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# Wisconsin Legislative Council

## RULES CLEARINGHOUSE

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## CLEARINGHOUSE RULE 22-022

### Comments

**[NOTE: All citations to “Manual” in the comments below are to the Administrative Rules Procedures Manual, prepared by the Legislative Council Staff and the Legislative Reference Bureau, dated November 2020.]**

#### 1. Statutory Authority

In the rule summary’s listing of statutory authority, the department should remove the citation to s. 227.24, Stats. That statute relates to emergency rules. The instant order proposes permanent rules. Similarly, in the rule summary’s “Explanation of Agency Authority”, the department should either remove the last sentence or modify it to cite s. 227.11 (2) (a) (intro.), Stats., rather than s. 227.24, Stats.

#### 2. Form, Style and Placement in Administrative Code

a. In the introductory clause for the proposed rule:

- (1) The enumeration of items to renumber should appear before the enumeration of items to amend. [s. 1.01 (1) (b), Manual.] However, see comment 2. f., below, for a suggestion to avoid renumbering.
- (2) Within each type of treatment, the “ATCP” source designation does not need to be repeated. For example, the enumeration of items repealed in the proposed rule should appear as follows: “to repeal ATCP 21.01 (2g), (6m), and (12), 21.12, 21.17, and 21.21”.

b. The department should carefully review the proposed rule in relation to the current administrative code. In several places, the proposed rule introduces changes into ch. ATCP 21 without identifying those changes by striking-through or underscoring, such as the following:

- (1) In SECTION 2 of the proposed rule, the word “any” in s. ATCP 21.01 (8g) is in normal typeface. In the current administrative code, however, the word “a” is used. If the department wishes to change “a” to “any”, the word “a” should be stricken-through and the word “any” should be underscored. Also, the comma after “*Tsuga*” should be underscored, and the final period should be shown without underscoring.

- (2) In SECTION 3 of the proposed rule, a semi-colon appears between “adelgid” and “import” in the current title of s. ATCP 21.16. That semi-colon should be shown stricken-through rather than simply omitted in the text of the amended title.
  - (3) In SECTION 4 of the proposed rule:
    - (a) In s. ATCP 21.16 (1) (intro.):
      1. The comma after “Alaska” should be underscored.
      2. The parentheses around the underscored “3” should be underscored.
      3. After “Nova Scotia”, the following text disappears from the current administrative code: “, and any state or country, or”. The phrase should be shown stricken-through.
      4. The semi-colon after “woolly adelgid” should be underscored and the final colon should be shown without underscoring.
    - (b) In s. ATCP 21.16 (1) (e), the first appearance of the word “bark” should be underscored. However, the department may want to reconsider whether to insert that word into the current code. Is the phrase “Hemlock bark chips with bark” redundant? Perhaps “Hemlock chips with bark” or “Hemlock bark chips” would be preferable.
    - (c) In s. ATCP 21.16 (1) (e) and (f), the change from lowercase “hemlock” to uppercase “Hemlock” should be depicted in each instance as follows: “~~Uncomposted hemlock~~ Hemlock”. [s. 1.04 (4) (b), Manual.]
  - (4) In SECTION 9 of the proposed rule, the final period in s. ATCP 21.19 (2) (a) should be shown without underscoring.
- c. SECTION 1 of the proposed rule repeals six provisions, three of which are rule subunits and three of which are rule sections. The department should consider the following:
- (1) The repeal of s. ATCP 21.01 (2g) and (6m) may remain in SECTION 1 of the proposed rule because intervening subunits are unaffected by the proposed rule. [s. 1.03 (2) (c) 2., Manual.]
  - (2) The repeal of s. ATCP 21.01 (12) should be moved to a new SECTION between SECTIONS 2 and 3 of the proposed rule because s. ATCP 21.01 (8g) intervenes and receives a different treatment in SECTION 2 of the proposed rule. Nonconsecutive subunits may not be placed in the same SECTION if an intervening subunit is affected by a different treatment. [s. 1.03 (2) (c) 2., Manual.]
  - (3) The repeals of ss. ATCP 21.12, 21.17, and 21.21 should be placed in their own SECTION of the proposed rule because they are not consecutively numbered rule sections. [s. 1.03 (2) (c) 1., Manual.]
- d. SECTION 3 of the proposed rule amends the title of s. ATCP 21.16. The department should emulate the first example in s. 1.10 (2) (c) 1., Manual, to wit: the treatment clause should not recite the current title (it should simply read “ATCP 21.16 (title) is amended to read:”), and the word “(title)” should appear after “21.16” in the text of the amended title.

e. In SECTION 4 of the proposed rule, the department should consider the following with regard to s. ATCP 21.16 (1):

- (1) The treatment clause should be revised to state that the SECTION amends s. ATCP 21.16 (1) (intro.), (e), and (f). The text of pars. (a) to (d) should not be shown as they are not amended. The treatment of pars. (g) and (h) should be moved to a new SECTION to create those subunits and their text should be shown without underscoring. [ss. 1.03 (2) (a) 2. and 1.04 (2) (a), Manual.]
- (2) In sub. (1) (intro.), the department proposes restricting the movement of items from an infested area. The term “infested area” is not defined for purposes of s. ATCP 21.16, although it is defined for other purposes within ch. ATCP 21. The department should consider adding a definition that applies here, particularly if it is meant to refer to an area within Wisconsin. (See also the comment 2. j., below, regarding infested areas.)
- (3) In par. (g), the department should consider how the prohibition relating to “cut hemlock trees” will interact with existing prohibitions, particularly those in pars. (c) and (d), both of which depend on an item having bark. For example, if a hemlock log has bark, it is prohibited by par. (c). If a hemlock log does not have bark, would it nevertheless be prohibited as a “cut hemlock tree”?

f. SECTIONS 5 and 6 of the proposed rule renumber current sub. (2) of s. ATCP 21.16 as sub. (3) and insert a new sub. (2). It would be preferable to leave current sub. (2) as is and insert the new material as sub. (1m). [s. 1.10 (3), Manual.]

g. In SECTION 8 of the proposed rule, the change from lowercase “updates” to uppercase “Updates” should be depicted as follows: “~~updates~~ Updates”.

h. In SECTION 9 of the proposed rule, the text of s. ATCP 21.19 (2) (title) and (intro.) should be removed, as they are not amended. Also, at the beginning of the stricken material, consider removing the strike-through that is shown for the phrase “of the”, and at the beginning of the underscored material, removing the underscored phrase “of the”.

i. In SECTION 11 of the proposed rule:

- (1) In s. ATCP 21.23 (1), the definition for “spotted lanternfly” should be moved to follow “pest control official”, in order to appear in alphabetical order. [s. 1.07 (2) (b) 3., Manual.] Also, a comma should be inserted after “nymphs”.
- (2) In s. ATCP 21.23 (1) (c), the designation “s.” should be inserted in the definition for “pest control official” before the reference to “ATCP 21.01 (11)”.
- (3) In s. ATCP 21.23 (1) (b) 1., the listing of New York and New Jersey could be flipped to adhere to alphabetical order, as is done in s. ATCP 21.24 (1) (b) 1. in SECTION 12 of the proposed rule. (Note, however, that those two states are out of alphabetical order in current s. ATCP 21.16 (1), which could be corrected by amendment in this proposed rule.)
- (4) In s. ATCP 21.23 (2):
  - (a) Insert a comma after “Stats.”.

- (b) The reference to “any living life stage of the spotted lanternfly” could be replaced with “spotted lanternfly”. The definition of “spotted lanternfly” in s. ATCP 21.23 (1) (a) already covers any living life stage of that insect.
- (5) In s. ATCP 21.23 (3) (intro.):
  - (a) Change “sub. 4” to “sub. (4)”.
  - (b) Avoid the use of the slashed alternative and/or. [s. 1.08 (1) (d), Manual.]
  - (c) Change “infested area.” to “infested area?”.
- (6) In s. ATCP 21.23 (3) (b), the reference to “any living life stage of the spotted lanternfly” could be replaced with “spotted lanternfly”. The definition of “spotted lanternfly” in s. ATCP 21.23 (1) (a) already covers any life stage of that insect.
- (7) In s. ATCP 21.23 (3) (a) and (b), and (4) (a), both instances of the phrase “; but is not limited to” and the phrase “; but not limited to,” should be removed. [s. 1.07 (3) (b) 2., Manual.] Also, consider revising both instances of “shall include” to “may include”.
- (8) In s. ATCP 21.23 (2) and (3), the titles should be shown in small capital letters. [s. 1.10 (2) (b) 3., Manual.] This comment also applies to the subsection titles in ss. ATCP 21.16 and 21.24.

j. SECTIONS 11 and 12 of the proposed rule each add a new section to ch. ATCP 21. Each new section includes a new definition of “infested area”. In each case, the definition has two prongs. The first prong is a list of states (and the District of Columbia, if applicable). The second prong is a description of areas based on plant pest infestation. This second prong raises the following questions:

- (1) Should the second prongs mirror one another? In SECTION 11, the second prong reads:

“Any state or country, or any delineated area within a state or country, which the responsible state agency has declared to have an infestation of or interior quarantine for [plant pest].” [s. ATCP 21.23 (1) (b) 2.]

In SECTION 12, the second prong reads:

“Any state or country, or any delineated area within a state or country, which the responsible state agency has declared to be infested with [plant pest].” [s. ATCP 21.24 (1) (b) 2.]

Is it intentional that the definition in SECTION 12 does not mention interior quarantine? Further, is it intentional that one definition uses “declared to have an infestation” and the other uses “declared to be infested”?

- (2) Can an “infested area” be an area within Wisconsin? Elsewhere in SECTIONS 11 and 12, ss. ATCP 21.23 and 21.24 prohibit both the **importation** of an item from an infested area and the **movement** of an item from an infested area to an area that is not infested within this state. If all “infested areas” are in other states or countries, the prohibition on movement would be redundant of the prohibition on importation. So, presumably an infested area can be an area within Wisconsin. If

that is correct, it might be clearer if the definition made that explicit. Additionally, can the United States be a “country” for purposes of the second prong, such that DATCP could add states (or parts of states) to the list in the first prong?

- (3) Does “the responsible state agency” within the second prong mean DATCP? Or does it mean some agency located in the state or country at issue? If it is the latter, is there a formal process for Wisconsin to recognize a responsible state agency?

k. The introductory clause for the proposed rule should be updated to reflect any changes made in response to these comments.

## 5. Clarity, Grammar, Punctuation and Use of Plain Language

a. In the second paragraph of the rule summary’s plain language analysis, “two generation per year” should probably be “two generations per year” and “list of states or area within states” should probably be “list of states or areas within states”.

b. In SECTION 5 of the proposed rule:

- (1) Should the colon in the title of s. ATCP 21.16 (2) be changed to a semi-colon? Throughout ch. ATCP 21, semi-colons are occasionally used in titles but colons are not.
- (2) A comma should be inserted after “94.03” and also after “Stats.” in s. ATCP 21.16 (2).

c. In SECTION 11 of the proposed rule, has the department considered the potential for an overly broad restriction on the importation and movement of non-plant products in s. ATCP 21.23 (3) (b)? As written, this “catch all” restriction applies to all non-plant products, including those that pose a reasonable risk of spreading spotted lanternfly as determined by a pest control official. Thus, every non-plant product could be subject to the quarantine whether or not it poses a risk. This may not be the intent. Would it be preferable to alter par. (b) to read along the following lines:

(b) Non-plant products that pose a reasonable risk of spreading spotted lanternfly as determined by a pest control official. This may include outdoor household articles, vehicles, or means of conveyance.

The department may also want to consult and more closely emulate the “catch all” approach taken in ss. ATCP 21.17 (2) (g), 21.18 (2) (d), and 21.19 (2) (d) of the current administrative code:

Any other item or substance...that may be designated as a regulated item if a pest control official determines that it presents a risk of spreading [plant pest] and notifies the person in possession of the item or substance that it is subject to the restrictions of the regulations.

d. In SECTION 12 of the proposed rule:

- (1) In s. ATCP 21.24 (1) (b) (intro.), closing quotation marks should be added after the term “infested area”.
- (2) In s. ATCP 21.24 (2), a comma should be inserted after “Stats.”.
- (3) In s. ATCP 21.24 (3) (a), consider removing the word “following” and the internal colon, to instead appear as “Import conifer plants or plant parts of the plant taxa

*Abies spp.*, ...”. Also, consider inserting a comma after the phrase “into this state”, to more clearly apply the clause “if those materials originate...” to all items in the list.

- (4) In s. ATCP 21.24 (3) (b), consider removing the word “following” and the internal colon, to instead appear as “Move conifer plans or plant parts of the plant taxa *Abies spp.*, ...”. Also, consider inserting a comma after the phrase “or décor”, to more clearly apply the clause “from an infested area...” to all items in the list.