

1 **Report From Agency**

2 **DATCP Docket No. 07-R-03**
Rules Clearinghouse No. 07-085

Proposed Final Draft
November 21, 2007

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

3 The Wisconsin department of agriculture, trade and consumer protection hereby proposes the
4 following order *to create* ss. ATCP 21.01(6p), (6r) and (9), and 21.20, *relating to* firewood in
5 Wisconsin state parks, voluntary certification of firewood dealers, voluntary treatment of
6 firewood, labeling of treated firewood, and firewood sales representations.

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

This rule creates a voluntary certification program for firewood dealers, in order to prevent the spread of pests such as Emerald Ash Borer. The Department of Agriculture, Trade and Consumer Protection (“DATCP”) will administer the certification program. The Wisconsin Department of Natural Resources (“DNR”) has adopted rules limiting the use of firewood from *uncertified* sources in Wisconsin state parks. Firewood from a *certified* dealer, if treated and labeled according to this rule, may be used in Wisconsin state parks.

Statutes Interpreted

Statutes Interpreted: ss. 93.06(1p) and (1q), 93.07(12), 94.01 and 100.20, Stats.

Statutory Authority

Statutory Authority: ss. 93.06(1p) and (1q), 93.07(1), 93.07(12), 94.01 and 100.20, Stats.

Explanation of Statutory Authority

DATCP has general authority, under s. 93.07(1), Stats., to interpret laws under its jurisdiction. DATCP has authority, under ss. 93.07(12) and 94.01, Stats., to adopt regulations to prevent and control plant pest infestations. DATCP has authority, under ss. 93.06(1p) and (1q), to provide

inspection and marketing services upon request and to charge a fee for its services. DATCP has authority, under s. 100.20(2), Stats., to regulate business practices and methods of competition.

Related Rules or Statutes

This rule supplements and is consistent with DNR rules under s. NR 45.04(1)(g).

Plain Language Analysis

Emerald Ash Borer and other major pests are carried by firewood. DNR has adopted rules, under NR 45.04(1), to restrict the entry of firewood into Wisconsin state parks. The DNR rules prohibit, in state parks, firewood originating more than 50 miles from the park or from outside this state unless the firewood originates from a DATCP-approved source.

Firewood in Wisconsin State Parks

Consistent with DNR rules, this rule allows a person to enter a Wisconsin state park with firewood that originates more than 50 miles from the park or from outside this state if all of the following apply:

- The firewood originates from a DATCP-certified firewood dealer.
- The certified firewood dealer has treated the firewood in this state, according to standards in this rule.
- The firewood is labeled as treated firewood, and bears the certification number of the certified firewood dealer that treated it.

Firewood Dealers; Voluntary Certification

This rule creates a voluntary certification program for firewood dealers. A firewood dealer is not required to be certified, except to provide firewood for use in Wisconsin state parks. Under this rule:

- An annual certification expires on December 31 of each year.
- A firewood dealer seeking certification must submit an annual certification application that complies with this rule. There is an annual certification fee of \$50 for each location at which the firewood dealer treats firewood in this state for possible use in Wisconsin state parks.
- DATCP must inspect the dealer's firewood treatment facilities, to determine whether the dealer is capable of meeting the treatment requirements under this rule.
- Firewood treated for possible use in state parks must be treated according to this rule, and must be labeled as treated firewood. The firewood dealer must label the treated firewood with the dealer's certification number.
- A certified dealer may sell untreated, as well as treated, firewood. But only treated firewood, labeled according to this rule, is allowed in state parks.

Certification Application

A certification application must include all of the following:

- The correct legal name of the firewood dealer, and any trade names under which the firewood dealer sells or distributes firewood in this state.
- The address of the firewood dealer's business headquarters.
- The address of each location in this state at which the dealer treats firewood.
- The approximate annual volume of firewood (treated and untreated) that the firewood dealer sells or distributes in this state.
- The approximate annual volume of firewood that the dealer treats at each treatment location in this state.
- The states and counties from which the firewood dealer obtains firewood for sale or distribution in this state.
- The name and address of each person from whom the firewood dealer procures cut firewood.
- The following statement:

“The firewood dealer certifies that, before selling or distributing any firewood in this state as treated firewood, the dealer will treat that firewood in this state in one of the following ways:

- 1. Heating each piece of firewood to a temperature at least 160° F. (71.1° C.) at the center of the piece, and maintaining that temperature for at least 75 minutes.**
- 2. Removing all bark, and additional wood to a depth of at least ½ inch beneath the bark, from each piece of firewood.**
- 3. Storing the firewood on the firewood dealer's premises for at least 2 years.**
- 4. Fumigating the firewood with a registered fumigant pesticide, according to the pesticide label, to kill all insect pests that may inhabit the firewood.**
- 5. Treating the firewood in a manner approved, in writing, by the Wisconsin Department of Agriculture, Trade and Consumer Protection, to kill all insect pests that may inhabit the firewood.”**

Certification Action

DATCP must grant or deny a certification application within 60 business days after DATCP receives a complete application. DATCP may withdraw a certification if the applicant materially

misrepresents any information in the application, or fails to honor any of the commitments made in the application. A certification does not constitute a warranty, by DATCP, that firewood is free of pests.

Imported Firewood

This rule does not change current DATCP rules related to firewood imports (firewood may be imported to this state, but may *not* be imported from federally-designated quarantine areas). Firewood originating from outside this state may not be used in Wisconsin state parks unless it complies with this rule. Firewood legally imported from outside this state may be used in Wisconsin state parks if it is treated in this state by a certified firewood dealer.

Seller Representations

Under this rule, no seller or distributor of firewood may do any of the following, directly or by implication:

- Misrepresent that the firewood originates from a certified firewood dealer.
- Misrepresent that firewood is treated firewood.
- Represent that firewood is treated firewood, unless the firewood is labeled as treated firewood and the label bears the certification number of the firewood dealer who treated the firewood in this state.

Fiscal Impact

There are thousands of firewood dealers in Wisconsin, but few of them will have a strong incentive to be certified under this rule. DATCP assumes that, at least initially, certification will be attractive mainly for large firewood dealers who can afford to implement the firewood treatment regimen required for certification.

Certification may be especially attractive for large firewood dealers who wish to supply firewood to Wisconsin state parks. DNR state park rules prohibit firewood originating from outside the state or more than 50 miles from the state park, unless the firewood dealer is certified under this rule. This rule supplements and reinforces the DNR rules.

DATCP projects approximately one day of staff time each year, for each certified firewood dealer, to process the dealer's annual certification application and inspect the dealer's treatment facilities. DATCP will incur inspector travel costs, but will attempt to minimize those costs by integrating inspections with other inspections. DATCP does not plan to do routine follow-up inspections, but may conduct occasional random inspections of certified firewood dealers.

DATCP assumes that approximately 30 firewood dealers will apply for certification under this rule each year. The \$50 annual certification fee per treatment location will offset a portion of DATCP's certification expenses. DATCP will absorb the remaining expenses with existing staff and funding.

Business Impact

This rule will not have a significant impact on firewood dealers. This rule does not require firewood dealers to be certified, nor does it restrict the sale or distribution of firewood by uncertified dealers. This rule creates a voluntary certification program, which may benefit some firewood dealers. Those dealers who choose to be certified will pay a \$50 certification fee.

DNR state park rules prohibit firewood originating outside this state or more than 50 miles away, unless the firewood dealer is certified by DATCP. This rule will allow certified firewood dealers to supply firewood to state parks throughout the state, regardless of the firewood dealer's distance from the park. This rule will primarily benefit large firewood dealers who can afford to implement the firewood treatment regimen required for certification.

This rule does not change current DATCP rules related to firewood imports (firewood may be imported to this state, except from federally-designated quarantine areas). Firewood originating from outside this state may not be used in Wisconsin state parks unless it complies with this rule. Firewood legally imported from outside this state may be used in Wisconsin state parks if it is treated in this state by a certified firewood dealer.

Environmental Impact

This rule will not have a significant impact on the environment. This rule does not restrict the sale or movement of firewood in this state. This rule will allow some firewood in state parks that would otherwise be prohibited by DNR rules, but only if the wood comes from a certified dealer who agrees to treat the wood to destroy plant pests such as Emerald Ash Borer. DATCP will inspect at least annually to verify that the firewood dealer has the necessary facilities and equipment to honor the agreement.

Federal and Surrounding State Programs

Federal Programs

Under the federal Plant Protection Act, the Animal and Plant Health Inspection Service of the United States Department of Agriculture (USDA-APHIS) has responsibility for excluding, eradicating and controlling serious plant pests, including the Emerald Ash Borer. USDA-APHIS has instituted statewide quarantines on the movement of ash wood for Illinois, Indiana and Ohio, in addition to the Lower Peninsula of Michigan. These quarantines include restrictions on the interstate movement of any hardwood (non-coniferous) firewood, and are in addition to the regulations adopted by each state related to the movement of firewood. Firewood cannot be moved from a quarantined area unless it is accompanied by a USDA-APHIS certificate that shows the firewood to be free of infested wood.

Surrounding State Programs

Surrounding states where EAB has been identified (Illinois, Indiana, Ohio and Michigan) have state and federal quarantines that prohibit the movement of regulated articles, including all hardwood firewood, out of quarantined areas. Firewood can only move out of quarantined areas after it is certified by USDA. Other surrounding states, such as Minnesota and Iowa, are conducting information and education campaigns about the danger of moving firewood and are considering regulatory options for dealing with firewood movement.

Data and Analytical Methodologies

DATCP consulted DNR, firewood dealers and a substantial body of research conducted by the United States Department of Agriculture (“USDA”) to determine effective methods for eliminating pests from firewood.

DATCP Contact

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

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P.O. Box 8911
Madison, WI 53708-8911
Telephone (608) 224-4573
E-Mail: Robert.Dahl@datcp.state.wi.us

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- 1 **SECTION 1.** ATCP 21.01(6p), (6r), (9) and (10) are created to read:
- 2 ATCP 21.01(6p) “Firewood” means wood sold or distributed for burning for heat, or for
- 3 recreational burning, and includes home heating and campfire wood.
- 4 (6r) “Firewood dealer” means a person who regularly sells or distributes firewood in this
- 5 state and whose primary business location is in Wisconsin.
- 6 (9) “Person” means an individual, corporation, partnership, cooperative, limited liability
- 7 company, trust or other legal entity.
- 8 (10) “Treated firewood” means firewood that a firewood dealer certified under s.

1 21.20(2) has treated, at a location identified in s. 21.20(2)(c)3., according to the dealer's
2 representations under s. 21.20(1)(b).

3 **SECTION 2.** ATCP 21.20 is created to read:

4 **ATCP 21.20 Treated firewood from certified sources. (1) FIREWOOD IN WISCONSIN**
5 **STATEPARKS.** For purposes of s. NR 45.04(1) (g), firewood is from a source approved by the
6 department if all of the following apply:

7 (a) The firewood originates from a firewood dealer who is certified under sub. (2).

8 (b) The certified firewood dealer has treated the firewood, at a location identified in sub.
9 (2)(c)3., according to the representations made in sub. (2)(d).

10 (c) The firewood is labeled as treated firewood. The label shall bear the certification
11 number under sub. (2)(a) of the firewood dealer who treated the firewood in this state.

12 **NOTE:** See s. NR 45.04(1)(g). Firewood may comply with par. (b), regardless of
13 whether the firewood originates from this state.
14

15 **(2) VOLUNTARY CERTIFICATION OF FIREWOOD DEALERS.** (a) *General.* The department
16 may annually certify a firewood dealer for purposes of sub. (1)(a). The department shall issue its
17 certification in writing. The certification shall include a unique certification number assigned to
18 the firewood dealer. An annual certification expires on December 31 of each year. A firewood
19 dealer is not required to be certified under this subsection in order to sell or distribute firewood
20 in this state.

21 (b) *Certification standards.* The department may certify a firewood dealer under par. (a)
22 if all of the following apply:

23 1. The firewood dealer submits a complete application under par. (c).

1 2. The department inspects all of the business premises identified under par. (c)3. and
2 determines, based on that inspection, that the firewood dealer is equipped to fulfill all of the
3 firewood dealer's representations under par. (d).

4 (c) *Applying for certification.* A firewood dealer who wishes to be certified under par.
5 (a) shall submit a certification application to the department, on a form provided by the
6 department. The application shall include all of the following:

7 1. The correct legal name of the firewood dealer, and any trade names under which the
8 firewood dealer sells or distributes firewood in this state.

9 2. The address of the firewood dealer's business headquarters.

10 3. The address of every business location in this state at which the firewood dealer treats
11 firewood for purposes of sub. (1)(b).

12 4. The approximate annual volume of firewood that the firewood dealer sells or
13 distributes in this state, including treated and untreated firewood.

14 5. The approximate annual volume of firewood that the firewood dealer treats at each
15 location identified under subd. 3.

16 6. Each state and county from which the firewood dealer obtains firewood for sale or
17 distribution in this state.

18 7. The name and address of each person from whom the firewood dealer procures wood
19 for sale or distribution in this state.

20 8. The statement required under par. (d).

21 9. An annual certification fee of \$50 for each firewood treatment location identified
22 under subd. 3.

1 **NOTE:** You may obtain an application form, without charge, by contacting the
2 Department of Agriculture, Trade and Consumer Protection, P.O. Box 8911,
3 Madison, WI 53708-8911. You may also contact the department by telephone at
4 (608) 224-4573, or by e-mail at: Robert.Dahl@datcp.state.wi.us.

5 (d) *Statement by firewood dealer.* An application under par. (c) shall include the
6 following signed and notarized statement by the firewood dealer, or by an authorized officer or
7 representative of the firewood dealer:

8 **“The firewood dealer certifies that, before selling or distributing any firewood in
9 this state as treated firewood, the dealer will treat that firewood in this state in one
10 of the following ways:**

- 11 **1. Heating each piece of firewood to a temperature at least 160° F. (71.1° C.) at the
12 center of the piece, and maintaining that temperature for at least 75 minutes.**
- 13 **2. Removing all bark, and additional wood to a depth of at least ½ inch beneath the
14 bark, from each piece of firewood.**
- 15 **3. Storing the firewood on the firewood dealer’s premises for at least 2 years.**
- 16 **4. Fumigating the firewood with a registered fumigant pesticide, according to the
17 pesticide label, to kill all insect pests that may inhabit the firewood.**
- 18 **5. Treating the firewood in a manner approved, in writing, by the Wisconsin
19 Department of Agriculture, Trade and Consumer Protection, to kill all insect
20 pests that may inhabit the firewood.”**

21 (e) *Notice of change.* A firewood dealer shall immediately notify the department if, at
22 any time before or after the firewood dealer is certified under par. (a), the firewood dealer’s
23 statement under par. (d) is no longer accurate.

24 (f) *Action on application.* The department shall grant or deny an application under par.
25 (c) within 60 business days after the department receives a complete application. If the
26 department denies an application, the denial notice shall include the reasons for denial.

27 (g) *Withdrawing certification.* The department may withdraw a certification under par.
28 (a) if the department finds that the firewood dealer has materially misrepresented any

1 information in the application under par. (c), or has failed to fulfill any representation included in
2 the statement under par. (d).

3 (h) *Department not a warrantor.* A certification under this subsection does not
4 constitute a warranty by the department that firewood is free of pests, or that the certified
5 firewood dealer has complied with all of the representations made in the application for
6 certification.

7 (3) SELLER REPRESENTATIONS. No seller or distributor of firewood may do any of the
8 following, directly or by implication:

9 (a) Misrepresent that the firewood originates from a dealer certified under sub. (2).

10 (b) Misrepresent that that firewood is treated firewood.

11 (c) Represent that firewood is treated firewood, unless the firewood is labeled as treated
12 firewood and the label bears the certification number under sub. (2)(a) of the firewood dealer
13 who treated the firewood in this state.

EFFECTIVE DATE: This rule takes effect on the first day of the month following
publication in the Wisconsin administrative register, as provided in s. 227.22(2)(intro.), Stats.

Dated this _____ day of _____, _____.

STATE OF WISCONSIN DEPARTMENT
OF AGRICULTURE TRADE AND
CONSUMER PROTECTION

By _____
Rodney J. Nilsestuen, Secretary