

Agriculture, Trade and Consumer Protection – Revises s. ATCP 21.17 - EmR1209

Filed with LRB: July 16, 2012
Publication Date: July 17, 2012
Effective Dates: July 17, 2012 to December 13, 2012
Hearing Date: August 28, 2012

The scope statement for this rule, SS 019-11, was approved by the governor on August 29, 2011, published in Register No. 669, on September 15, 2011, and approved by the Board of Agriculture, Trade and Consumer Protection on December 15, 2011.

This rule was approved by the Governor on July 12, 2012.

**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 quarantines of Rock County and Walworth County for emerald ash borer.

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

This emergency rule creates quarantines for Rock County and Walworth County for the emerald ash borer (“EAB”). Under this rule, the Department of Agriculture, Trade and Consumer Protection (“DATCP”) quarantines Rock County and Walworth 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 Rock County and Walworth 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 Walworth County near the village of Fontana on June 11, 2012. APHIS also identified EAB in Rock County in the city of Janesville on June 25, 2012. This emergency rule creates DATCP quarantines for Rock County and Walworth County. Federal quarantines 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 Rock County and Walworth County, is prohibited with certain exceptions. The emergency rule will do the following:

- Create quarantines for EAB for Rock County and Walworth 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 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 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 EAB may produce additional workload for local governments in Rock County and Walworth 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 Rock County or Walworth County. The affected businesses are all small businesses. This emergency rule restricts the sale or distribution of ash products plus any hardwood firewood from Rock County and Walworth County to locations outside of the contiguously quarantined counties of Fond du Lac, Sheboygan, Washington, Ozaukee, Waukesha, Milwaukee, Racine and Kenosha.

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

Rock County and Walworth County have a combined total of 36 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 southeast Wisconsin, though discussions with the Wisconsin Nursery Association indicate that few, if any, nurseries continue to sell ash trees. There are also a total of three known firewood dealers in Rock County and Walworth 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 six sawmills (non-veneer) in Rock County and Walworth County and an unknown number of other wood processing facilities that deal with ash. To sell ash wood products outside

of contiguous quarantine areas 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 and West Virginia, in addition to portions of Iowa, Kentucky, Maryland, Michigan, Minnesota, Missouri, New York, and Virginia. APHIS has also enacted quarantines for Brown, Kenosha, Racine, 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 (1) On June 11, 2012, APHIS identified EAB in Walworth County, near the village of
2 Walworth. Subsequently, APHIS also positively identified EAB in Rock County in the city of
3 Janesville on June 25, 2012. EAB is an exotic pest that poses a dire risk to the ash forest. When
4 APHIS declares quarantine, DATCP has regulatory authority for import controls and quarantine
5 for EAB under s. ATCP 21.17. It is anticipated that APHIS will declare quarantines for Rock
6 County and Walworth County but that it will take six to eight weeks for APHIS to act. A six
7 week delay until enactment of the federal quarantines leaves too much time for businesses or
8 individuals to move potentially EAB infested material out of these counties to areas of
9 Wisconsin or other states that are not infested with EAB.

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

12 **EMERGENCY RULE**

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

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

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

18 **ATCP 21.17 (1) (c)** Rock County and Walworth County are designated emerald ash
19 borer regulated areas.

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

Dated this _____ day of _____ 2012.

STATE OF WISCONSIN DEPARTMENT
OF AGRICULTURE TRADE AND
CONSUMER PROTECTION

By _____
Ben Brancel, Secretary

<p>FISCAL ESTIMATE</p> <p>DOA-2048 (R 10/94) <input checked="" type="checkbox"/> ORIGINAL <input type="checkbox"/> UPDATED</p> <p style="padding-left: 150px;"><input type="checkbox"/> CORRECTED <input type="checkbox"/> SUPPLEMENTAL</p>	<p>LRB or Bill No. / Adm. Rule No.</p> <p style="text-align: center;">Ch. ATCP 21</p> <hr/> <p>Amendment No. (If Applicable)</p>
<p>Subject:</p> <p style="text-align: center;">Emergency Rule for Quarantines of Rock County and Walworth County for Emerald Ash Borer</p>	
<p>Fiscal Effect</p> <p>State: <input checked="" type="checkbox"/> No State Fiscal Effect</p> <p>Check below only if bill makes a direct appropriation or affects a sum sufficient appropriation.</p> <p><input type="checkbox"/> Increase Existing Appropriation <input type="checkbox"/> Increase Existing Revenues</p> <p><input type="checkbox"/> Decrease Existing Appropriation <input type="checkbox"/> Decrease Existing Revenues</p> <p><input type="checkbox"/> Create New Appropriation</p>	<p><input type="checkbox"/> Increase Costs –</p> <p>May be possible to absorb within agency's budget? <input type="checkbox"/> Yes <input type="checkbox"/> No</p> <p><input type="checkbox"/> Decrease Costs</p>
<p>Local :</p> <p><input checked="" type="checkbox"/> No local government costs</p>	<p>5. Types of Local Gov. Unit Affected:</p> <p><input type="checkbox"/> Towns <input type="checkbox"/> Villages</p>

1. <input type="checkbox"/> Increase Costs <input type="checkbox"/> Permissive <input type="checkbox"/> Mandatory	3. <input type="checkbox"/> Increase Revenues <input type="checkbox"/> Permissive <input type="checkbox"/> Mandatory	<input type="checkbox"/> Counties <input type="checkbox"/> Cities <input type="checkbox"/> Other: <u>County Drainage Boards</u>
2. <input type="checkbox"/> Decrease Costs <input type="checkbox"/> Permissive <input type="checkbox"/> Mandatory	4. <input type="checkbox"/> Decrease Revenues <input type="checkbox"/> Permissive <input type="checkbox"/> Mandatory	<input type="checkbox"/> School Districts <input type="checkbox"/> WTCS Districts

Fund Source Affected: <input type="checkbox"/> GPR <input type="checkbox"/> FED <input type="checkbox"/> PRO <input type="checkbox"/> PRS <input type="checkbox"/> SEG <input type="checkbox"/> SEG-S	Affected Ch. 20 Appropriations:
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Assumptions Used in Arriving at Fiscal Estimate

The United States Department of Agriculture-Animal and Plant Health Inspection Services (APHIS) positively identified emerald ash borer (EAB) in Walworth County on June 11, 2012, and subsequently in Rock County on June 25, 2012. This emergency rule creates Wisconsin Department of Agriculture, Trade and Consumer Protection (DATCP) quarantines for Rock County and Walworth 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 quarantines leaves too much time for businesses or individuals to move potentially emerald ash borer infested material out of the counties 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 tree resources. This insect has the potential to destroy entire stands of ash, and any incursion of EAB can result in substantial losses to both 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 alone 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. The proposed rule will do the following:

- Create quarantines for EAB for Rock County and Walworth 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 contiguous quarantine 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.
- 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.

This rule will be administered by DATCP. 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 Rock County and Walworth County, but the quarantines themselves will not produce any local fiscal impact.

Long - Range Fiscal Implications

If multiple infestations are found in this state, DATCP may experience substantial costs and personnel demands for providing regulatory oversight and working with affected industries. Costs may vary, depending on the nature and scope of the infestations, and cannot be accurately predicted at this time.

Agency/prepared by: (Name & Phone No.)	Authorized Signature/Telephone No.	Date
DATCP Christopher Deegan 608-224-4573		July 10, 2012

Wisconsin Department of Agriculture, Trade and Consumer Protection

Business Impact Analysis¹

Rule Subject:	Plant Pest Import Controls and Quarantines
Adm. Code Reference:	ATCP 21
Clearinghouse #:	Not Applicable
DATCP Docket #:	11-R-06

¹ This analysis includes, but is not limited to, a small business analysis ("regulatory flexibility analysis") under s. 227.114, Stats.

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Rule Description

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

DATCP is adopting this temporary emergency rule pending the adoption of a federal regulation to quarantine Rock County and Walworth County. The 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.

The United States Department of Agriculture-Animal and Plant Health Inspection Services (“APHIS”) positively identified EAB in Walworth County near the village of Walworth on June 11, 2012. APHIS also positively identified EAB in Rock County in the city of Janesville on June 25, 2012. This emergency rule creates DATCP quarantines for Rock County and Walworth County. Federal quarantines 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 counties to areas of Wisconsin or other states that are not infested with EAB.

Key Rule Provisions

This rule includes the following key provisions:

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- Creates quarantines for EAB for Rock County and Walworth 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

- 1 and uncomposted chips of the genus *Fraxinus* (Ash wood), out of the contiguous
2 quarantined area .
- 3 • Provides an exemption for items that have been inspected and certified by a pest control
4 official and are accompanied by a written certificate issued by the pest control official
5 (some products, such as ash nursery stock, cannot be given an exemption).
 - 6 • Provides an exemption for businesses that enter into a state or federal compliance
7 agreement. The compliance agreement describes in detail what a company can and cannot
8 do with regulated articles.
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10 **Business Impact**

This emergency rule may have an impact on persons or companies that deal in any hardwood firewood or ash materials in Rock County and Walworth County. The affected businesses are all small businesses. This emergency rule restricts the sale or distribution of ash products plus any hardwood firewood from Rock County and Walworth County to locations outside of the contiguously quarantined counties of Fond du Lac, Sheboygan, Washington, Ozaukee, Waukesha, Milwaukee, Racine and Kenosha . .

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

Rock County and Walworth County have a combined total of 36 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 southeast Wisconsin, though discussions with the Wisconsin Nursery Association indicate that few, if any, nurseries continue to sell ash trees . There are also a total of four known firewood dealers in Rock County and Walworth 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 six mills (non-veneer) in Rock County and Walworth County and an unknown number of wood processing facilities that deal with ash. To sell ash wood products outside of the contiguous quarantine areathey 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 EAB to other locations.

1 **Accommodation for Small Business**

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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
5 character of the individual business. Therefore, each compliance agreement will be designed to
6 satisfy the regulations with minimal negative effects to the business.

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9 **Conclusion**

This rule will help affected businesses in Rock County and Walworth County to move ash wood and material without moving EAB from their counties 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.