nr040_EmR1036.pdf **Natural Resources – Revises Ch. NR 40 – EmR1036**

Publication Date: **September 29, 2010**
Effective Dates: **September 29, 2010 through** (See the following paragraph)
The emergency rules may remain in effect until whichever of the following occurs first: the first day of the 25th month beginning after the effective date of the emergency rule, the effective date of the repeal of the emergency rule, or the date on which the permanent rule identifying, classifying, or controlling the invasive species, promulgated under s. 23.22 (2) (b) 6., Stats., takes effect.

ORDER OF THE STATE OF WISCONSIN NATURAL RESOURCES BOARD
CREATING RULES

The Wisconsin Natural Resources Board proposes an emergency order to create NR 40.04 (2) (g) relating to the identification, classification and control of invasive species.

IS-42-10(E)
Analysis Prepared by Department of Natural Resources

Statutes interpreted: Section 23.22 (2) (a), Stats.

Statutory authority: Sections 23.09 (2) (intro.), 23.091, 23.11 (1), 23.22 (2) (a) and (b) and (2t) (a), 23.28 (3), 27.01 (2) (j), 29.039 (1), 227.11(2)(a), and 227.24 (1) (a), Stats.

Explanation of agency authority: The principal authority for the department's invasive species rules is s. 23.22 (2) (a) and (b) 6., Stats., which requires the department to establish a statewide program to control invasive species in this state and directs the department to promulgate rules to identify, classify and control invasive species for purposes of the program, which may include procedures and requirements for issuing permits to control invasive species. In order to fulfill this broad duty, the department adopted ch. NR 40 to provide it with all of the tools that are required to control invasive species, wherever found in the state, including regulation of the possession, transportation, transfer and introduction of specific invasive species, general preventive measures designed to restrict pathways by which humans commonly spread or introduce invasive species, authority to enter property in order to inspect, survey and control invasive species, and authority to recover the state's costs when it must carry out necessary control measures because responsible parties do not comply with department orders to control invasives themselves.

Section 23.11 (1), Stats., delegates to the department such further powers as may be necessary or convenient to enable it to exercise the functions and perform the duties required of it by ch. 23, Stats., and by other provisions of law.

Invasive species have caused environmental and economic damage and threaten human health, and will continue doing so unless adequate control measures are adopted and implemented. The general legislative delegation to the department of all necessary or convenient powers set out in s. 23.11 (1), Stats., combined with the broad directive in s. 23.22 (2) (a) and (b) 6., Stats., to control invasive species in this state give the department sufficient power to adopt and revise as needed rules for the protection of public health, safety, welfare and the environment, but particularly for the promotion of public welfare, convenience and general prosperity. The department's exercise of legislatively delegated police powers, as embodied in its invasive species rules, has its basis in the inherent power and duty of government to protect and promote the life, comfort, safety and welfare of society.

Section 23.09 (2) (intro), Stats., grants the department general authority to adopt rules for the protection, development and use of forests, fish and game, lakes, streams, plant life, flowers and other outdoor resources in this state. Section 23.091, Stats., authorizes the department to acquire, develop, operate and maintain state recreation areas, to establish use zones within state recreation areas providing for the full range of recreational uses, including hunting and fishing, and to promulgate rules to control uses within zones and limit the number of persons using any zone. Section 23.11 (1), Stats., gives the department the authority to have and take the general care, protection and supervision of all state parks, of all state fish hatcheries and lands used therewith, of all state forests, and of all lands owned by the state or in which it has any interests.

Section 23.28 (3), Stats., prohibits the department from allowing any use of a designated state natural area which is inconsistent with or injurious to its natural values, and authorizes the department to establish use zones, control uses within a zone and limit the number of persons using zones in designated state natural areas. Section 27.01 (2) (j), Stats.,

grants the department authority to promulgate rules necessary to govern the conduct of state park visitors, and for the protection of state park property, or the use of facilities, including the use of boats and other watercraft on lakes or rivers within the limits of a state park, and the use of roads, trails or bridle paths.

Section 29.039 (1), Stats., authorizes the department to develop conservation programs to ensure the perpetuation of nongame species, require harvest information and establish limitations relating to taking, possession, transportation, processing and sale or offer for sale, of nongame species. "Nongame species" is defined as any mammal, bird, fish, or other creature of a wild nature endowed with sensation and the power of voluntary motion that is living in the wild and that is not classified as a game fish, game animal, game bird or furbearing animal.

Section 227.11 (2) (a), Stats., expressly confers rulemaking authority on the department to promulgate rules interpreting any statute enforced or administered by it, if the agency considers it necessary to effectuate the purpose of the statute. The department considers the rules created by this Order to be necessary to effectuate the purposes of s. 23.22, Stats.

Section 227.24 (1) (a), Stats., authorizes state agencies to promulgate a rule as an emergency rule without complying with the notice, hearing and publication requirements under ch. 227, Stats., if preservation of the public peace, health, safety or welfare necessitates putting the rule into effect prior to the time it would take effect if the agency complied with the procedures. However, s. 23.22 (2t) (a), Stats., authorizes the department to promulgate emergency rules to identify, classify, or control an invasive species without having to provide evidence that an emergency rule is necessary for the preservation of public peace, health, safety, or welfare or to provide a finding of emergency. In addition, such emergency rules may remain in effect until whichever of the following occurs first: the first day of the 25th month beginning after the effective date of the emergency rule, the effective date of the repeal of the emergency rule, or the date on which the permanent rule identifying, classifying, or controlling the invasive species, promulgated under s. 23.22 (2) (b) 6., Stats., takes effect.

Related statute or rule: Related statutes or rules include but are not limited to the following provisions which, to varying degrees, may apply to the identification, classification, control or other regulation of species that are invasive, or to conduct that may result in the introduction or spread of invasive species:

Statutory section	Title [or subject]
15.347 (18)	Invasive species council.
23.093	Carp control research.
23.235	Nuisance weeds.
23.24	Aquatic plants.
26.20 (4)	[Railroad right-of-way annual weed removal]
26.30	Forest insects and diseases; department jurisdiction; procedure.
27.019 (7) (c)	[County rural planning – highways - only native plantings allowed]
27.05 (5) and (7)	[County authority to manage plants and control weeds in county waters, parks and county lands]
29.011	Title to wild animals.
29.047	Interstate transportation of game.
29.053	Specific open and closed seasons.
29.055	Wild animals; possession in closed season or in excess of bag limit.
29.057	Wild animals; possession in open season.
29.089	Hunting on land in state parks and state fish hatcheries.
29.091	Hunting or trapping in wildlife refuge.
29.192	Regulation of takings of certain wild animals.
29.301	General restrictions on hunting.
29.307	Hunting with aid of aircraft prohibited.
29.314	Shining animals.
29.327	Regulation of waterfowl blinds.
29.331	Trapping regulation.
29.334	Hunting and trapping; treatment of wild animals.
29.335	Feeding wild animals for nonhunting purposes.
29.337	Hunting and trapping by landowners and occupants.

29.354 Possession of game birds and animals.
29.407 Transportation of fish.
29.414 Erection of barriers to exclude rough fish.
29.417 Permit to take rough fish.
29.421 Removal of rough fish.
29.424 Control of detrimental fish.
29.509 Bait dealer license.
29.516 Fishing with nets and setlines.
29.601 Noxious substances.
29.604 Endangered and threatened species protected.
29.614 Scientific collector permit.
29.627 Domestic fur–bearing animal farms.
29.701 Propagation of fish; protected wild animals.
29.705 Propagation of fish; removal of fish.
29.733 Natural waters used in fish farms.
29.734 Barriers required for fish farms.
29.735 Importation of fish.
29.736 Stocking of fish.
29.737 Permit for private management.
29.738 Private fishing preserves.
29.741 Food in the wild for game birds.
29.875 Disposal of escaped deer or elk.
29.885 Removal of wild animals.
29.887 Wildlife control in urban communities.
29.924 Investigations; Searches.
29.927 Public nuisances.
29.931 Seizures.
29.934 Sale of confiscated game and objects.
30.07 Transportation of aquatic plants and animals; placement of objects in navigable waters.
30.1255 Report on control of aquatic nuisance species.
59.70 (17) and (18) [County funds, equipment, fees for pest and weed control, plant or animal diseases.]
66.0407 Noxious weeds. [local governments]
66.0517 Weed commissioner. [local governments]
66.0627 Special charges for current services. [charges for weed elimination]
84.07 (3) [DOT highway patrol officers to destroy noxious weeds on highways]
93.07 Department duties. [Dept. of Agriculture, Trade and Consumer Protection - pests]
94.01 Plant inspection and pest control authority.
94.02 Abatement of pests.
94.03 Shipment of pests and biological control agents; permits.
94.10 Nursery stock; inspection and licensing.
94.38 Agricultural and vegetable seeds; definitions.
94.41 Prohibitions. [Sale or distribution of noxious weed seed]
94.45 Powers and authority of the department.
94.46 Stop sale; penalties; enforcement.
94.69 Pesticides; rules.
94.76 Honeybee disease and pest control.
146.60 Notice of release of genetically engineered organisms into the environment.
169.04 Possession of live wild animals.
169.06 Introduction, stocking, and release of wild animals.
169.07 Exhibition of live wild animals.
169.08 Propagation of wild animals.
169.10 Sale and purchase of live wild animals.
169.11 Harmful wild animals.
169.36 Record–keeping and reporting requirements.
182.017 Transmission lines; privileges; damages. [utility weed control along transmission lines]

281.17 (2) [DNR to supervise chemical treatment of waters for the suppression of nuisance–producing organisms that are not regulated by the program established under s. 23.24 (2).]
237.10 Rapide Croche lock [Fox river lamprey barrier]

Plain language analysis: The proposed changes to ch. NR 40, Wis. Adm. Code, will add the fungus, *Geomyces destructans*, to the list of prohibited invasive species, allowing the department to effectively manage its spread and limit human transport.

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 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.

Summary of, and comparison with, existing or proposed federal regulations: We are not aware of any existing or proposed federal regulations that would list the fungus, *Geomyces destructans*, as an invasive species.

Comparison with rules in adjacent states: Wisconsin appears to be unique in taking the approach of listing the fungus, *Geomyces destructans*, as an invasive species; we are not aware of any other states or provinces that have taken similar actions. We don't know of any other states that have a similar mechanism—an invasive species rule— for listing the fungus. We are also not aware of any existing or proposed federal regulations that would list the fungus, *Geomyces destructans*, as an invasive species.

Summary of factual data and analytical methodologies: White-nose Syndrome (WNS) is a disease responsible for unprecedented mortality in cave hibernating bats and is identified by the white fungus (*Geomyces destructans*) that grows on the nose, ears, and muzzle and/or wing membrane. Infected bats exhibit atypical behavior, such as daytime activity during winter hibernation, which rapidly depletes stored energy reserves. Wing damage and emaciation are also common.

WNS has been documented in fourteen states and two Canadian provinces, is spreading rapidly from the first affected sites (up to 800 miles per year). The speed at which WNS is spreading necessitates immediate action on the part of the department to list the white-nose fungus as a prohibited invasive species. Based on the current location and known rate of spread of the disease, WNS could be present in Wisconsin as early as January 2011.

This rule was developed with the assistance of the Bureaus of Endangered Resources and Legal Services and with input from the Wisconsin Council on Invasive Species (Council). The Bureau of Endangered Resources prepared an Issue Brief for the Council, which provided background on white-nose syndrome, the extent and serious nature of the threat of the disease to Wisconsin's cave bats, and the need for listing *Geomyces destructans* as a prohibited invasive species.

Analysis and supporting documents used to determine effect on small business or in preparation of economic impact report: None.

Effect on small business: 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 scientific research licenses, 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 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.

Agency contact person: Erin Crain, 101 S. Webster St., P.O. Box 7921, Madison, WI 53707-7921. (608) 267-7479, erin.crain@wisconsin.gov.

Deadline for written comments: The deadline for submission of written comments is November 1, 2010.

SECTION 1. NR 40.04 (2) (g) is created to read:

NR 40.04 (2) (g) *Funguses*. The following fungus invasive species are prohibited:

1. *Geomyces destructans* (white-nose syndrome)

SECTION 2. **EFFECTIVE DATE.** This rule shall take effect upon publication, as provided in s. 227.24 (1) (d), Stats.

SECTION 3. **BOARD ADOPTION**. The foregoing emergency rule was approved and adopted by the State of Wisconsin Natural Resources Board on _____.

Dated at Madison, Wisconsin _____.

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

By _____
Matthew J. Frank, Secretary

(SEAL)