey effective notice to persons who are likely to have an interest in the declaration. The same procedure shall be followed to cancel or modify the declaration or any part thereof. This rule does not apply to a state of emergency declared by the governor under s. 166.03, Stats., and does not supersede the authority of the department of agriculture, trade and consumer protection under ch. 94, Stats.

(3) In this section:

- (a) “Disease” includes any disturbance of a plant that interferes with its normal structure or function.
- (b) “Pest” includes any living stage of insects, mites, nematodes, slugs, snails or other invertebrate animals injurious to plants, plant products, animals and humans; any bacteria, fungi, other parasitic plants or their reproductive parts, viruses, mycoplasma, protozoans or infectious substances which cause disease in or damage to plants or plant products; and any host upon which a plant pest is dependent for the completion of all or a portion of its life cycle.

SECTION 2. **EFFECTIVE DATE.** This rule shall take effect on the first day of the month following publication in the Wisconsin Administrative Register.

SECTION 3. **BOARD ADOPTION.** This rule was approved and adopted by the State of Wisconsin Natural Resources Board on March 26, 2008.

Dated at Madison, Wisconsin _____.

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

By _____
Matthew J. Frank, Secretary

(SEAL)