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**Hearing Date: October 27, 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 September 11, 2014.

## **EmR1424**

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

#### **EMERGENCY RULE**

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) (c), *relating to* the quarantine of Columbia, Door, Grant, Green, Iowa, Lafayette, Monroe and Richland Counties for the emerald ash borer beetle.

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

This emergency rule creates a quarantine for Columbia, Door, Grant, Green, Iowa, Lafayette, Monroe and Richland Counties for the emerald ash borer beetle (“EAB”). Under this rule, the Department of Agriculture, Trade and Consumer Protection (“DATCP”) quarantines Columbia, Door, Grant, Green, Iowa, Lafayette, Monroe and Richland Counties to mitigate the risk of movement of emerald ash borer to other areas of Wisconsin and to other states.

DATCP is adopting this temporary emergency rule pending the adoption of a federal regulation to quarantine Columbia, Door, Grant, Green, Iowa, Lafayette, Monroe and Richland Counties. 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 the village of Fish Creek, Door County on June 10, 2014. EAB was also identified in the city of Sturgeon Bay on June 19, 2014. APHIS subsequently identified EAB in Nelson Dewey State Park, Grant County, and in the Village of Oakdale, Monroe County, on July 11, 2014. On July 17, 2014, APHIS identified EAB in the Town of Lodi, Columbia County. While EAB has not yet been positively identified in the southwestern contiguous counties of Richland, Iowa, Lafayette and Green, these four counties are now completely surrounded by the current state and federal EAB quarantine. It is very likely that these counties already contain some level of EAB infestation, and there is little economic or ecological benefit to keeping them out of the quarantine.

This emergency rule creates a DATCP quarantine for Columbia, Door, Grant, Green, Iowa, Lafayette, Monroe and Richland Counties. 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. An eight-week delay until enactment of the federal quarantine leaves too much time for businesses or individuals to move potentially EAB infested material out of these eight 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 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 or movement of plants or other

materials into and 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 Columbia, Door, Grant, Green, Iowa, Lafayette, Monroe and Richland Counties, is prohibited with certain exceptions. The emergency rule will do the following:

- Create a quarantine for EAB for Columbia, Door, Grant, Green, Iowa, Lafayette, Monroe and Richland Counties that prohibits the movement of regulated articles, including 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 these counties 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 Plant Industry Bureau staff, 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 Columbia, Door, Grant, Green, Iowa, Lafayette, Monroe and Richland Counties. 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 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 Columbia, Door, Grant, Green, Iowa, Lafayette, Monroe and Richland Counties. 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 Columbia, Door, Grant, Green, Iowa, Lafayette, Monroe and Richland Counties to locations outside of these counties or outside any contiguously quarantined counties.

The business impact of this emergency rule depends on the quantity of 1) nurseries that sell or distribute ash nursery stock outside these counties, 2) firewood producers/dealers that sell or distribute firewood 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.

Columbia, Door, Grant, Green, Iowa, Lafayette, Monroe and Richland Counties have a total of 48 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 an estimated 66 known firewood producers or dealers in these eight counties. Firewood dealers would need to be certified under s. ATCP 21.20, Wis. Admin. Code, to sell or move firewood outside of the quarantine area. To obtain certification, an inspected firewood dealer pays a \$50 annual fee to DATCP and treats the firewood in a manner that ensures it is free of EAB. There are 41 known lumber mills in these eight counties and an estimated 48 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, Iowa, Kentucky, Missouri, New Jersey, Ohio, Pennsylvania, Virginia and West Virginia, in addition to portions of Colorado, Connecticut, Georgia, Kansas, 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, Dane, 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.

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### **FINDING OF EMERGENCY**

(1) The United States Department of Agriculture – Animal and Plant Health Inspection Service (“APHIS”) positively identified Emerald Ash Borer (“EAB”) in the village of Fish Creek, Door County on June 10, 2014. EAB was also identified in the city of Sturgeon Bay on June 19, 2014. APHIS subsequently identified EAB in Nelson Dewey State Park, Grant County, and in the Village of Oakdale, Monroe County, on July 11, 2014. On July 17, 2014, APHIS identified EAB in the Town of Lodi, Columbia County. While EAB has not yet been positively identified in the southwestern contiguous counties of Richland, Iowa, Lafayette and Green, these

four counties are now completely surrounded by the state and federal EAB quarantine. It is very likely that these counties already contain some level of EAB infestation, and there is little economic or ecological benefit to keeping them out of the quarantine. 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 Columbia, Door, Grant, Green, Iowa, Lafayette, Monroe and Richland Counties but that it will take six to eight weeks for APHIS to act. An eight-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).

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

**ATCP 21.17 (1) (c)** Columbia, Door, Grant, Green, Iowa, Lafayette, Monroe and Richland Counties are designated as emerald ash borer regulated areas.

**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 30<sup>th</sup> day of July, 2014.

STATE OF WISCONSIN  
DEPARTMENT OF AGRICULTURE,  
TRADE AND CONSUMER  
PROTECTION

Ben Brancel, Secretary

### **Initial Regulatory Flexibility Analysis**

***Rule Subject:*** Plant Pest Import Controls and Quarantines

***Adm. Code Reference:*** ATCP 21

***Clearinghouse #:*** Not Applicable

***DATCP Docket #:***

#### ***Rule Description***

This emergency rule creates a quarantine for Columbia, Door, Grant, Green, Iowa, Lafayette, Monroe and Richland Counties for emerald ash borer (“EAB”). Under this rule, the Department of Agriculture, Trade and Consumer Protection (“DATCP”) quarantines these counties to mitigate the risk of movement of EAB to other areas of Wisconsin and to other states.

DATCP is adopting this temporary emergency rule pending the adoption of a federal regulation to quarantine Columbia, Door, Grant, Green, Iowa, Lafayette, Monroe and Richland Counties. 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 Service (“APHIS”) positively identified EAB in the village of Fish Creek, Door County on June 10, 2014. APHIS subsequently identified EAB in Nelson Dewey State Park, Grant County, and in the Village of Oakdale, Monroe County, on July 11, 2014. On July 17, 2014, APHIS identified EAB in the Town of Lodi, Columbia County. While EAB has not yet been positively identified in the southwestern contiguous counties of Richland, Iowa, Lafayette and Green, these four counties are now completely surrounded by the state and federal EAB quarantine. It is very likely that these counties already contain some level of EAB infestation, and there is little economic or ecological benefit to keeping them out of the quarantine.

This emergency rule creates a DATCP quarantine for Columbia, Door, Grant, Green, Iowa, Lafayette, Monroe and Richland Counties. 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. An eight-week delay until enactment of the federal quarantine leaves too much time for businesses or individuals to move potentially EAB infested material out of these eight counties to areas of Wisconsin or other states that are not infested with EAB.

### ***Key Rule Provisions***

This rule includes the following key provisions:

- Creates a quarantine for EAB for Columbia, Door, Grant, Green, Iowa, Lafayette, Monroe and Richland Counties 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 these counties or any contiguous EAB quarantined counties.
- 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.

### ***Small Business Affected***

This emergency rule may have an impact on persons or companies that deal in any hardwood firewood or ash materials in Columbia, Door, Grant, Green, Iowa, Lafayette, Monroe and Richland Counties. The affected businesses are all small businesses. This emergency rule restricts the sale or distribution of ash trees and ash wood products plus any hardwood firewood from these eight counties to locations outside of these counties or outside any contiguously quarantined counties.

The business impact of this emergency rule depends on the number of 1) nurseries that sell/distribute ash nursery stock outside these counties, 2) firewood producers/dealers that sell/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.

Columbia, Door, Grant, Green, Iowa, Lafayette, Monroe and Richland Counties have a total of 48 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 an estimated 66 known firewood dealers in these eight counties.

Firewood dealers would need to be certified under s. ATCP 21.20, Wis. Admin. Code, to sell or move 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 41 known lumber mills in these eight counties and an estimated 48 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.

### ***Reporting, Bookkeeping and other Procedures***

Nursery growers will not have any additional reporting or record-keeping requirements. Wood products industries (*e.g.* firewood producers or saw mills) who enter into a compliance agreement shall keep records of all regulated product movement that leaves the contiguous quarantine area.

### ***Professional Skills Required***

No additional professional skills are required.

### ***Accommodation for Small Business***

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

### ***Conclusion***

This rule will help affected businesses in Columbia, Door, Grant, Green, Iowa, Lafayette, Monroe and Richland Counties to move ash wood and material without moving EAB to areas free from EAB. This will in turn help to protect the resources on which these businesses depend. This rule may impose additional costs on some businesses, including small businesses, depending on the nature of their reliance on ash trees or ash wood products. 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.