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Details: Public Hearing notices by Department of Agriculture, Trade, and Consumer Protection.
(FORM UPDATED: 08/11/2010)

WISCONSIN STATE LEGISLATURE ... PUBLIC HEARING - COMMITTEE RECORDS

2009-10

(session year)

Joint

(Assembly, Senate or Joint)

Committee for Review of Administrative Rules ...

COMMITTEE NOTICES ...

- Committee Reports ... **CR**
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INFORMATION COLLECTED BY COMMITTEE FOR AND AGAINST PROPOSAL

- Appointments ... **Appt** (w/Record of Comm. Proceedings)
- Clearinghouse Rules ... **CRule** (w/Record of Comm. Proceedings)
- Hearing Records ... bills and resolutions (w/Record of Comm. Proceedings)
 - (**ab** = Assembly Bill) (**ar** = Assembly Resolution) (**ajr** = Assembly Joint Resolution)
 - (**sb** = Senate Bill) (**sr** = Senate Resolution) (**sjr** = Senate Joint Resolution)
- Miscellaneous ... **Misc**

* Contents organized for archiving by: Stefanie Rose (LRB) (June 2012)

Department of Agriculture,
Trade and Consumer Protection

MEMORANDUM

Office of Legal Counsel

DATE: August 27, 2009

TO: Bruce Hoesly, Legislative Reference Bureau
David Schmiedicke, State Budget Director, DOA

FROM: Karen Schultz, DATCP 
(608) 224-5023

SUBJECT: NOTICE OF HEARING – Wisconsin Administrative Code
**Chapter ATCP 21 – Quarantines of Brown County and
Kenosha County for Emerald Ash Borer**

Attached is Notice of Hearing for the above emergency rule, for printing in the next issue of the Wisconsin Administrative Register.

Please initial and return the attached copy of this memo for our files.

Thank you.

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Senator Jim Holperin
JCRAR Co-Chair
409 South, State Capitol

State of Wisconsin
Department of Agriculture, Trade, and Consumer Protection

HEARING NOTICE

Rule Related to Administrative Orders and Contested Cases

The Wisconsin Department of Agriculture, Trade and Consumer Protection (DATCP) announces that it will hold a public hearing on a proposed amendment to chapter ATCP 1, Wis. Adm. Code, relating to administrative orders and contested cases.

DATCP will hold the public hearing at the time and location shown below. DATCP invites the public to attend the hearing and comment on the rule. Following the hearing, the hearing record will remain open until September 15, 2009 for additional written comments. Comments may be sent to the Office of the Secretary, at the address below, by email to Emily.phelps@wi.gov or online at <http://adminrules.wisconsin.gov>.

You may obtain free copy of this proposed rule by contacting the Wisconsin Department of Agriculture, Trade and Consumer Protection, Division of Trade and Consumer Protection, 2811 Agriculture Drive, P.O. Box 8911, Madison, WI 53708. You may also obtain copies by calling (608) 224-5160 or emailing emily.phelps@wi.gov. Copies will also be available at the hearing. To view the proposed rule online, go to: <http://adminrules.wisconsin.gov>.

To provide comments or concerns relating to small business, you may also contact DATCP's small business regulatory coordinator Keeley Moll at the address above, or by emailing to Keeley.Moll@wi.gov or by telephone at (608) 224-5039.

Hearing impaired persons may request an interpreter for these hearings. Please make reservations for a hearing interpreter by August 24, 2009, by writing to Emily Phelps, Office of the Secretary, P.O. Box 8911, Madison, WI 53708-8911, emily.phelps@wi.gov, telephone (608) 224-5013. Alternatively, you may contact the DATCP TDD at (608) 224-5058. Handicap access is available at the hearings.

Hearing Dates and Locations:

August 27, 2009

1:00 – 2:30 p.m.

WI Department of Agriculture, Trade & Consumer Protection

2811 Agriculture Drive, Room 456

Madison, WI 53718

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

The department of agriculture, trade and consumer protection (DATCP) administers a wide range of laws related to food safety, disease control, consumer protection, agricultural resource management and other matters. Under these laws, DATCP may issue various kinds of administrative orders and take other administrative actions that have the force of law.

Persons adversely affected by these orders and actions may request a trial-type “contested case” hearing under ch. 227, Stats., and ch. ATCP 1, Wis. Adm. Code (ATCP 1). This rule updates and clarifies current “contested case” procedures under ATCP 1.

Statutes Interpreted

Statutes Interpreted: s. 93.18, Stats., and subch. III of ch. 227, Stats.

Statutory Authority

Statutory Authority: ss. 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 Rules and Statutes

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.

Background

An impartial administrative law judge (ALJ) presides over a “contested case” hearing. DATCP is currently in the process of transferring its ALJ functions to the department of administration, division of hearings and appeals. ALJs from the division of hearings and appeals will conduct DATCP “contested case” hearings, subject to ch. 227, Stats., and ATCP 1. DATCP will pay the division of hearings and appeals for the ALJ services.

The DATCP Secretary or designee typically makes the final decision in a “contested case,” after reviewing the ALJ’s proposed decision. The final decision is subject to judicial review, as provided in ch. 227, Stats.

Rule Content

Administrative Law Judge

Under current rules, the DATCP secretary may appoint an ALJ to hear a DATCP “contested case.” This rule clarifies that the secretary may appoint an ALJ from the department of administration (division of hearings and appeals) or another state agency, with the agreement of that agency. An ALJ must conduct a DATCP “contested case” according to DATCP procedural rules in ATCP 1.

Producer Security; Recovery Proceedings

DATCP currently administers an agricultural producer security program under ch. 126, Stats., to protect agricultural producers against financial defaults by grain warehouse keepers, grain dealers, milk contractors and vegetable contractors. In the event of a default, DATCP may initiate a recovery proceeding to determine the amount of producer claims allowed under the producer security program. The recovery proceeding is conducted as a “contested case” according to ch. 126, Stats., and ATCP 1. This rule updates ATCP 1 to incorporate current procedures and terminology under ch. 126, Stats.

“Contested Case” Hearing Requests and Assignments

This rule clarifies current procedures for requesting a “contested case” hearing, and for granting or denying a hearing request, consistent with current standards under ch. 227, Stats. The clarified procedures will help DATCP coordinate “contested case” hearings and ALJ assignments with the department of administration, division of hearings and appeals.

Under this rule, as under current rules, the DATCP secretary will make the initial decision to grant or deny a “contested case” hearing request, and will issue a written notice to the parties. Under this rule, the secretary must grant or deny a “contested case” hearing request within 30 days after a complete request is filed with the secretary (compared to 20 days under current rules).

If the secretary issues a notice granting a “contested case” hearing request, the notice will assign an ALJ and set a date for hearing or for a pre-hearing conference with the ALJ. If the notice sets an actual hearing date, the hearing date may be not sooner than 30 days after the notice is issued (compared to 10 days under current rules). The ALJ may schedule or reschedule a hearing date, as necessary.

Hearing on Summary Orders

Under many of its programs, DATCP is authorized to issue summary orders (without prior notice or hearing) to protect public health, safety or welfare. These include food holding orders, food condemnation orders, animal disease quarantine and condemnation orders, invasive pest quarantine and control orders, and a variety of other orders. The recipient of a summary order may request a hearing on that order.

This rule clarifies that the recipient of a summary order may request an immediate informal hearing, or a formal “contested case” hearing, or both. Many cases are resolved with an informal hearing, without the need for a formal “contested case” hearing. A requested informal hearing must be conducted as soon as reasonably possible, but not more than 20 days after the hearing request (compared to 10 days under current rules). A requester may agree to a later informal hearing date.

Informal hearings are conducted by DATCP managers or staff who have had no prior involvement in the case, and who are authorized to take or recommend remedial action as necessary. This rule clarifies that informal hearings are not governed by formal “contested case” procedures. If a matter is not successfully resolved by informal hearing, the affected party may request a formal “contested case” hearing.

Parties Represented by Attorney

Under current rules, a party to a formal “contested case” hearing may appear on his or her own behalf or may have a legal representative. Under this rule, the representative must be an attorney who is authorized to practice law in this state. As under current rules, the attorney’s actions are binding on the represented party.

ALJ Authority

This rule clarifies, but does not substantially alter, the authority exercised by an ALJ (including an ALJ from the department of administration, division of hearings and appeals) in a DATCP “contested case.”

Disclosure of Witnesses and Evidence; Discovery

Under current rules and this rule, parties must generally disclose (to opposing parties) the witnesses and evidence that they intend to call or offer in a “contested case hearing.” Under this rule, the parties must disclose their witnesses and evidence at least 10 days prior to hearing (current rule requires 7 days).

Under current rules and this rule, parties may have a right to “discover” (via pre-hearing depositions, interrogatories, etc.) relevant information possessed by opposing parties. Under this rule, “discovery” must be completed at least 10 days prior to hearing.

Hearing Transcripts

Under current rules, hearings in DATCP “contested cases” may be electronically recorded or transcribed in writing. This rule clarifies that hearings will normally be electronically recorded (the normal method used by the department of administration, division of hearings and appeals) unless the ALJ orders a written transcript with the approval of DATCP.

- Under current rules and this rule, any party may request a written transcript.

- Under current rules and this rule, if a written transcript is prepared in response to a request from any party, that party must pay the transcription and copying cost. Under this rule, DATCP must charge its actual per-page transcription cost (compared to a standard per-page charge of \$1.75 under current rules) plus a copying cost of 25 cents per page. Other parties may obtain copies by paying a copying cost of 25 cents per page.
- Under current rules and this rule, if DATCP orders a written transcript for its own purposes or for purposes of judicial review, DATCP must pay the transcription cost. Other parties may obtain copies for 25 cents per page.

Videoconferencing

Under this rule, an ALJ may conduct a “contested case” hearing by videoconferencing if current statutory standards for videoconference court proceedings are met.

Order of Proof

This rule clarifies, but does not substantially alter, current rules related to the order of proof in “contested cases.” Generally speaking, the party bringing the case has the initial burden of going forward.

Proposed ALJ Decision; Objections

Under current DATCP rules, the DATCP secretary is normally the final decisionmaker in a “contested case” unless the secretary delegates that authority to the ALJ or another official. If the ALJ is not the final decisionmaker, the ALJ must prepare a proposed decision for consideration by the final decisionmaker. The ALJ must provide copies of the proposed decision to the parties. Under this rule, parties have at least 30 days to file objections to the proposed decision (compared to 15 days under current rules).

Settlement

This rule clarifies, but does not substantially alter, current procedures for settling “contested cases.” Parties may settle a “contested case” at any time, subject to the approval of the final decisionmaker. Among other things, the parties may stipulate to a DATCP order resolving the disputed matter.

Frivolous Claims; Cost Award

Under s. 227.485, Stats., and current DATCP rules, if an individual or small business prevails in a “contested case” against DATCP, the ALJ may order DATCP to pay costs and attorney fees to the prevailing individual or small business unless the ALJ finds that DATCP’s losing position was substantially justified. This rule does not change these current rule provisions.

Under s. 227.483, Stats., if an ALJ finds that any party (including a private party or DATCP) has asserted a “frivolous” claim in a contested case, the ALJ may order the party to reimburse another party (including a private party or DATCP) for reasonable costs and attorney fees incurred in defending that claim. This rule incorporates the provisions of s. 227.483, Stats., into ATCP 1. Under this rule, as under s. 227.483, Stats., an ALJ may not find that a claim is “frivolous” unless the ALJ finds at least one of the following:

- The action, claim or defense was initiated or pursued in bad faith, solely for the purpose of harassing or maliciously injuring another.
- The party or party’s attorney knew or should have known that the action, claim or defense was without any reasonable basis in law or equity, and could not be supported by a good faith argument for an extension, modification, or reversal of existing law.

Fiscal Estimate

This rule will have no fiscal effect on DATCP or local units of government. A complete *fiscal estimate* is attached.

Business Impact

This rule will have no significant effect on business. A complete *business impact analysis* is attached.

Federal Regulations

A variety of federal regulations govern procedures in federal “contested cases.” However, none of those regulations has a direct bearing on this rule.

Surrounding State Programs

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.

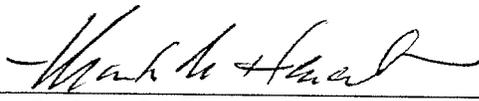
Data and Analytical Methods

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

Dated this 14/22 day of July, 2009

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

By



Rodney J. Nilsestuen, Secretary



State of Wisconsin
Department of Agriculture, Trade, and Consumer Protection

NOTICE OF HEARING

Rule Related to Plant Pest Import Controls and Quarantine

The State of Wisconsin Department of Agriculture, Trade and Consumer Protection (DATCP) announces that it will hold a public hearing on its emergency rule, s. ATCP 21.17, Wis. Adm. Code, relating to the quarantines of Brown County and Kenosha County for emerald ash borer.

DATCP will hold two public hearings at the times and places shown below. DATCP invites the public to attend the hearings and comment on the emergency rule. Following the public hearings, the hearing record will remain open until Friday, October 9, 2009 for additional written comments. Comments may be sent to the Division of Agricultural Resource Management at the address below, to Robert.dahl@datcp.state.wi.us or at <https://apps4.dhfs.state.wi.us/admrules/public/home>.

You may obtain a free copy of this emergency rule by contacting the Wisconsin Department of Agriculture, Trade and Consumer Protection, Division of Agricultural Resource Management, 2811 Agriculture Drive, P.O. Box 8911, Madison, WI 53708. You can also obtain a copy by calling (608) 224-4573 or emailing robert.dahl@datcp.state.wi.us. Copies will also be available at the hearing. To view the emergency rule online, go to: <https://apps4.dhfs.state.wi.us/admrules/public/Home>.

To provide comments or concerns relating to small business, please contact DATCP's small business regulatory coordinator, Keeley Moll, at the address above, by emailing to Keeley.Moll@datcp.state.wi.us or by telephone at (608) 224-5039.

Hearing impaired persons may request an interpreter for this hearing. Please make reservations for a hearing interpreter by September 29, 2009, by writing to Jennifer Etter Goh, Division of Agricultural Resource Management, P.O. Box 8911, Madison, WI 53708-8911, telephone (608) 224-4577. Alternatively, you may contact the DATCP TDD at (608) 224-5058. The hearing facility is handicap accessible.

Hearing Dates and Locations:

Tuesday, September 29, 2009
10:30 a.m. to 12:30 p.m.
19600 75th Street
Bristol, WI 53104-0550

Wednesday, September 30, 2009
10:30 a.m. to 12:30 p.m.
Agriculture & Extension Service Center, Room 161
1150 Bellevue St.
Green Bay, WI 54302

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

This emergency rule creates quarantines for Brown County and Kenosha County for the emerald ash borer. Under this rule, the Department of Agriculture, Trade and Consumer Protection (“DATCP”) quarantines Brown County and Kenosha County to mitigate the movement of emerald ash borer to other areas of Wisconsin and other states.

DATCP is adopting this temporary emergency rule pending the adoption of federal quarantines for Brown County and Kenosha County. This emergency rule will take effect immediately upon publication in the official state newspaper, and will remain in effect for 150 days. The Legislature’s Joint Committee for Review of Administrative Rules may extend the emergency rule for up to 120 additional days.

Statutes Interpreted

Statutes Interpreted: ss. 93.07(12) and 94.01, Stats.

Statutory Authority

Statutory Authority: ss. 93.07(1), 93.07(12), 94.01 and 227.24, Stats.

Explanation of Statutory Authority

The Wisconsin Department of Agriculture, Trade and Consumer Protection (“DATCP”) has broad general authority, under s. 93.07 (1), Stats., to adopt regulations to enforce laws under its jurisdiction. DATCP also has broad general authority, under ss. 93.07 (12) and 94.01, Stats., to adopt regulations to prevent and control plant pest infestations. Emerald ash borer quarantines created by this rule are part of an overall state strategy to prevent and control plant pest infestations, including emerald ash borer infestations. DATCP is adopting this temporary emergency rule, under authority of s. 227.24, Stats., pending the adoption of federal regulations on the same subject.

Background

The United States Department of Agriculture-Animal and Plant Health Inspection Services (APHIS) positively identified emerald ash borer in Brown County on July 24, 2009, and in Kenosha County on August 12, 2009. This emergency rule creates DATCP quarantines for Brown County and Kenosha County. A federal quarantine will be enacted approximately two to six weeks after a formal submission by the state plant regulatory official. Emerald ash borer is carried by untreated ash wood products. A two to six week delay until enactment of the federal quarantine leaves too much time for businesses or individuals to move potentially emerald ash borer infested material out of the county to areas of Wisconsin or other states that are not infested with emerald ash borer.

Emerald ash borer is an injurious exotic pest that now endangers Wisconsin's 750 million ash trees and ash tree resources. This insect has the potential to destroy entire stands of ash, and any incursion of emerald ash borer can result in substantial losses to forest ecosystems and urban trees, as well as the state's thriving tourism and timber industries. Efforts are currently underway in other states to eradicate emerald ash borer. Those efforts have proven to be costly, time-consuming, and not completely effective. In Michigan, emerald ash borer has caused an estimated \$11.6 million in landscape industry and wood lot losses and approximately \$2 million in lost nursery stock sales annually. The United States Department of Agriculture predicts the national urban impact from this pest could exceed \$370 billion.

DATCP has plant inspection and pest control authority under s. 94.01, Stats., to adopt rules establishing quarantines or other restrictions on the importation into or movement of plants or other materials within this state, if these measures are necessary to prevent or control the spread of injurious plant pests. A quarantine order may prohibit the movement of any pest, or any plant, pest host or pest-harboring material, which may transmit or harbor a pest.

Emergency Rule Content

Under this emergency rule, movement of all hardwood (non-coniferous) firewood of any type plus movement of any ash wood out of Brown County and Kenosha County is prohibited with certain exceptions. The emergency rule will do the following:

- Create quarantines of emerald ash borer for Brown County and Kenosha County that prohibit the movement of all hardwood species of firewood, nursery stock, green lumber, and other material living, dead, cut or fallen, including logs, stumps, roots, branches and composted and uncomposted chips of the genus *Fraxinus* (Ash wood), out of the county.
- Provide an exemption for items that have been inspected and certified by a pest control official and are accompanied by a written certificate issued by the pest control official (some products, such as nursery stock, cannot be given an exemption).
- Provide an exemption for businesses that enter into a state or federal compliance agreement. The compliance agreement spells out what a company can and cannot do with regulated articles.

Fiscal Impact

DATCP will have additional workload related to enforcing the quarantines but it will be able to absorb the projected workload and costs within DATCP's current budget and with current staff. The presence of emerald ash borer may produce additional workload for local governments in Brown County and Kenosha County, but the quarantines will not themselves produce any local fiscal impact.

Business Impact

This emergency rule may have an impact on persons or companies that deal in any hardwood firewood or ash materials in Brown County or Kenosha County. The affected businesses are all small businesses. This emergency rule restricts the sale or distribution of ash products plus any

hardwood firewood from Brown County and Kenosha County to locations outside of Brown County and Kenosha County.

The business impact of this emergency rule depends on the number of nurseries that sell/distribute ash nursery stock outside the county, firewood producers/dealers that sell/distribute outside the county, saw mills that move untreated ash stock outside the county, and green wood waste that is moved outside the county.

Brown County has 21 and Kenosha County has 17 licensed nursery growers that could possibly be growing ash nursery stock. Those growers will not be able to sell ash nursery stock outside of the county during the quarantine. Thirteen known firewood dealers have been identified in Brown County and 18 known firewood dealers have been identified in Kenosha County. They would need to be certified under s. ATCP 21.20 to sell firewood outside of the county. To obtain certification a firewood dealer will have to pay an annual certification fee to DATCP of \$50 and treat the firewood in a manner that insures it is free of emerald ash borer. There is one veneer mill in Brown County and up to three wood processing mills in Kenosha County that deal with ash. To sell ash wood products outside of their counties they will have to enter into a compliance agreement with DATCP or APHIS that authorizes movement of ash products outside of their counties only when there is assurance that the movement will not spread the emerald ash borer to other locations.

Environmental Impact

This emergency rule will not have a significant impact on the environment.

Federal and Surrounding State Programs

Federal Programs

Under the federal Plant Protection Act, APHIS has responsibility for excluding, eradicating and controlling serious plant pests, including emerald ash borer. APHIS has instituted statewide quarantines on the movement of all ash wood for Illinois, Indiana and Ohio, in addition to the Lower Peninsula of Michigan. APHIS has also instituted quarantines for Ozaukee, Washington, Sheboygan, Fond du Lac, Vernon and Crawford Counties in Wisconsin. The quarantines include restrictions on the movement of any hardwood (non-coniferous) firewood.

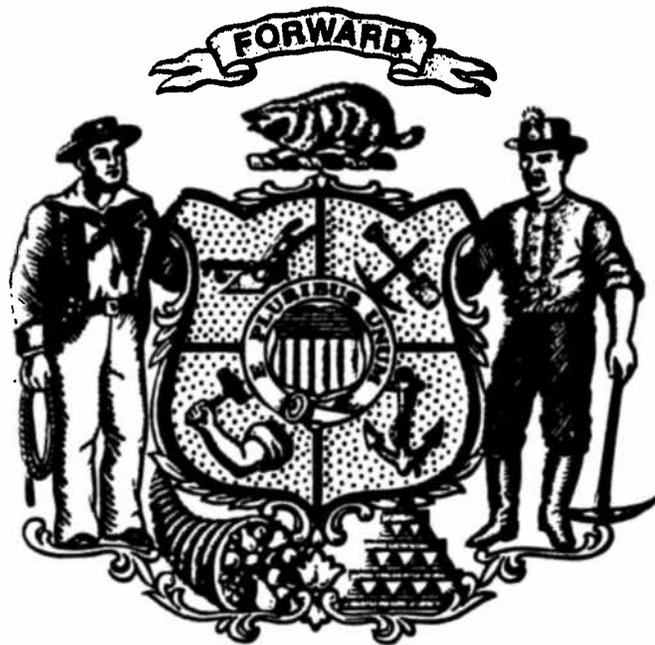
Surrounding State Programs

Surrounding states where emerald ash borer has been identified (Illinois, Indiana, Ohio, Minnesota and Michigan) have state and federal quarantines that prohibit the movement of regulated articles out of quarantined areas. A regulated article can only move out of quarantined areas after it is certified by USDA or state officials.

Dated this 27 day of August, 2009

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

By Randy Rasmussen for
Rodney J. Nilsestuen, Secretary



Department of Agriculture,
Trade and Consumer Protection

MEMORANDUM

Office of Legal Counsel

DATE: September 9, 2009

TO: Bruce Hoesly, Legislative Reference Bureau
David Schmiedicke, State Budget Director, DOA

FROM: Karen Schultz, DATCP 
(608) 224-5023

SUBJECT: NOTICE OF HEARING – Wisconsin Administrative Code
**Chapter ATCP 21 – Quarantines of Milwaukee County,
Racine County and Waukesha County for Emerald Ash Borer**

Attached is Notice of Hearing for the above emergency rule, for printing in the next issue of the Wisconsin Administrative Register.

Please initial and return the attached copy of this memo for our files.

Thank you.

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State of Wisconsin
Department of Agriculture, Trade, and Consumer Protection

NOTICE OF HEARING

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Hearing impaired persons may request an interpreter for this hearing. Please make reservations for a hearing interpreter by October 13, 2009, by writing to Jennifer Etter Goh, Division of Agricultural Resource Management, P.O. Box 8911, Madison, WI 53708-8911, telephone (608) 224-4577. Alternatively, you may contact the DATCP TDD at (608) 224-5058. The hearing facility is handicap accessible.

Hearing Date and Location:

October 15, 2009
1:00 pm to 3:00 pm
Franklin Public Library, Fadrow Room A
9151 W. Loomis Road
Franklin, WI 53132

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

This emergency rule creates quarantines for Milwaukee County, Racine County and Waukesha County for the emerald ash borer. Under this rule, the Department of Agriculture, Trade and Consumer Protection (“DATCP”) quarantines Milwaukee County, Racine County and Waukesha County to mitigate the movement of emerald ash borer to other areas of Wisconsin and other states.

DATCP is adopting this temporary emergency rule pending the adoption of federal quarantines for Milwaukee County, Racine County and Waukesha County. This emergency rule will take effect immediately upon publication in the official state newspaper, and will remain in effect for 150 days. The Legislature’s Joint Committee for Review of Administrative Rules may extend the emergency rule for up to 120 additional days.

Statutes Interpreted

Statutes Interpreted: ss. 93.07(12) and 94.01, Stats.

Statutory Authority

Statutory Authority: ss. 93.07(1), 93.07(12), 94.01 and 227.24, Stats.

Explanation of Statutory Authority

The Wisconsin Department of Agriculture, Trade and Consumer Protection (“DATCP”) has broad general authority, under s. 93.07 (1), Stats., to adopt regulations to enforce laws under its jurisdiction. DATCP also has broad general authority, under ss. 93.07 (12) and 94.01, Stats., to adopt regulations to prevent and control plant pest infestations. Emerald ash borer quarantines created by this rule are part of an overall state strategy to prevent and control plant pest infestations, including emerald ash borer infestations. DATCP is adopting this temporary emergency rule, under authority of s. 227.24, Stats., pending the adoption of federal regulations on the same subject.

Background

The United States Department of Agriculture-Animal and Plant Health Inspection Services (APHIS) positively identified emerald ash borer in Milwaukee County, near the border of Racine County and Waukesha County, on August 28, 2009. This emergency rule creates DATCP quarantines for Milwaukee County, Racine County, and Waukesha County. A federal quarantine will be enacted approximately two to six weeks after a formal submission by the state plant regulatory official. Emerald ash borer is carried by untreated ash wood products. A two to six week delay until enactment of the federal quarantine leaves too much time for businesses or individuals to move potentially emerald ash borer infested material out of the county to areas of Wisconsin or other states that are not infested with emerald ash borer.

Emerald ash borer is an injurious exotic pest that now endangers Wisconsin's 750 million ash trees and ash tree resources. This insect has the potential to destroy entire stands of ash, and any incursion of emerald ash borer can result in substantial losses to forest ecosystems and urban trees, as well as the state's thriving tourism and timber industries. Efforts are currently underway in other states to eradicate emerald ash borer. Those efforts have proven to be costly, time-consuming, and not completely effective. In Michigan, emerald ash borer has caused an estimated \$11.6 million in landscape industry and wood lot losses and approximately \$2 million in lost nursery stock sales annually. The United States Department of Agriculture predicts the national urban impact from this pest could exceed \$370 billion.

DATCP has plant inspection and pest control authority under s. 94.01, Stats., to adopt rules establishing quarantines or other restrictions on the importation into or movement of plants or other materials within this state, if these measures are necessary to prevent or control the spread of injurious plant pests. A quarantine order may prohibit the movement of any pest, or any plant, pest host or pest-harboring material, which may transmit or harbor a pest.

Emergency Rule Content

Under this emergency rule, movement of all hardwood (non-coniferous) firewood of any type plus movement of any ash wood out of Milwaukee County, Racine County and Waukesha County is prohibited with certain exceptions. The emergency rule will do the following:

- Create quarantines of emerald ash borer for Milwaukee County, Racine County, and Waukesha County that prohibit the movement of all hardwood species of firewood, nursery stock, green lumber, and other material living, dead, cut or fallen, including logs, stumps, roots, branches and composted and uncomposted chips of the genus *Fraxinus* (Ash wood), out of the county.
- Provide an exemption for items that have been inspected and certified by a pest control official and are accompanied by a written certificate issued by the pest control official (some products, such as nursery stock, cannot be given an exemption).
- Provide an exemption for businesses that enter into a state or federal compliance agreement. The compliance agreement spells out what a company can and cannot do with regulated articles.

Fiscal Impact

DATCP will have additional workload related to enforcing the quarantines but it will be able to absorb the projected workload and costs within DATCP's current budget and with current staff. The presence of emerald ash borer may produce additional workload for local governments in Milwaukee County, Racine County and Waukesha County, but the quarantines will not themselves produce any local fiscal impact.

Business Impact

This emergency rule may have an impact on persons or companies that deal in any hardwood firewood or ash materials in Milwaukee County, Racine County and Waukesha County. The affected businesses are all small businesses. This emergency rule restricts the sale or distribution of

ash products plus any hardwood firewood from Milwaukee County, Racine County and Waukesha County to locations outside of Milwaukee County, Racine County and Waukesha County.

The business impact of this emergency rule depends on the number of nurseries that sell/distribute ash nursery stock outside the county, firewood producers/dealers that sell/distribute outside the county, saw mills that move untreated ash stock outside the county, and green wood waste that is moved outside the county.

Milwaukee County, Racine County and Waukesha County have a combined total of 84 licensed nursery growers that could possibly be growing ash nursery stock. Those growers will not be able to sell ash nursery stock outside of the county during the quarantine. There are also a total of 50 known firewood dealers in Milwaukee County, Racine County and Waukesha County. Additional firewood dealers are being identified weekly. Firewood dealers would need to be certified under s. ATCP 21.20 to sell firewood outside of the county. To obtain certification a firewood dealer will have to pay an annual certification fee to DATCP of \$50 and treat the firewood in a manner that insures it is free of emerald ash borer. There are 3 mills (non-veneer) in Milwaukee County, Racine County and Waukesha County and an unknown number of wood processing facilities that deal with ash. To sell ash wood products outside of their counties they will have to enter into a compliance agreement with DATCP or APHIS that authorizes movement of ash products outside of their county only when there is assurance that the movement will not spread emerald ash borer to other locations.

Environmental Impact

This emergency rule will not have a significant impact on the environment.

Federal and Surrounding State Programs

Federal Programs

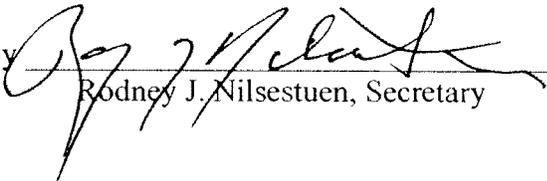
Under the federal Plant Protection Act, APHIS has responsibility for excluding, eradicating and controlling serious plant pests, including emerald ash borer. APHIS has instituted statewide quarantines on the movement of all ash wood for Illinois, Indiana and Ohio, in addition to the Lower Peninsula of Michigan. APHIS has also instituted quarantines for Brown, Kenosha, Ozaukee, Washington, Sheboygan, Fond du Lac, Vernon and Crawford Counties in Wisconsin. The quarantines include restrictions on the movement of any hardwood (non-coniferous) firewood.

Surrounding State Programs

Surrounding states where emerald ash borer has been identified (Illinois, Indiana, Ohio, Minnesota and Michigan) have state and federal quarantines that prohibit the movement of regulated articles out of quarantined areas. A regulated article can only move out of quarantined areas after it is certified by USDA or state officials.

Dated this 8 day of September, 2009

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

By 
Rodney J. Nilsestuen, Secretary



Holperin

Department of Agriculture,
Trade and Consumer Protection

MEMORANDUM

Office of Legal Counsel

DATE: September 14, 2009

TO: Bruce Hoesly, Legislative Reference Bureau
David Schmiedicke, State Budget Director, DOA

FROM: Karen Schultz, DATCP *Jennifer Kleator - Schubert*
(608) 224-5023

SUBJECT: NOTICE OF HEARING (Revised) – Wisconsin Administrative
Code **Chapter ATCP 21 – Quarantines of Milwaukee County,
Racine County and Waukesha County for Emerald Ash Borer**

Attached is Notice of Hearing – Revised for the above emergency rule, for printing in the next issue of the Wisconsin Administrative Register.

Please initial and return the attached copy of this memo for our files.

Thank you.

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State of Wisconsin
Department of Agriculture, Trade, and Consumer Protection

NOTICE OF HEARING -- REVISED

Rule Related to Plant Pest Import Controls and Quarantine

The state of Wisconsin Department of Agriculture, Trade and Consumer Protection (DATCP) announces that it will hold a public hearing on its emergency rule, s. ATCP 21.17, Wis. Adm. Code, relating to the quarantines of Milwaukee County, Racine County and Waukesha County for emerald ash borer.

DATCP will hold a public hearing at the time and place shown below. DATCP invites the public to attend the hearing and comment on the emergency rule. Following the public hearing, the hearing record will remain open until Friday, October 23, 2009 for additional written comments. Comments may be sent to the Division of Agricultural Resource Management at the address below, to Robert.dahl@datcp.state.wi.us or at <http://adminrules.wisconsin.gov>.

You may obtain a free copy of this emergency rule by contacting the Wisconsin Department of Agriculture, Trade and Consumer Protection, Division of Agricultural Resource Management, 2811 Agriculture Drive, P.O. Box 8911, Madison, WI 53708. You can also obtain a copy by calling (608) 224-4573 or emailing robert.dahl@datcp.state.wi.us. Copies will also be available at the hearing. To view the emergency rule online, go to: <http://adminrules.wisconsin.gov>.

To provide comments or concerns relating to small business, please contact DATCP's small business regulatory coordinator, Keeley Moll, at the address above, by emailing to Keeley.Moll@datcp.state.wi.us or by telephone at (608) 224-5039.

Hearing impaired persons may request an interpreter for this hearing. Please make reservations for a hearing interpreter by October 13, 2009, by writing to Jennifer Etter Goh, Division of Agricultural Resource Management, P.O. Box 8911, Madison, WI 53708-8911, telephone (608) 224-4577. Alternatively, you may contact the DATCP TDD at (608) 224-5058. The hearing facility is handicap accessible.

Hearing Date and Location:

October 15, 2009
1:00 pm to 3:00 pm
Franklin Public Library, Fadrow Room A
9151 W. Loomis Road
Franklin, WI 53132

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

This emergency rule creates quarantines for Milwaukee County, Racine County and Waukesha County for the emerald ash borer. Under this rule, the Department of Agriculture, Trade and Consumer Protection (“DATCP”) quarantines Milwaukee County, Racine County and Waukesha County to mitigate the movement of emerald ash borer to other areas of Wisconsin and other states.

DATCP is adopting this temporary emergency rule pending the adoption of federal quarantines for Milwaukee County, Racine County and Waukesha County. This emergency rule will take effect immediately upon publication in the official state newspaper, and will remain in effect for 150 days. The Legislature’s Joint Committee for Review of Administrative Rules may extend the emergency rule for up to 120 additional days.

Statutes Interpreted

Statutes Interpreted: ss. 93.07(12) and 94.01, Stats.

Statutory Authority

Statutory Authority: ss. 93.07(1), 93.07(12), 94.01 and 227.24, Stats.

Explanation of Statutory Authority

The Wisconsin Department of Agriculture, Trade and Consumer Protection (“DATCP”) has broad general authority, under s. 93.07 (1), Stats., to adopt regulations to enforce laws under its jurisdiction. DATCP also has broad general authority, under ss. 93.07 (12) and 94.01, Stats., to adopt regulations to prevent and control plant pest infestations. Emerald ash borer quarantines created by this rule are part of an overall state strategy to prevent and control plant pest infestations, including emerald ash borer infestations. DATCP is adopting this temporary emergency rule, under authority of s. 227.24, Stats., pending the adoption of federal regulations on the same subject.

Background

The United States Department of Agriculture-Animal and Plant Health Inspection Services (APHIS) positively identified emerald ash borer in Milwaukee County, near the border of Racine County and Waukesha County, on August 28, 2009. This emergency rule creates DATCP quarantines for Milwaukee County, Racine County, and Waukesha County. A federal quarantine will be enacted approximately two to six weeks after a formal submission by the state plant regulatory official. Emerald ash borer is carried by untreated ash wood products. A two to six week delay until enactment of the federal quarantine leaves too much time for businesses or individuals to move potentially emerald ash borer infested material out of the county to areas of Wisconsin or other states that are not infested with emerald ash borer.

Emerald ash borer is an injurious exotic pest that now endangers Wisconsin's 750 million ash trees and ash tree resources. This insect has the potential to destroy entire stands of ash, and any incursion of emerald ash borer can result in substantial losses to forest ecosystems and urban trees, as well as the state's thriving tourism and timber industries. Efforts are currently underway in other states to eradicate emerald ash borer. Those efforts have proven to be costly, time-consuming, and not completely effective. In Michigan, emerald ash borer has caused an estimated \$11.6 million in landscape industry and wood lot losses and approximately \$2 million in lost nursery stock sales annually. The United States Department of Agriculture predicts the national urban impact from this pest could exceed \$370 billion.

DATCP has plant inspection and pest control authority under s. 94.01, Stats., to adopt rules establishing quarantines or other restrictions on the importation into or movement of plants or other materials within this state, if these measures are necessary to prevent or control the spread of injurious plant pests. A quarantine order may prohibit the movement of any pest, or any plant, pest host or pest-harboring material, which may transmit or harbor a pest.

Emergency Rule Content

Under this emergency rule, movement of all hardwood (non-coniferous) firewood of any type plus movement of any ash wood out of Milwaukee County, Racine County and Waukesha County is prohibited with certain exceptions. The emergency rule will do the following:

- Create quarantines of emerald ash borer for Milwaukee County, Racine County, and Waukesha County that prohibit the movement of all hardwood species of firewood, nursery stock, green lumber, and other material living, dead, cut or fallen, including logs, stumps, roots, branches and composted and uncomposted chips of the genus *Fraxinus* (Ash wood), out of the county.
- Provide an exemption for items that have been inspected and certified by a pest control official and are accompanied by a written certificate issued by the pest control official (some products, such as nursery stock, cannot be given an exemption).
- Provide an exemption for businesses that enter into a state or federal compliance agreement. The compliance agreement spells out what a company can and cannot do with regulated articles.

Fiscal Impact

DATCP will have additional workload related to enforcing the quarantines but it will be able to absorb the projected workload and costs within DATCP's current budget and with current staff. The presence of emerald ash borer may produce additional workload for local governments in Milwaukee County, Racine County and Waukesha County, but the quarantines will not themselves produce any local fiscal impact.

Business Impact

This emergency rule may have an impact on persons or companies that deal in any hardwood firewood or ash materials in Milwaukee County, Racine County and Waukesha County. The affected businesses are all small businesses. This emergency rule restricts the sale or distribution of

ash products plus any hardwood firewood from Milwaukee County, Racine County and Waukesha County to locations outside of Milwaukee County, Racine County and Waukesha County.

The business impact of this emergency rule depends on the number of nurseries that sell/distribute ash nursery stock outside the county, firewood producers/dealers that sell/distribute outside the county, saw mills that move untreated ash stock outside the county, and green wood waste that is moved outside the county.

Milwaukee County, Racine County and Waukesha County have a combined total of 84 licensed nursery growers that could possibly be growing ash nursery stock. Those growers will not be able to sell ash nursery stock outside of the county during the quarantine. There are also a total of 50 known firewood dealers in Milwaukee County, Racine County and Waukesha County. Additional firewood dealers are being identified weekly. Firewood dealers would need to be certified under s. ATCP 21.20 to sell firewood outside of the county. To obtain certification a firewood dealer will have to pay an annual certification fee to DATCP of \$50 and treat the firewood in a manner that insures it is free of emerald ash borer. There are 3 mills (non-veneer) in Milwaukee County, Racine County and Waukesha County and an unknown number of wood processing facilities that deal with ash. To sell ash wood products outside of their counties they will have to enter into a compliance agreement with DATCP or APHIS that authorizes movement of ash products outside of their county only when there is assurance that the movement will not spread emerald ash borer to other locations.

Environmental Impact

This emergency rule will not have a significant impact on the environment.

Federal and Surrounding State Programs

Federal Programs

Under the federal Plant Protection Act, APHIS has responsibility for excluding, eradicating and controlling serious plant pests, including emerald ash borer. APHIS has instituted statewide quarantines on the movement of all ash wood for Illinois, Indiana and Ohio, in addition to the Lower Peninsula of Michigan. APHIS has also instituted quarantines for Brown, Kenosha, Ozaukee, Washington, Sheboygan, Fond du Lac, Vernon and Crawford Counties in Wisconsin. The quarantines include restrictions on the movement of any hardwood (non-coniferous) firewood.

Surrounding State Programs

Surrounding states where emerald ash borer has been identified (Illinois, Indiana, Ohio, Minnesota and Michigan) have state and federal quarantines that prohibit the movement of regulated articles out of quarantined areas. A regulated article can only move out of quarantined areas after it is certified by USDA or state officials.

Dated this 14th day of September, 2009

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

By 
Rodney J. Nilsestuen, Secretary



State of Wisconsin
Department of Agriculture, Trade, and Consumer Protection

HEARING NOTICE

Rule Related to Weights and Measures Licensing and Fees

The Wisconsin Department of Agriculture, Trade and Consumer Protection (DATCP) announces that it will hold public hearings on a proposed hearing draft to chapter ATCP 92, Wis. Adm. Code, relating to Weights and Measures Licensing and Fees.

DATCP will hold the public hearings at the times and locations shown below. DATCP invites the public to attend the hearing and comment on the rule. Following the hearing, the hearing record will remain open until Friday, January 29, 2010 for additional written comments. Comments may be sent to the Division of Trade and Consumer Protection at the address below, by email to michelle.reinen@wi.gov or online at <https://apps4.dhfs.state.wi.us/admrules/public/Home>.

You may obtain a free copy of this rule by contacting the Wisconsin Department of Agriculture, Trade and Consumer Protection, Division of Trade and Consumer Protection, 2811 Agriculture Drive, P.O. Box 8911, Madison, WI 53708. You can also obtain a copy by calling (608) 224-5160 or emailing michelle.reinen@wi.gov. Copies will also be available at the hearings. To view the proposed rule online, go to <http://adminrules.wisconsin.gov>.

To provide comments or concerns relating to small business, you may also contact DATCP's small business regulatory coordinator Keeley Moll at the address above, or by emailing to Keeley.Moll@datcp.state.wi.us or by telephone at (608) 224-5039.

Hearing impaired persons may request an interpreter for these hearings. Please make reservations for a hearing interpreter by January 8, 2010, by writing to Michelle Reinen, Division of Trade and Consumer Protection, P.O. Box 8911, Madison, WI 53708-8911, Michelle.reinen@wi.gov, telephone (608) 224-5160. Alternatively, you may contact the DATCP TDD at (608) 224-5058. Handicap access is available at the hearings.

Hearing Dates and Locations:

Monday, January 11, 2010
10:00 a.m. to 12:00 p.m.
Department of Agriculture, Trade and Consumer Protection
2811 Agriculture Drive, Board Room (CR-106)
Madison, Wisconsin, 53718-6777

Tuesday, January 12, 2010
10:30 a.m. to 12:30 p.m.
Marathon County Public Library – Wausau Library
300 North First Street
Wausau, Wisconsin 54403

Friday, January 15, 2010
11:00 a.m. to 1:00 p.m.
Havenwoods State Forest
6141 North Hopkins Street
Milwaukee, Wisconsin 53209-3565

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

The Department of Agriculture, Trade and Consumer Protection (DATCP) administers state laws to ensure the accuracy of commercial weights and measures. DATCP adopts weights and measures rules, and licenses persons who operate or service weighing and measuring devices. DATCP may establish certain license fees and other fees by rule.

This rule modifies current DATCP weights and measures rules. Among other things, this rule implements 2009 Wis. Act 28 (biennial budget act). Act 28 changed state weights and measures laws, including laws related to vehicle scales, weights and measures service companies, vehicle tank meters and liquefied petroleum (LP) gas meters. Act 28 created new license requirements, and authorized DATCP to establish certain license fees and surcharges by rule. Act 28 also authorized DATCP to charge reinspection fees to help pay for reinspections made necessary by weights and measures law violations.

Statutes Interpreted

Statutes Interpreted: ss. 93.06(1p), 93.07(1), 97.30(3m)(c)3., 98.03(2), 98.16, 98.18, 98.224, 98.245 and 98.255, Stats.

Statutory Authority

Statutory Authority: ss. 93.07(1), 97.30(5), 98.03(2), 98.16(4), 98.18(2), 98.224(4), 98.245(9) and 98.255(2), Stats.

Explanation of Statutory Authority

General

DATCP has general authority, under s. 93.07(1), Stats., to interpret laws under its jurisdiction. Under s. 93.06(1p), Stats., DATCP may charge for certain services (including analytical services) provided in response to a voluntary request (in this case, fees to analyze and process voluntary requests for livestock scale construction variances).

Weights and Measures; General

DATCP administers ch. 98, Stats., related to commercial weights and measures. Under s. 98.03(2), Stats., DATCP has broad authority to adopt rules governing the construction, installation and use of commercial weights and measures (including scales and other weighing and measuring devices).

Retail Food Establishments

DATCP licenses and inspects retail food establishments for food safety purposes under s. 97.30, Stats. However, DATCP also conducts weights and measures inspections of retail food establishments. Licensed establishments must pay an annual weights and measures fee under s. 97.30(3m)(c)3., Stats. DATCP may establish that fee by rule (s. 97.30(5), Stats.).

Vehicle Scales

Vehicle scales are regulated by s. 98.16, Stats. Under s. 98.16 (as modified by Act 28), a vehicle scale operator must:

- Be annually licensed by DATCP and pay an annual license fee for each vehicle scale (DATCP may adjust license fees by rule).
- Pay a license fee surcharge for each vehicle scale if the operator is found operating that scale without a license (Act 28 authorizes DATCP to adjust that surcharge by rule).
- Obtain a permit from DATCP before installing or relocating a vehicle scale (Act 28 authorizes DATCP to charge a permit fee).
- Comply with scale construction standards, unless DATCP grants a variance (Act 28 authorizes DATCP to charge a fee for processing variance requests).
- Pay reinspection fees for reinspections made necessary by law violations (DATCP may adopt reinspection fees by rule under s. 98.255, Stats.).

DATCP may adopt rules to establish and adjust fees, and regulate the construction and operation of vehicle scales (s. 98.16(3), Stats.).

Weights and Measures Service Companies and Technicians

Section 98.18, Stats., regulates persons engaged in the business of installing, servicing, testing or calibrating scales and other weighing and measuring devices (weights and measures service companies). Under that section:

- Weights and measures service companies must:
 - Be annually licensed by DATCP and pay an annual license fee (DATCP may adjust license fees by rule).
 - Pay a license fee surcharge if the weights and measures service company is found operating without a license (DATCP is *not* authorized to adjust that surcharge by rule).
- DATCP may adopt rules to regulate weights and measures service companies and establish license fees (s. 98.18(2), Stats.).

DATCP rules currently exempt individual weights and measures technicians from licensing if they are employed by a licensed weights and measures service company. However, individual technicians must be certified for competence (there is a certification examination fee of \$25). A certification is good for 5 years.

Vehicle tank meters

Vehicle tank meters are regulated by s. 98.224, Stats., as created by Act 28. Under that section, a vehicle tank meter operator must:

- Be annually licensed by DATCP and pay an annual license fee for each vehicle tank meter (DATCP must establish license fees by rule). An operator must pay a license fee surcharge if the operator is found operating a vehicle tank meter without a license (DATCP may establish the surcharge by rule).
- Comply with testing and reporting requirements. An operator who fails to do so must pay a license fee surcharge that DATCP must establish by rule.
- Pay reinspection fees for reinspections made necessary by law violations (DATCP may adopt reinspection fees by rule under s. 98.255, Stats.).

DATCP may adopt rules to establish and license fees and surcharges; testing, reporting and recordkeeping requirements; and standards for the construction, operation and maintenance of vehicle tank meters (s. 98.16(4), Stats.).

LP Gas Meters

LP gas meters are regulated by s. 98.245, Stats., as modified by Act 28. Under that section, LP

gas meter operators must:

- Be annually licensed by DATCP and pay an annual license fee for each LP gas meter (DATCP must establish license fees by rule). An operator must pay a license fee surcharge if the operator is found operating an LP gas meter without a license (DATCP must establish the surcharge by rule).
- Comply with testing and reporting requirements. An operator who fails to do so must pay a license fee surcharge that DATCP must establish by rule.
- Pay reinspection fees for reinspections made necessary by law violations (DATCP may adopt reinspection fees by rule under s. 98.255, Stats.).

DATCP may adopt rules to establish and license fees and surcharges; testing, reporting and recordkeeping requirements; and standards for the construction, operation and maintenance of vehicle tank meters (s. 98.245(9), Stats.).

Reinspection Fees

Under s. 98.255, Stats. (as created by Act 8), DATCP may charge a reinspection fee to cover DATCP reinspection costs incurred because of a law violation found on an initial inspection of a weight or measure (including a scale or other weighing or measuring device). DATCP may establish reinspection fee amounts by rule (s. 98.255(2), Stats.). DATCP may specify different reinspection fees for different types of weighing or measuring devices. The fee for each type of device may not exceed DATCP's average cost to reinspect that type of device.

Related Statutes and Rules

Among other things, this rule establishes annual weights and measures fees for retail food establishments, which are licensed and regulated (for food safety purposes) under s. 97.30, Stats., and ch. ATCP 75, Wis. Adm. Code.

Rule Content

The Department of Agriculture, Trade and Consumer Protection (DATCP) administers Wisconsin's weights and measures program which ensures the accuracy of commercial weights and measures. DATCP inspects commodities, scales and measuring devices to ensure that businesses and consumers get what they pay for. The weights and measures program is partially funded by weights and measures license fees. The biennial budget act expanded licensing of weights and measures devices, and authorized certain fee adjustments by rule, in order to improve weights and measures regulation and help remedy a severe budget shortfall. The budget act affects vehicle scales, vehicle tank meters and LP gas meters, among other things. It also authorizes DATCP to charge fees for reinspections made necessary by weights and measures law violations.

This rule is designed to implement the budget act. However, this rule also updates and clarifies other weights and measures rule provisions under ch. ATCP 92, Wis. Adm. Code. This rule establishes different fees for different weights and measures program and license categories, based upon an analysis of program costs associated with each category. Fees are generally proportionate to program costs in each category. Specifically, this rule does all of the following:

Retail Food Establishments

This rule increases the annual *weights and measures* inspection fees paid by licensed retail food establishments (it does *not* change *food safety* inspection fees). This rule does all of the following:

- Increases, from \$100 to \$420, the annual fee for a retail food establishment that has annual food sales of at least \$1 million and processes potentially hazardous food.
- Increases, from \$45 to \$55, the annual fee for a retail food establishment that has annual food sales of at least \$25,000 but less than \$1 million and processes potentially hazardous food.
- Increases, from \$25 to \$45, the annual fee for a retail food establishment that has annual food sales of at least \$25,000 and is engaged in food processing, but does not process potentially hazardous food.
- Establishes a fee of \$30 for a retail food establishment that is not engaged in food processing.

Vehicle and Livestock Scales

This rule does all of the following:

- Increases, from \$100 to \$140, the annual fee for a vehicle scale operator license (does *not* apply to livestock scales other than vehicle scales).
- Increases, from \$200 to \$350, the license fee surcharge for a person found operating a vehicle scale without a license (does *not* apply to operators of livestock scales other than vehicle scales, because those operators are not licensed).
- Establishes a license fee surcharge of \$350 for an operator who, during the previous year, failed to comply with vehicle scale testing and reporting requirements (does *not* apply to operators of livestock scales other than vehicle scales, because those operators are not licensed).
- Establishes a fee of \$160 for a permit to install or relocate a vehicle scale. This fee does *not* apply to livestock scale permits (other than vehicle scales) because the statutes do not authorize DATCP to charge fees for livestock scale permits mandated by DATCP.
- Establishes a fee of \$360 to process a request, by a vehicle scale operator *or livestock scale*

operator, for a variance from an applicable scale construction standards (this rule does not change current construction standards). See ss. 93.06(1p) and 98.16(2m)(b) and (4), Stats.

- Updates and clarifies current requirements for annual testing of vehicle scales *and livestock scales*, and reporting test results to DATCP.
- Establishes a vehicle scale operator license surcharge of \$350 for an operator who fails to comply with annual scale testing and reporting requirements (does *not* apply to operators of livestock scales other than vehicle scales, because those operators are not licensed).

Weights and Measures Service Companies and Technicians

This rule increases current annual license fees for weights and measures service companies, as follows:

- Increases the basic license fee from \$250 to \$325.
- Increases the supplementary license fee for companies operating more than one business location. The fee for each additional business location is increased from \$75 to \$100.

This rule increases, from \$25 to \$35, the current examination fee for certification of an individual weights and measures technician (5-year certification). The examination fee may be paid by the weights and measures service company that employs the technician.

LP Gas Meters

This rule does all of the following:

- Implements statutory licensing requirements for operators of LP gas meters.
- Establishes an annual license fee of \$140.
- Establishes a license fee surcharge of \$350 for an applicant who was found operating an LP gas meter without a required license during the previous year.
- Establishes basic annual testing and test reporting requirements related to LP gas meters, and establishes a license fee surcharge of \$350 for an applicant who failed to comply with those basic requirements in the previous year.

Vehicle Tank Meters

This rule does all of the following:

- Implements statutory licensing requirements for vehicle tank meter operators.
- Establishes an annual license fee of \$140.

- Establishes a license fee surcharge of \$350 for an applicant who was found operating a vehicle tank meter without a required license during the previous year.
- Establishes basic annual testing and test reporting requirements related to vehicle tank meters, and establishes a license fee surcharge of \$350 for an applicant who failed to comply with those basic requirements in the previous year.

Reinspection Fees

This rule establishes reinspection fees to cover DATCP reinspection costs incurred because of law violations found on an initial inspection of a weight or measure (including a scale or other weighing or measuring device). This rule establishes the following reinspection fees for the following types of weights and measures, based on DATCP's average cost to reinspect that type of weight or measure:

- Large capacity scale (over 5,000 lbs), \$300.
- Medium capacity scale (300-5,000lbs), \$185
- Small capacity scale (up to 300 lbs), \$150
- Vehicle tank meter, \$230.
- Liquefied petroleum gas meter, \$360.
- Loading rack meter, \$300
- Retail motor fuel device (or similar liquid measuring device), \$150
- Timing device, \$150.
- Grain moisture meter, \$200.
- Package labeling accuracy, \$185.
- Price accuracy, \$255.
- Other reinspections, \$175.

Fiscal Impact

This rule will increase annual DATCP revenues by an estimated \$400,000 and will allow DATCP to cover a larger share of its costs to administer Wisconsin's weights and measures program. This rule will have no significant impact on local units of government. A complete *fiscal estimate* is attached.

Business Impact

This rule will affect businesses that operate or service weights and measures in Wisconsin. Many affected business will pay higher fees, or will pay fees for the first time. However, the fee increases are not expected to have a major impact on overall business costs. Fees for each business category are proportionate to weights and measures program costs for that business category, and cover only a portion of program costs. A complete *business impact analysis* is attached.

Federal and Surrounding State Programs

Federal Programs

States have the primary responsibility for regulating weights and measures. The National Institute of Standards and Technology (NIST) provides model regulations and standards which may be adopted and enforced by the states. This rule is not mandated by federal law.

Surrounding State Programs

Wisconsin has a well-developed weights and measures program. Wisconsin statutes authorize DATCP to license persons who operate or service weights and measures in the state and also authorize DATCP to adopt rules prescribing standards for the construction, operation and maintenance of weights and measures and to establish the fees for inspections and licenses.

Some surrounding states have less comprehensive weights and measures programs, and fewer administrative options for standardizing and regulating weights and measures. Surrounding states tend to regulate weights and measures on a more *ad hoc* basis. However, several surrounding states have established weights and measures fees to help fund their state programs

- *Retail Food Establishments*

Illinois and Minnesota charge retail food establishment scale fees, and Minnesota charges fees for package checking. Comparable Illinois scale fees range from \$20-\$900 annually per establishment, depending upon number of scales. Minnesota scale fees range from \$35-\$1125 annually per establishment, depending upon number of scales (the fee is \$25 per scale). Minnesota package checking fees range from \$35-\$330 depending on lot size.

- *Weights and Measures Service Companies and Technicians*

Illinois and Michigan license weights and measures service companies. Illinois has an annual license fee of \$50. Michigan has a \$300 biennial license fee. Minnesota does not have a licensing program (funding comes from general program revenue).

Illinois and Michigan both license service company technicians. Illinois has an annual technician license fee of \$25. Michigan has a \$100 technician license fee every 2 years. Minnesota does not have a licensing program (funding comes from general program revenue).

- *Vehicle Scales*

Illinois and Minnesota both license vehicle scales. Illinois has an annual license fee of \$200. Minnesota charges a range of \$170-\$250 per license with a Place in Service fee of \$110. Michigan does not have a licensing program (funding comes from general program revenue).

- *LP Gas Meters*

Illinois and Minnesota both license LP gas meters. Illinois has an annual license fee of \$165. Minnesota has a \$150 license fee with a “place-in-service” fee of \$110. Michigan does not have a licensing program (funding comes from general program revenue).

- *Vehicle Tank Meters*

Illinois and Minnesota both license vehicle tank meters. Illinois charges a range of \$100 to \$200 for an annual license. Minnesota’s program funding comes from other sources, but does have a “place-in-service” fee of \$110. Michigan does not have a licensing program (funding comes from general program revenue).

- *Reinspection Fees*

Device	Illinois fees	Michigan fees	<i>Minnesota fees</i>
Vehicle Scale (large capacity)	\$200	GPR (no fee)	Avg \$388
Medium Capacity Scale	\$75-200	GPR	\$145-270
Small Capacity Scale	\$20-50	GPR	\$125-\$250
Vehicle Tank Meter	\$100-200	GPR	SEG
LPG Meter	\$165	GPR	\$250
Loading Rack Meter	\$200	GPR	SEG
Retail Motor Fuel	\$50	GPR	SEG
Timing Device	N/A	GPR	\$175/hr
Grain Moisture Meter	\$100	GPR	N/A
Package Labeling	N/A	GPR	\$235-\$530
Price Accuracy	N/A	GPR	\$175-\$190/hour
Other	N/A	GPR	\$175-190/hour

DATCP Contact

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

Michelle Reinen, Program & Policy Analyst
Department of Agriculture, trade and Consumer Protection
P.O. Box 8911
Madison, WI 53708-8911
Telephone (608) 224-5160
E-Mail: hearingcomments@datcp.state.wi.us

Dated this _____ day of November, 2009.

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

By _____
Rodney J. Nilsestuen, Secretary