

Report From Agency

REPORT TO LEGISLATURE

NR 40, Wis. Adm. Code
Board Order No. IS-41-10
Clearinghouse Rule No. CR 10-115

Basis and Purpose of the Proposed Rule

Due to the immediate threat of white-nose syndrome in Wisconsin, the department proposes to add *Geomyces destructans*, the fungus that causes white-nose syndrome, as a prohibited invasive species under s. NR 40.04, Wis. Admin. Code Chapter NR 40, Wis. Admin. Code, establishes a classification system for invasive species and regulates those in the prohibited and restricted categories. It also establishes preventive measures that when followed, will help minimize the spread of invasive species into or around the state. Existing rules ban the transportation (including importation), possession, transfer (including sale) and introduction of invasive species that are listed or identified as "prohibited", with certain exceptions. Transportation, possession, transfer and introduction without a permit are exempt if the department determines that the transportation, possession, transfer or introduction was incidental or unknowing, and was not due to the person's failure to take reasonable precautions. Existing rules authorize the department to enter property with the permission of the owner or person in control of the property and, if permission cannot be obtained, to seek an inspection warrant from the Circuit Court. Entry is only for the purpose of inspection, sampling or control of prohibited invasive species. The listing of the fungus that causes WNS may result in the need for cavers to decontaminate caving equipment or avoid environmentally sensitive areas.

The current rules also allow the department to enter into consent orders with persons who own, control or manage property where prohibited invasive species are present to implement approved control measures, and to issue unilateral orders for control purposes unless the person was not responsible for the presence of the prohibited invasive species. If a control order is not complied with and the department undertakes control measures, the current rules allow for cost-recovery by the department for the expenses it incurred. We have had excellent cooperation from cave owners thus far in voluntary work to protect bats from WNS. These rule provisions allow regulation and unilateral action so that one person or party is not able to undo the positive actions by many and put Wisconsin bat populations at risk.

Summary of Public Comments

The department held five public hearings on the proposed changes to ch. NR 40, Wis. Admin. Code (Order IS-41-10). Hearings were held on October 26 (Fitchburg) and November 29 (Madison, Green Bay, Eau Claire, Wausau). The October 26 hearing was held concurrently with a hearing on an emergency and proposed permanent rule to list Wisconsin's four cave bat species as threatened in s. NR 27.03(3), Wis. Admin. Code (Order ER-35-10). The November 29 hearings were held concurrently with hearings to list Wisconsin's four cave bat species as threatened in s. NR 27.03(3), Wis. Admin. Code, and hearings to revise ch. NR 40, Wis. Admin. Code, relating to the management of *Geomyces destructans*, the fungus associated with white-nose syndrome (Order IS-47-10).

Comments were combined for all three rule orders (ER-35-10, IS-41-10 and IS-47-10). A summary of the comments is provided in the table below. In general, those providing testimony did not identify specific rules but rather referred to the whole set of rules that they supported or opposed. Consequently, if comments contained opposition to any portion of the rules, the comments was considered in opposition to the whole group of rules. There were 208 comments (75%) in support of the rules and 71 comments (25%) opposed.

Modifications Made

No changes were made to the rule based on public comments.

Appearances at the Public Hearing

October 26, 2010 – Fitchburg

In support: 1

Joseph Senulis, 1325 E. Johnson St., Madison, WI 53703

In opposition: 3

John Lovaas, 308 E. Kimball, Woodstock, IL 60098

Gerald Hanson, 2809 E. Hamilton Ave. #164, Eau Claire, WI 54701

Brandt Hanson, 2809 E Hamilton Ave. #164, Eau Claire, WI 54701

As interest may appear: 5

Hazel Barton, Northern Kentucky University, Dept. Biological Sci, SC 204D Nunn Dr., Highland Heights, KY 41076

Andy Hanks, 616 Neenah Ave., Sturgeon Bay, WI 54235

Marshall Hanks, 1312 Shiloh Rd., Sturgeon Bay, WI. 54235

Michael J. Bakke, 911 Central Ave., Sparta, WI 54656

Marianne English, 7654 Carrington Dr. Apt. D, Madison, WI 53719

Appearances at the Public Hearing

November 29, 2010 – Wausau

In support: 1

Justin Zweck, 122 Broadway, Wausau, WI 54403

In opposition: 1

Jeff Barry, 2229 Hwy 64, Merrill, WI 54452

As interest may appear: 1

Karina Gonzalez, 800 Scott St., Wausau, WI 54402

Appearances at the Public Hearing

November 29, 2010 – Green Bay

In support: 3

Lori Bankson, 1660 E. Shore Dr., Green Bay, WI 54302

Kim Diedrich, 1660 E. Shore Dr., Green Bay, WI 54302

Jody Sperduto, 1660 E. Shore Dr., Green Bay, WI 54302

In opposition: 0

As interest may appear: 4

Duke Eisch, 100 S. Matthias St., Appleton, WI 54915

Shawn Puzen, 700 N. Adams St., Green Bay, WI 54307

Jamie Nuthals, 700 N. Adams St., Green Bay, WI 54307

Matt Schweiter, E6126 Progress Rd., Manawa, WI 54949

Appearances at the Public Hearing

November 29, 2010 – Eau Claire

In support: 0

In opposition: 12

Jared Hanson, E13805 County Rd O, Augusta, WI
Jeannie Cunningham, W965 State Road 29, Spring Valley, WI 54767
Kery Erickson, 28 Burr Oak Ave. NE, Chatfield, MN 55932
Blaze Cunningham, W965 State Road 29, Spring Valley, WI 54767
Tony Huppert, W2555 State Road 29, Spring Valley, WI 54767
Don Nellessen, N7219 County Rd. CC, Spring Valley, WI 54767
Jae Anderson, 405 325th St., Knapp, WI 54749
Hannah I. Hanson, 927 Briar Lane Apt. 7, Altoona, WI 54720
Gerald Hanson, 2809 E. Hamilton Ave. #164, Eau Claire, WI
Kaye Bird, N8200 Hwy 63, Spring Valley, WI 54767
Bill Warner, UWRF-RDI Bldg 117, 410 S. 3rd St., River Falls, WI 54022
Brant Hanson, 927 Briar Ln, Apt #7, Altoona, WI 54720

As interest may appear: 2

Tom Arndt, E634 Wolf River Rd., Iola, WI 54945
Mike Bakke, 911 Central Ave., Sparta, WI 54656

Appearances at the Public Hearing

November 29, 2010 – Madison

In support: 5

Doug Wright, 2827 Hank St. #2, Madison, WI 53704
Andrea Gargas, PhD, 3710 Valley Ridge Rd., Middleton, WI 53562
Kris Kesselhon, 115 N. Stevenson St., DeForest, WI 53532
Andria Blattner, 523 W. Olin Ave., Madison, WI
George E. Meyer, 201 Randolph Dr., Madison, WI 53717-1615

In opposition: 4

Ethan Brodsky, 1339 Drake St. #2, Madison, WI 53715
John Lovaas, 308 E. Kimball Ave., Woodstock, IL 60098
George Mayhew, 109 East Hill St., Blanchardville, WI 53516
Tamara Thomsen, 5504 University Ave., Madison, WI 53705

As interest may appear: 7

Barbara Bowman, 2956 Fern Dr., Sun Prairie, WI 53590
Carla Hacker, Curriculum and Assessment, Madison Metropolitan Schools, 545 W. Dayton St., Madison, WI 53703
Houssam Nassif, 1122 E. Gorham, Madison, WI 53703
Joseph Senulis, 1325 E. Johnson St., Madison, WI 53703
Scott Rubin, 12 Langdon St. Apt. 9, Madison, WI 53703
Kasey Fiske, S19740 Exchange Rd., Prairie du Sac, WI 53578
Melissa Brumm, 5500 Mendota Drive, Middleton, WI 53562

Additional comments were submitted by email and standard mail.

Changes to Rule Analysis and Fiscal Estimate

None

Response to Legislative Council Rules Clearinghouse Report

No comments were received from the Rules Clearinghouse on the proposed addition of the fungus, *Geomyces destructans*, as a prohibited invasive species. However, the following Rules Clearinghouse comment on proposed Board Order IS-47-IO (revisions to ch. NR 40, regarding the management of white-nose syndrome in bats) is also relevant to this proposed rule:

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

a. Sections NR 40.03 (3m) and 40.07 (8) (d) contain the phrase "*Geomyces destructans* (white nose syndrome)." Because the fungus is thought to cause or relate to white nose syndrome, but is not synonymous with it, the phrase "(white nose syndrome)" should be replaced by the phrase ", the fungus causing or relating to white nose syndrome."

Based on this comment, "*Geomyces destructans* (white-nose syndrome)" has been replaced in the proposed rule by "*Geomyces destructans* (white-nose syndrome fungal pathogen)" to maintain consistency with other ch. NR 40 species descriptions, rather than follow the exact style suggested by the Clearinghouse.

Final Regulatory Flexibility Analysis

Affected constituencies include commercial caves and mines, private cave and mine owners, recreational cavers, property owners, the agricultural industry, and the conservation community. Concerns will likely include how listing the fungus will affect current activities. Many of these potential concerns may be addressed through cost-sharing, technical support, and education provided by the department. Examples include: reviewing proposed research proposals and issuance of invasive species permits, cost-sharing for installation of bat gates and other conservation actions, providing cave closure signage and decontamination protocols, and providing locations of caves that may be used for recreational caving activities (where bats are known to have been excluded).

Under ch. NR 40, the department may ask any person who owns, controls, or manages property where a prohibited species is present to control the prohibited species in accordance with a plan approved by the department. While a person who owns, controls or manages property where a prohibited species is present is responsible for controlling the prohibited species that exists on the property, the department will seek funds to assist in the control of prohibited species. Therefore, conducting control measures will not necessarily result in a cost to commercial cave operators. Additionally, commercial caves will have the option to exclude bats from their cave(s) with the help of the department, allowing them to remain open for tourism, and resulting in no loss of tourism dollars.

Under s. 227.19 (3m), Wis. Stats., a final regulatory flexibility analysis is not required.