

Agriculture, Trade and Consumer Protection – Revises s. ATCP 21.17 - EmR1211

Filed with LRB: September 6, 2012
Publication Date: September 7, 2012
Effective Dates: September 7, 2012 through February 3, 2013
Hearing Date: October 12, 2012

This rule was approved by the governor on August 30, 2012.

The scope statement for this rule, SS 042-11, was approved by the governor on November 8, 2011, published in Register No. 671, on November 30, 2011, and approved by the Board of Agriculture, Trade and Consumer Protection on December 15, 2011.

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

EMERGENCY RULE

- 1 The state of Wisconsin department of agriculture, trade and consumer protection hereby adopts
- 2 the following emergency rule *to amend* s. ATCP 21.17 (1) (b) and *to create* s. ATCP 21.17 (1)
- 3 (c), *relating to* the quarantine of Trempealeau County for emerald ash borer.

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

This emergency rule creates a quarantine for Trempealeau County for the emerald ash borer (“EAB”). Under this rule, the Department of Agriculture, Trade and Consumer Protection (“DATCP”) quarantines Trempealeau 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 a federal regulation to quarantine Trempealeau 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

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 EAB 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 EAB in Trempealeau County at Perrot State Park on August 16, 2012. This emergency rule creates a DATCP quarantine for Trempealeau County. A Federal quarantine will be enacted approximately six to eight weeks after a formal submission by the state plant regulatory official. EAB is carried and spread by untreated ash wood products. A six week delay until enactment of the federal quarantine leaves too much time for businesses or individuals to move potentially EAB infested material out of the county to areas of Wisconsin or other states that are not infested with EAB.

EAB is an injurious exotic pest that now endangers Wisconsin’s 750 million ash trees and ash resources. This insect has the potential to destroy entire stands of ash, and any incursion of EAB can result in substantial losses to forest ecosystems and urban trees, as well as the state’s thriving tourism and timber industries. The emerald ash borer has killed over fifty million trees in the Midwest and has cost several hundred million dollars in losses to the woodlot, nursery, landscape industries and municipalities. 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 Trempealeau County, is prohibited with certain exceptions. The emergency rule will do the following:

- Create a quarantine for EAB for Trempealeau County that prohibits 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 contiguous quarantined area.

- 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 describes in detail what a company can and cannot do with regulated articles.

Fiscal Impact

DATCP will have additional workload related to enforcing the quarantine but it will be able to absorb the projected workload and costs within DATCP's current budget and with current staff. The presence of EAB may produce additional workload for local governments in Trempealeau County, but the quarantine will not itself 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 Trempealeau County. The affected businesses are all small businesses. This emergency rule restricts the sale or distribution of ash products plus any hardwood firewood from Trempealeau County to locations outside of the contiguous quarantined counties of La Crosse, Vernon and Crawford.

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

Trempealeau County has a total of eight 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 contiguous quarantine area of western Wisconsin. Discussions with the Wisconsin Nursery Association indicate that few, if any, nurseries continue to sell ash trees. There are no known firewood dealers in Trempealeau County. Firewood dealers would need to be certified under s. ATCP 21.20 to sell firewood outside of the contiguous quarantine area. To obtain certification a firewood dealer pays a \$50 annual certification fee to DATCP and treats the firewood in a manner that ensures it is free of EAB. There are three sawmills (non-veneer) in Trempealeau County and an unknown number of other wood processing facilities that deal with ash. To sell ash wood products outside of contiguous quarantine area they will have to enter into a compliance agreement with DATCP or APHIS that authorizes movement of ash products outside of the quarantine only when there is assurance that the movement will not spread EAB 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 EAB. APHIS has instituted statewide quarantines on the movement of all ash wood for Illinois, Indiana, Ohio, Pennsylvania, Virginia and West Virginia, in addition to portions of Iowa, Kentucky, Maryland, Michigan, Minnesota, Missouri and New York. APHIS has also enacted quarantines for Brown, Kenosha, Racine, Walworth, Rock, Milwaukee, Waukesha, Ozaukee, Washington, Sheboygan, Fond du Lac, La Crosse, 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 EAB has been identified (Illinois, Indiana, Iowa, 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.

DATCP Contact

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

Brian Kuhn or Christopher Deegan
Department of Agriculture, Trade and Consumer Protection
P.O. Box 8911
Madison, WI 53708-8911
Telephone: (608) 224-4590 or (608) 224-4573
E-Mail: Brian.Kuhn@wisconsin.gov or Christopher.Deegan@wisconsin.gov

Rule comments will be accepted up to two weeks after the last public hearing is held on this rule. Hearing dates will be scheduled after this emergency rule is approved by the Governor and published in the Wisconsin State Journal.

- 1 **FINDING OF EMERGENCY**
- 2 (1) On August 16, 2012, APHIS identified Emerald Ash Borer (EAB) in Trempealeau
- 3 County, at Perrot State Park. EAB is an exotic pest that poses a dire risk to the ash forest. When

1 APHIS declares quarantine, DATCP has regulatory authority for import controls and quarantine
2 for EAB under s. ATCP 21.17. It is anticipated that APHIS will declare quarantines for
3 Trempealeau County but that it will take six to eight weeks for APHIS to act. A six week delay
4 until enactment of the federal quarantines leaves too much time for businesses or individuals to
5 move potentially EAB infested material out of the county to areas of Wisconsin or other states
6 that are not infested with EAB.

7 (2) DATCP is adopting this rule as a temporary emergency rule, pending completion of
8 federal quarantine regulations. DATCP does not anticipate completing a permanent rule.

9 **EMERGENCY RULE**

10 **SECTION 1.** ATCP 21.17 (1) (b) is amended to read:

11 **ATCP 21.17 (1) (b)** Move any regulated item under sub. (2) out of an emerald ash borer
12 regulated area that is identified in 7 CFR 301.53-3 and located in this state or out of an emerald
13 ash borer regulated area identified in (c).

14 **SECTION 2.** ATCP 21.17 (1) (c) is created to read:

15 **ATCP 21.17 (1) (c)** Trempealeau County is designated an emerald ash borer regulated
16 area.

17 **SECTION 3. EFFECTIVE DATE:** This emergency rule takes effect upon publication,
18 and remains in effect for 150 days. The department may seek to extend this emergency rule as
19 provided in s. 227.24, Stats.

Dated this _____ day of August, 2012.

STATE OF WISCONSIN
DEPARTMENT OF AGRICULTURE,
TRADE AND CONSUMER
PROTECTION

quarantine will be enacted approximately six to eight weeks after a formal submission by the state plant regulatory official. EAB is carried and spread by untreated ash wood products. A six week delay until enactment of the federal quarantine leaves too much time for businesses or individuals to move potentially EAB infested material out of the county to areas of Wisconsin or other states that are not infested with EAB.

Key Rule Provisions

This rule includes the following key provisions:

1
2
3
4
5
6
7
8
9
10
11
12

- Creates a quarantine for EAB for Trempealeau County that prohibits 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 contiguous quarantined area .
- Provides 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 ash nursery stock, cannot be given an exemption).
- Provides an exemption for businesses that enter into a state or federal compliance agreement. The compliance agreement describes in detail what a company can and cannot do with regulated articles.

Business Impact

13

This emergency rule may have an impact on persons or companies that deal in any hardwood firewood or ash materials in Trempealeau County. The affected businesses are all small businesses. This emergency rule restricts the sale or distribution of ash products plus any hardwood firewood from Trempealeau County to locations outside of the contiguously quarantined counties of La Crosse, Vernon and Crawford.

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.

Trempealeau County has a total of eight 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 contiguous quarantine area of western Wisconsin, though discussions with the Wisconsin Nursery Association indicate that few, if any, nurseries continue to sell ash trees. There are no known firewood dealers in Trempealeau County. Firewood dealers would need to be certified under s. ATCP 21.20 to sell firewood outside of the contiguous quarantine area. To obtain certification, a firewood dealer pays a \$50 annual certification fee to DATCP and treats the firewood in a manner that ensures it is free of EAB. There are three mills (non-veneer) in Trempealeau County and an unknown number of wood processing facilities that deal with ash. To sell ash wood products outside of the contiguous quarantine area, they will have to enter into a compliance agreement with DATCP or APHIS that authorizes movement of ash products outside of the quarantine only when there is assurance that the movement will not spread EAB to other locations.

1 **Accommodation for Small Business**

2

3 DATCP recognizes that every small business is different. DATCP will work with individual
4 businesses to meet the requirements of the quarantine while accommodating the unique character
5 of the individual business. Therefore, each compliance agreement will be designed to satisfy the
6 regulations with minimal negative effects to the business.

7 **Conclusion**

This rule will help affected businesses in Trempealeau County to move ash wood and material without moving EAB from their county to areas free from EAB. This will in turn help to protect the resources on which they depend. This rule may impose additional costs on some businesses, including small businesses, depending on the nature of their ash wood business. The department works closely with each affected business to minimize any costs and these costs are outweighed by the protection of Wisconsin's ash resource.