

EmR1322

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

EMERGENCY RULE

Filed with LRB: December 17, 2013

Publication Date: December 18, 2013

Effective Dates: December 18, 2013 through May 16, 2014

Hearing Date: January 13, 2014

The blanket scope for this rule, SS 141-13, was approved by the Governor on October 30, 2013 published in register No. 695 on November 14, 2013, and approved by the Board of Agriculture, Trade & Consumer Protection on December 10, 2013.

This emergency rule was approved by the Governor on December 10, 2013.

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

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

This emergency rule creates a quarantine for Dane County for the emerald ash borer (“EAB”). Under this rule, the Department of Agriculture, Trade and Consumer Protection (“DATCP”) quarantines Dane 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 Dane 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 Service (“APHIS”) positively identified EAB in Dane County near Warner Park in the City of Madison on November 22, 2013. This emergency rule creates a DATCP quarantine for Dane 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 both to forest ecosystems and to urban trees, as well as the state’s vital 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. APHIS predicts the national urban impact alone from this pest may 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 Dane County, is prohibited with certain exceptions. The emergency rule will do the following:

- Create a quarantine for EAB for Dane 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 this county or any contiguous EAB quarantined counties.
- 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.

Summary of Factual Data and Analytical Methodologies

Data for this analysis was obtained from DATCP nursery license records, local business directories and field surveys of the wood products industry (*e.g.* timber, lumber, firewood) in the area. This analysis was based on the regulatory language of ATCP 21.17 and 7 CFR 301.53, on the observations of DATCP nursery inspectors, and on conversations with stakeholders in the nursery and other timber-related industries.

Analysis and Supporting Documents used to Determine Effect on Small Business

DATCP searched its nursery license database to obtain current records for licensed nursery growers operating in Dane County. Based on previous and ongoing work with Wisconsin's Gypsy Moth and firewood certification programs, DATCP staff also identified known saw mills, wood products companies and firewood industry concerns. Finally, online Yellow Pages business listings were also searched to find related tree nursery, timber, firewood and tree service companies.

Business Impact

This emergency rule may have an impact on persons or companies that deal in any hardwood firewood or ash materials in Dane County. The affected businesses are all small businesses. This emergency rule restricts the sale or distribution of ash trees, ash wood products, and any hardwood firewood from Dane County to locations outside of this county or any contiguously quarantined counties, and to neighboring states.

The business impact of this emergency rule depends on the number of 1) nurseries that sell or distribute ash nursery stock outside these counties, 2) firewood producers/dealers that sell or distribute outside these counties, 3) sawmills that move untreated ash stock (green lumber) outside these counties, and 4) untreated wood waste (e.g. ash brush, chips or mulch) that is moved outside these counties.

Dane County has a total of 61 licensed nursery growers that could possibly be growing ash nursery stock. Those growers will not be able to move or sell ash nursery stock outside of the quarantine area, though discussions with the Wisconsin Nursery Association indicate that few, if any, nurseries continue to sell ash trees. There are also 35 known firewood producers or dealers in Dane County. Firewood dealers would need to be certified under s. ATCP 21.20 to sell or move firewood outside of the 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 lumber mills in Dane County and an estimated 20 other tree service/wood processing facilities that may also deal with ash. To transport ash wood products outside of the 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 non-quarantined locations. Certification and compliance agreements will require some additional recordkeeping on the part of those businesses.

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, Missouri, Ohio, Pennsylvania, Virginia and West Virginia, in addition to portions of Connecticut, Iowa, Kansas, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, New York, North Carolina and Tennessee. APHIS has also enacted quarantines for Brown, Kenosha, Racine, Walworth, Rock, Milwaukee, Waukesha, Jefferson, Ozaukee, Washington, Dodge, Sheboygan, Fond du Lac, Winnebago, Trempealeau, La Crosse, Vernon, Sauk, Crawford and Douglas 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:

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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.

FINDING OF EMERGENCY

(1) The United States Department of Agriculture – Animal and Plant Health Inspection Service (“APHIS”) positively identified Emerald Ash Borer (“EAB”) in Madison, Dane County on November 22, 2013. EAB is an exotic, invasive pest that poses a dire risk to the ash forest. When APHIS declares quarantine, DATCP has regulatory authority for import controls and quarantine for EAB under s. ATCP 21.17. It is anticipated that APHIS will declare a quarantine for Dane County but that it will take six to eight weeks for APHIS to act. A six week delay until enactment of the federal quarantines leaves too much time for businesses or individuals to move potentially EAB infested material out of this county to areas of Wisconsin or other states that are not infested with EAB.

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

EMERGENCY RULE

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

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

SECTION 2. ATCP 21.17 (1) (f) is created to read:

ATCP 21.17 (1) (f) Dane County is designated an emerald ash borer regulated area.

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

Dated this 26th day of November, 2013.

STATE OF WISCONSIN
DEPARTMENT OF AGRICULTURE,
TRADE AND CONSUMER
PROTECTION

Ben Brancel, Secretary