

Report From Agency

REPORT TO LEGISLATURE

Chapter NR 40, Wis. Adm. Code
Invasive Species Identification, Classification and Control

Board Order No. IS-34-06
Clearinghouse Rule No. 08-074

Basis and Purpose of the Proposed Rule

Invasive species threaten Wisconsin's traditions, environment and economy in every corner of our lands and waters. Section 23.22 (1) (c), Stats., defines "invasive species" to mean nonindigenous species whose introduction causes or is likely to cause economic or environmental harm or harm to human health. Section 23.22 (2) (a) and (b) 6., Stats., directs the Department to establish a statewide program to control invasive species, and to promulgate rules to identify, classify and control invasive species for purposes of the program. The Order creates those rules as part of the Department's state-wide program. These comprehensive rules establish a science-based classification system designed to address those invasive species considered most threatening to our environment and economy.

The Wisconsin Council on Invasive Species (the Council) was created by s. 15.347 (18), Stats., and appointed by the Governor to make recommendations to the Department for classifying invasive species under the invasive species program. The Department and the Council have been working over the last 4 years to develop rules to classify and regulate invasive species. The Council's Research and Regulations committees, consisting of experts and industry and stakeholder representatives, developed the process that the Department followed to assess invasive species for purposes of classification.

The Council consists of representatives of the Departments of Natural Resources, Administration, Agriculture, Trade and Consumer Protection, Commerce, Tourism, and Transportation and 7 other members serving 5-year terms representing public and private interests such as the agriculture, nursery, and commercial fishing industries, landowners, conservation groups and the University

The Council's Research and Regulations committees developed detailed criteria for assessing species for classification. The criteria include:

- a) Potential economic, environmental or human health impacts of the species
- b) Current presence, distribution and abundance in the state
- c) Potential for establishment and spread
- d) Control potential
- e) Socio-economic impacts of the species, both positive and negative

Department staff, with input from the Council and others, developed the lists of species to be assessed based on these criteria. Summaries of the available scientific literature were written on each of those species, specifically with regard to the assessment criteria. These literature summaries were reviewed by land managers and species specialists and knowledgeable stakeholders. Species Assessment Groups (SAGs) were developed to assess the species and to make recommendations to the Council. The SAGs, which were comprised of experts in their respective fields and stakeholder groups, used the criteria for species selection to advise the

Council on the placement of species in specific categories. Separate SAGs were developed for specific categories including:

- a) aquatic plants and algae
- b) woody plants
- c) terrestrial herbaceous plants
- d) fish and aquatic invertebrates
- e) terrestrial and aquatic vertebrates
- f) terrestrial invertebrates and plant disease causing microorganisms

For this initial rule development, species that were assessed were generally limited to those that did not have significant socio-economic values to some sector of society. Those species that are widely used or sold will require more extensive review and coordination with affected stakeholders. They will be assessed in a future rule revision that will follow the same SAG process utilized in this effort. The Council met in October, 2007 and discussed the SAGs' recommendations. For a few species the Council revised the classifications recommended by the SAGs. For most species, the Council agreed with the SAG recommendations.

In 2007, the Department prepared a draft rule and conducted informal listening sessions to garner input on the draft rule. Listening sessions for the public were held in Milwaukee, Madison, La Crosse, Spooner, Rhinelander (2), and Green Bay. Listening sessions for Department staff were held in Milwaukee, Madison, Fitchburg, Spooner, Rhinelander and Green Bay. The sessions included a brief overview of the rule and then participants asked questions and provided comments. There was also an opportunity to comment via email, on the Department website and through a printed questionnaire. Several hundred comments were received and Department staff considered the comments in making further revisions to the draft rule.

In 2008 the Natural Resources Board approved public hearings on the proposed rule. Six hearings were held and 129 persons attended. In addition, over 1350 comments were received by mail and email. These comments are summarized below. Many meetings were held with organizations, companies and individuals who submitted significant comments.

Rule Summary

The proposed rule creates ch. NR 40, Wis. Adm. Code. The chapter establishes criteria for classifying invasive species and lists or identifies specific invasive species into 2 categories (prohibited and restricted) according to those criteria. The rule prohibits or restricts the transportation (including importation), possession, transfer (including sale) and introduction of invasive species that are listed or identified as "prohibited", with certain exceptions. Based on input from the public and the Natural Resources Board, a section was added to the rule to allow the Secretary of the Department to temporarily add species to the prohibited category in emergency situations.

"Restricted" invasive species are also subject to a conditional ban on transportation, transfer and introduction, but not possession (except for fish and crayfish), with certain exceptions. The rule also allows transportation, possession, transfer or introduction for research, education, identification, control or disposal or for other specified purposes when authorized by exemption or by a Department permit.

Transportation, possession, transfer and introduction of listed invasive species without a permit are not violations of the chapter 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. Following Best Management Practices that are currently being developed by stakeholder groups would be one of several means of taking “reasonable precautions”. Another rule in the chapter bans transportation out of quarantined areas and DNR infestation control zones of items or host materials that may carry any invasive species and that are subject to a quarantine by the Department, the Wisconsin Department of Agriculture, Trade and Consumer Protection (DATCP) or the United States Department of Agriculture Animal and Plant Health Inspection Service (USDA APHIS), regardless of whether the transportation was incidental or unknowing.

For prohibited species, the goal of the rule is to eradicate, contain or slow the spread of the infestation, regardless of whose property the species is on. Unless entry is otherwise authorized by law, Department staff must seek permission before entering any property where they have reason to believe a prohibited species is present. The Department will seek to work cooperatively with the land owner or manager to determine the best means of control and approve a management plan. The Department will seek funds to assist in the control of prohibited species. Control efforts will be attempted only if the Department determines it is feasible and reasonable to control the prohibited species on the property. The rule authorizes the Department, if needed, to enter property for the purpose of inspection, sampling and control of prohibited invasive species. If the inspection finds that the landowner is responsible for the infestation of the prohibited species, the rule allows the Department to order persons who own, control or manage property where prohibited invasive species are present to implement approved control measures. If inspection determines that the landowner is at no fault for the presence of the prohibited species, the Department may conduct the control efforts. If a control order is not complied with and the Department undertakes control measures, the rule allows for cost-recovery by the Department for the expenses it incurred. In contrast, “restricted” species are not subject to any control requirements, except that persons who grow restricted plant species at a nursery are required to make best efforts to destroy them if the nursery closes.

General preventive measures are also required by the rule, without being specific as to species. These measures regulate certain common activities that function as pathways for the inadvertent introduction or spread of invasive species, unless a permit to engage in the activity has been issued by the Department. The preventive measures have been revised so that they complement and do not conflict with or duplicate other rules or statutes such as the VHS rules in ss. NR 19.05 and 19.055, the rules governing operation and maintenance of dry fire hydrants in s. NR 329.04, the prohibition in s. NR 109.08 (4) against placing equipment used in aquatic plant management in another navigable water, and the “illegal to launch” prohibitions in s. 30.715, Stats., which ban the placement of a boat, trailer or boating equipment in navigable water if there are aquatic plants attached or (for the St. Croix river only) zebra mussels attached.

Preventive measures include requirements to:

- notify the department of the escape of restricted invasive fish species from a safe facility,
- remove all attached aquatic plants and aquatic animals from vehicles, boats, trailers, equipment and gear of any type immediately upon their removal from the water,
- drain all water from any vehicle, equipment other than boating or fishing equipment, or gear of any type immediately upon its removal from the water,
- remove all attached aquatic plants and aquatic animals from vehicles, boats, trailers, equipment and gear of any type before bringing it into the state over land for use on any water of the state or its bank or shore.

- drain all water from any vehicle, equipment other than boating or fishing equipment, or gear of any type before bringing it into the state over land for use on any water of the state or its bank or shore,
- remove attached aquatic plants and aquatic animals from any vehicle, certain boats, boat trailers, and equipment, and gear of any type or from a sea plane before placing it in any water of the state, and before taking off a in a seaplane or transporting a vehicle, boat, boat trailer, equipment or gear of any type on a public highway,
- not transport “identified carriers” – materials that are covered by a department infestation control zone designation or a DATCP or USDA APHIS quarantine order,
- not use a prohibited invasive fish or crayfish species as bait,
- not introduce a nonnative aquatic plant, algae or cyanobacteria species into any water of the state.

The preventive measure rules also set out specific exemptions for permitted activities, for movement and cleaning of aquatic plant harvesting equipment, for wild rice, for waterfowl blinds, transport of an identified carrier of an invasive species from a department infestation control zone, a DATCP quarantine area or a United States Department of Agriculture Animal and Plant Health Inspection Service quarantine area pursuant to a DATCP-USDA APHIS compliance agreement, and for other specific situations.

Criteria and procedures for permit application, issuance, administration and revocation are detailed in the rule. Finally, the rule sets out the enforcement procedures available to the Department under the statutes for violations of the rule and of permits issued under the rule.

Fish and aquatic invertebrates: The rule defines all non-native fish species as prohibited invasive species, but identifies non-native species in the aquaculture industry, non-native viable species in the aquarium trade, and established non-native species as “restricted” species that are permissible for certain defined uses. For example, nonnative fish species in the aquaculture industry may be transported, possessed in a safe facility, possessed in a registered fish farm, or transferred without a permit issued by the department under the rule.

In addition certain named species of fish and aquatic invertebrates are classified as “prohibited”: bighead carp, black carp, grass carp, silver carp, eastern mosquitofish, western mosquitofish, red shiner, viable (i.e., capable of surviving in Wisconsin) snakehead species, tench, zander, Asian clam, bloody shrimp, Chinese mitten crab, New Zealand mud snail, water flea, spiny water flea, fishhook water flea, and faucet snail. Species in this group may not be transported, possessed, transferred, or introduced without a permit issued by the Department.

“Restricted” fish and crayfish invasive species are classified into three groups: non-native viable fish species in the aquarium trade, non-native fish species in the aquaculture industry, and established non-native fish and crayfish species. *Non-native viable fish species in the aquarium trade* are goldfish, koi carp, sterlet, Chinese hi-fin banded shark, bitterling, ide, and weather loach. *Non-viable* fish species are those for which eggs, fry, or adults are not capable of surviving water temperatures below 38 degrees Fahrenheit or not capable of surviving in fresh water. *Non-native viable fish species in the aquarium trade* may, if held in a safe facility, be transported, possessed or transferred, but may not be possessed elsewhere, stocked, or used live as bait without a permit issued by the Department, except that goldfish and koi carp may be transported, possessed, or transferred. For fish, a *safe facility* is one that does not directly drain into a water of the state, is not subject to flooding, is not connected to any water of the state, and is not an open pond. *Non-native fish species in the aquaculture industry* are arctic char, Atlantic

salmon, brown trout, chinook salmon, coho salmon, rainbow trout, pink salmon, redear sunfish, tiger trout, and tilapia. Species in this group may be transported (DNR permit required under ch. 29, Stats., for importation), possessed in a *safe facility*, possessed on a registered fish farm, or transferred without a permit issued by the Department under this rule. Stocking is prohibited under current law except by DATCP and DNR permit and use as live bait is prohibited.

Established non-native fish and crayfish species are alewife, common carp, rainbow smelt, round goby, ruffe, sea lamprey, three-spine stickleback, tubenose goby, white perch, and rusty crayfish. Species in this group may not be transported, possessed, transferred, stocked, or used as live bait without a permit issued by the Department.

Terrestrial and Aquatic Vertebrates (except fish): Proposed prohibited terrestrial and aquatic vertebrates are Russian boar and other wild swine, feral domestic swine, and monk (Quaker) parrot (parakeet). Red-eared slider turtles with a carapace (top shell) length less than 4 inches are the only restricted terrestrial or aquatic invasive vertebrate. However, legally obtained prohibited or restricted animals that are pets may be possessed, transported, or transferred without a permit issued by the Department.

Terrestrial and Aquatic Plants: There are 27 prohibited species including such species as kudzu and giant hogweed. There are 32 restricted species including such species as garlic mustard, common buckthorn and Canada thistle. There are 12 “split-listed” species including Japanese hedge parsley and black swallow-wort that are prohibited in part of the state and restricted in the remaining part. The split classification is necessary because there are several plants that are located in a part of the state and not in another; therefore it is critical to prevent such species from spreading into uninfested areas of the state. It is likely that permits will be developed for certain species in the plant trade, such as the oriental bittersweet that is grown and exported for the cut flower industry. Some aquatic species were assessed for which there are documented invasions in southern climates, but for which there remains uncertainty about their potential to spread in Wisconsin. Most of these species are not proposed to be regulated unless more information becomes available to suggest a threat in northern climates. In addition, there are many species which have been suggested for addition to the rule as known or potential invasiveness. Many of these will be assessed in a future rule revision.

Terrestrial Invertebrates and Plant Disease Causing Microorganisms: There are 7 prohibited species including hemlock woolly adelgid, emerald ash borer, crazy worms, Asian longhorned beetle, scale from beech bark disease, Asian gypsy moth and sudden oak death pathogen, and one proposed restricted species: European gypsy moth.

Algae and Cyanobacteria: A total of 6 species of algae and cyanobacteria are listed as prohibited species. There are no restricted species.

Summary of Public Comments

Six public hearings were held in August, 2008 in Fitchburg, Milwaukee, Green Bay, La Crosse, Spooner and Wausau.

	Attendance	Appearance slips	Speakers
Fitchburg	27	16	3
Milwaukee	18	8	4
Green Bay	25	9	5
La Crosse	14	9	3

Spooner	34	21	6
Wausau	28	13	6
Totals	146	76	27

In addition, there were approximately 1,350 written comments submitted by email or mail. The majority of these comments (over 1,000) were regarding mute swans. There were several other issues that elicited a number of similar comments. However, there were also over 200 unique comments that have been taken into account in the revision of the rule. Department staff met with or called most organizations that submitted significant comments to answer their questions and revised the rule accordingly.

I. GENERAL COMMENTS

A. Rule revision process

1. Comment: The proposed rule should describe the process that will be followed to revise the rule in the future, e.g., to add or remove species to the lists or change a species’ classification. DNR should also describe how its non-regulatory “caution”, “non-restricted” and “pending” lists will be revised.

Response: Chapter 227, Stats., sets out in detail the procedures that agencies such as the department must follow in order to revise administrative rules. Chapter 227, Stats., and ch. NR 2, Wis. Adm. Code, set out the procedure by which citizens may formally petition the department for a rule change. There is no need to restate these procedures in ch. NR 40. However, the proposed rule includes a new procedure where, in an emergency, the department may issue a temporary order that effectively adds a species to the prohibited list until the Administrative Code can be revised.

Since ch. NR 40 is being promulgated under the authority of the invasive species law, s. 23.22, Stats., the Wisconsin Invasive Species Council is charged with advising the department regarding invasive species classifications. It is up to the Council – not the department – to determine what process it will follow in the future to develop its recommendations, but the department anticipates that the Council will again use Species Assessment Groups, including stakeholders that might be affected, to evaluate proposed changes to the prohibited and restricted invasive species lists. The department will work with the Council to develop guidance on the assessment process if requested.

The department plans to issue a guidance document that will explain how its 3 non-regulatory lists will be developed, maintained and revised.

B. Department entry on private land, control requirements, cost recovery

1. Comment: There were some concerns that overly broad powers have been given to the DNR. Private landowners and public land managers cannot be expected to pay for the control of invasive species nor required to allow state employees entry onto private property to inspect for or control invasive species. Eradication or control of invasive species is an unreasonable expectation as the spread of invasive species is of no fault of the landowner. Control requirements need to consider the extent of the infestations. If the department orders control of a prohibited species, the department plan must include the entire infested area and all associated landowners.

Response: Control will not be required for the more common “restricted” species. The department intends to work cooperatively with landowners to identify and contain newly emerging infestations of “prohibited” species when it is reasonable to do so, and when control methods are sufficiently effective to feasibly contain the new infestation. Department staff will work with landowners to develop a management plan that outlines the best means of control and, where possible, will seek funding to pay for the control work. Unless entry is otherwise authorized by law, entry onto private property will be made only with permission of the landowner or a court-issued inspection warrant if permission is not obtainable. Language was added to the rule to clarify that infestations would be assessed and control efforts would only be undertaken if it is reasonable and feasible to effectively contain the species. When determining feasibility of control, the potential cost of control activities and the benefits of such activities will be taken into account. Entire infestations will be addressed for prohibited species

The rule has been revised to clarify that a control order can be issued by the department only if there is evidence that the landowner has some responsibility for the presence of the prohibited invasive species, and that the department can recover its costs only if the order is violated and the department carries out control measures.

2. Comment: DNR language regarding cost recovery is vague and open to interpretation, specifically the term “reasonable and necessary expenses”.

Response: Reasonable and necessary expenses are those expenses that the department actually incurred and that a court would agree were appropriate under the specific circumstances of any particular case.

C. Potential costs to local governments, loggers, landowners and others.

1. Comment: Will the rule be effective and reasonable with respect to the “cost-benefit” for the stake holders?

Response: Rule language was revised to state that control would only be expected for prohibited species where it is reasonable and feasible to do so.

2. Comment: Consider the cost-benefit, hurdles to implementing “control” measures in land management, transportation of forest products, and the immense responsibility that timberland owners enrolled in the MFL open designation have to people who use our lands for recreation – both motorized and non-motorized.

Response: Rule language was revised to clarify that control would only be expected for prohibited species where it is reasonable and feasible. Best management practices (BMPs) are also being developed together with stakeholders, for forestry, recreation, and rights-of ways and are now referenced in the rule as examples of reasonable precautions landowners and recreation users can take.

3. Comment: Invasive species travel via wind, insects, birds, vertebrates, and adjacent public and other private lands. Neighboring properties can contain different habitats which can trigger the need for different control methods and landowner resources may differ significantly. Will criteria be developed that will address invasive species that cross property boundaries?

Response: Yes, on a case-by-case basis, depending on the landowners and if it is a prohibited species. The staff team will work with the landowners to develop a management plan for each situation after discussions with affected landowners.

4. Comment: The primary cost of adopting the rule for invasive species will be borne by loggers, landowners, and forest practitioners who make their living from the forest. Is there no public interest involved in bearing costs?

Response: In general the costs will be fairly minimal. Loggers, landowners and forest practitioners will be asked to follow best management practices but these will generally alter the timing or method of an activity, and will not greatly add to operating costs. For actual control practices, costs generally will be incurred only if a prohibited species is found on property owned or managed by those persons mentioned, the person has some culpability for the presence of the prohibited species, and the department orders control with no other assistance, which is not the intention. The department will try to find funding and assistance to control prohibited species, however, it will be on a case-by-case basis. The public interest is involved and the department will do all it can to secure funds for control.

5. Comment: Implementation of the rule will be challenging for loggers, forest managers, and landowners. The Natural Resources Board is urged to refer to the extensive work that has been accomplished by the Governor's Council on Forestry's Advisory Committee that developed draft Best Management Practices for Invasive Species. The NRB should consider who will enforce this rule and where the funds will come from to pay for eradication of prohibited species when they are discovered on public or private lands. Does the state have sufficient dollars to deal with populations of "prohibited" invasive species on state lands? Will the DNR have employees to police and eradicate invasive species?

Response: Best Management Practices are now referenced in the rule as a reasonable precaution. The department intends to search for funding sources to control prohibited species. The department does not intend to "police" private lands, and will work with landowners when the presence of a prohibited species has been reported.

6. Comment: There is not enough money in the state budget nor a private landowner's to control or eradicate some of these invasive species or ones coming in the future.

Response: The cost to control or eradicate prohibited species is extremely difficult to predict as there are so many unknowns, for instance, it could be 1 plant or 1,000, upon discovery, which would impact cost. Several years of experience have shown that usually control costs for new infestations of these prohibited plant species is very low and cost-effective. Control of restricted species, which are more wide spread, is not required under the rule.

7. Comment: We do not feel that private landowners will self-report nor request permits to deal with invasives found on their land based on the language in this proposed chapter. To do so would open them up to a significant financial bill for control or eradication.

Response: The department will develop the management plan with the landowner. Controls will only be expected where it is reasonable and feasible to contain the population. This process will be clearly addressed in outreach materials so landowners understand what the process will entail. Permits will not be needed unless a person wishes to intentionally utilize a listed species. Permits are not required for control efforts. The department would not be able to seek cost recovery,

unless landowner culpability exists, a control order is issued but not complied with, and the department actually undertakes the control measures at its expense.

8. Comment: The “No Local Government costs” statement in the Notice of Public Hearings IS-34-06 on page 3 is a false statement and it needs to be addressed with facts. A phased-in approach over several years to implement would give the opportunity for local units of government to provide more input in the development, give them an opportunity to serve the public to the maximum degree possible, and afford more input to the DNR as more information and unforeseen consequences arise.

Response: The fiscal estimate only considered the governmental costs of administering the rule, and only the department will administer the rule. However, it has been revised to show that there may be costs to state and local government to comply with the rule. In general the costs to local governments will be fairly minimal. They will be asked to follow best management practices for right-of-way management and other activities, but these will generally alter the timing or method of an activity, and will not greatly add to costs. As the first phase will be focused on education, the enforcement aspect of the rule will be phased in. There will be extensive department outreach, especially to those target audiences likely to be affected by the rule.

D. Accidental transport – Delayed implementation of enforcement, BMPs

1. Comment: Right-of-way managers are concerned that they will be in violation of the law by conducting normal practices such as roadside mowing. They are concerned that enforcement actions may be taken against them for accidentally transporting listed species and that their employees could be cited for criminal violations. They recommend a phased approach to implementation of the rule.

Response: A phased approach is customary with new rules in regard to enforcement. The normal practice of implementing a rule is to start with education. Highway departments will be trained on species ID, control and best management practices to minimize spread. Enforcement is a stepped process of informal contacts by staff, followed by notices of violations. Only if the landowner or manager refuses to return to compliance will a citation be considered. Imprisonment and fines are only for intentional criminal violations with sentences that would be issued only by a Court.

2. Comment: Several right-of-way managers suggested that additional language be added to indicate that the implementation of best management practices in the maintenance of roadsides should be considered as taking reasonable precautions.

Response: The rule has been revised by defining reasonable precautions and referencing best management practices as one of several ways to be taking reasonable precautions.

3. Comment: How will the BMPs for invasive species be integrated into the rule and be considered as “reasonable precautions”?

Response: Language was added to rule as a note that provides examples of reasonable precautions and includes BMPs for invasive species.

E. Enforcement

1. Comment: NR 40.08 Enforcement: How can a penalty be enforced on a person based on a "determination" made by the department. What criteria will the department use to determine the violation?

Response: The department cannot impose a penalty – only a Court can impose a fine or forfeiture, but the department can issue a citation (which is prosecuted by the District Attorney) or refer a violation to the Attorney General for prosecution. In all enforcement actions the department is required to make a determination of whether or not the department feels a violation has occurred. The facts related to the matter are reviewed to determine if there appears to be a violation. Based on all available information, the department then decides what course of action it will take. For purposes of this rule, department staff will follow normal stepped enforcement procedures and the program staff will be heavily involved in the determination of a violation. When necessary or beneficial, guidance documents may be developed to assure the intent of the rule is followed consistently.

2. Comment: Who will be responsible for inspecting to determine compliance?

Response: The department's program staff and Conservation Wardens will be involved in compliance determinations, and the department will develop a Memorandum of Agreement with DATCP so it can conduct compliance checks in concert with its normal duties.

3. Comment: What criteria will the department use to determine a violation?

Response: Department staff with expertise regarding the prohibited species involved will discuss potential violations with potential violators. Discussion will focus on what precautions the individual took (BMPs or other department-accepted guidance, examples of which were added to the rule) to limit potential of introduction or spread of prohibited species. Questions regarding whether or not the action was incidental or unknowing will also be explored.

4. Comment: What is considered incidental or unknowing transport?

Response: Definitions of incidental and unknowing were added to rule.

5. Comment: We are not supportive of either citations or imprisonment being included in this rule. It is unnecessary to have fines and prison hanging over the heads of Wisconsin's public servant's heads, imposing fear while performing their daily duties.

Response: The Legislature adopted this enforcement language and the department cannot change it. Imprisonment and fines can only be sought for intentional criminal violations, not for unintentional or inadvertent acts. These concerns should be resolved by the exemption for inadvertent or unknowing transport, transfer, possession or introduction if reasonable precautions are taken.

6. Comment: Our primary interest in the rule is that it be implemented in a manner that recognizes all reasonable efforts to practically manage for invasive species. We believe that the rule must provide adequate protections for affected sources that take reasonable precautions against the introduction and spread of invasive species. This will be especially important to utilities and other entities responsible for building and maintaining public infrastructure. Utility companies as well as other private and government entities often need to obtain temporary or permanent property easements with private landowners and customers. We need to be able to

manage any liabilities and resulting costs associated with construction activities and invasive species implications on these properties.

Response: The department concurs with this concern and feels that this rule does take into account when an individual or company has taken reasonable precautions. The determination of responsibility will be made on a case-by-case basis and all factors will be looked at and considered to make a decision.

7. Comment: Is it the landowner's or the logger's responsibility to inspect wood products for restricted species before transportation?

Response: This depends on the specific situation. But generally, under this rule, it would be the responsibility of the person transporting the materials to assure that they are in compliance with the rule.

8. Comment: Per the "Summary of major public comments for draft rule package 6-5-08", WWOA would like to reiterate that "the rule appeared to be too focused on enforcement for prohibited species, allowing the department to order controls, enter onto land to inspect, control or monitor and to charge the landowner for the control efforts..." The DNR's response is "The Department's goal is to focus on education and cooperation to identify and control prohibited species...Department staff will work with landowners or land managers with prohibited species to cooperatively control them, regardless of where they are found..." yet language to this effect does not appear in the proposed rule.

Response: Substantial changes have been made to the rule to clarify the focus on education, cooperative prevention and remediation.

9. Comment: Reporting and control requirements. The rule language limits reporting of invasive species activities when associated with a permit (NR 40.07 (4)) or transporting, possessing or give away a prohibited invasive species for the purpose of identification or disposal without a permit issued by the department under this chapter, if the person reports the location of origin of the prohibited invasive species to the department and no individual specimens or propagules are allowed to escape or be introduced (NR 40.04 (3) (e)). ATC collects a large amount of field data to support applications to the Public Service Commission of Wisconsin for CA or CPCN authority and permit applications to DNR, including information on invasive species. By submitting this data to the department, ATC is essentially reporting invasive species infestations both in areas where DNR may have jurisdiction for permit issuance and in areas where no DNR permit authority exists. This situation could cause conflict between ATC and the landowners where ATC has an easement but does not own or control the land. If a prohibited invasive species is encountered, the department may order control. ATC is suggesting the department consider this situation and clarify who is the responsible party for control of these species and to define what the reporting expectations are.

Response: The department is asking that all prohibited species infestations be reported so it can work with the landowner or manager to initiate control. However, reporting of prohibited species is mandatory only if required by a specific permit or if a person does not have a permit but is transporting, transferring or possessing specimens for purposes of identification or disposal. The department will conduct an investigation to determine the responsible party in each individual case. Regardless, the department's objective would be to cooperatively develop a plan to control the prohibited species.

F. Restricting public access

1. Comment: There were several comments that companies or individuals with lands enrolled in the Managed Forest Law would be required to restrict public access to their lands in order to minimize the spread of invasive species.

Response: The revised rule does not require limiting public access. The department is working with all the major outdoor recreation groups to develop BMPs for preventing the spread of invasive species through recreational activities.

G. The rule needs to be stricter

1. Comment: The rule should be stricter in mandating controls of prohibited and restricted species. Preventive measures proposed in sections NR 40.04(4) and NR 40.06(3) should be required.

Response: The intent of this rule is to work cooperatively with landowners and land managers. It is critical to maintain flexibility in the implementation of the rule in order to best evaluate each situation. Priorities for control efforts will be placed on the newly emerging prohibited species rather than the widespread restricted species. Preventive measures outlined in NR 40.07 are mandatory.

2. Comment: Make it possible for parks to pursue neighbors to eliminate encroaching invasives. Mandate and educate county road workers to spot and eliminate problem plants. Those who have forest tax breaks should have to eliminate invasives.

Response: Most of these recommendations were considered and rejected by the department as being unreasonable, unduly burdensome or too costly for both private and public lands.

3. Comment: Suggested additions: Road construction or new road development should not be allowed near or through an existing population of prohibited species. Following road construction or development, encourage planting and propagation of native species. Restrict recreation (boat traffic, hiking, etc.) in public areas with prohibited species.

Response: The department may not have the authority to prevent road work near a prohibited species. Restricting access to areas with prohibited species was included in the first draft of the rule, but was widely opposed and objectors argued that the department did not have authority to do so on any land other than department-managed lands.

H. Preventive measures

1. Comment: Many comments expressed concern about the spread of invasive aquatic plants and animals via the transfer of water, sediment, or aquatic plants between different waterbodies associated with certain activities such as boating, diversions, dredging, and operation of dry hydrants.

Response: Section NR 40.07 "Preventive measures" includes requirements for the removal of aquatic plants and animals and the drainage of water from vehicles, boats, boat trailers, equipment and gear under various circumstances, such as immediately after removing them from a waterbody. The preventive measures have been revised so that they compliment and do not conflict with or duplicate other rules or statutes such as the VHS rules in ss. NR 19.05 and

19.055, the rules governing operation and maintenance of dry fire hydrants in s. NR 329.04, the prohibition in s. NR 109.08 (4) against placing equipment used in aquatic plant management in another navigable water, and the “illegal to launch” prohibitions in s. 30.715, Stats., which ban the placement of a boat, trailer or boating equipment in navigable water if there are aquatic plants attached or (for the St. Croix river only) zebra mussels attached. Notes were added to the rule that inform readers of the requirements of the other rules or statutes, e.g., that decontamination standards already exist in administrative rules that govern dredging, replacement or maintenance of structures in waterways for the purposes of controlling the spread of invasive species, and that water diversions are regulated by a different administrative code and that the regulatory process allows for consideration of the risk of invasive species transfer before pumping is permitted.

2. Comment: Several comments indicated confusion regarding the exemption from prohibited activities if “reasonable precautions” had been taken with regard to the preventive measures that control the spread of aquatic invasive plants and animals.

Response: This exemption does not apply to the preventive measures. A note of clarification has been added to the rule on this point. In addition, under the definition of “reasonable precautions” language was added regarding best management practices and requirements for the sale and purchase of aquatic plants.

I. Permitting

1. Comment: Companies and individuals frequently obtain DNR permits which contain conditions regarding invasive species. There is confusion about the potential overlap of language in the proposed rule and existing permit requirements. Clarification of potential “double regulation” is needed.

Response: The rule has been revised to address permit overlap as much as possible by working with other programs to ensure ch. NR 40 is considered in other permits and the addition of exemptions in ch. NR 40 where other equivalent permits are issued.

2. Comment: A person or entity following established best management practices (BMPs) should be exempted from permit requirements.

Response: The rule now references BMPs as a way of taking “reasonable precautions”. Permits will generally only be required when a person intends to utilize a listed invasive species by intentionally transporting, possessing, transferring or introducing it. These permits will be specific to the permit application.

3. Comment: There currently are wastewater treatment facilities in the state that use Phragmites reed beds for sludge treatment. The department already has a permitting process in place to regulate these reed beds.

Response: The rule has been revised to specifically exempt from permit requirements Phragmites beds approved by a WPDES permit for sludge treatment.

4. Comment: The requirements of the rule should not be subject to discretion or exemption, other than the provisions that allow transportation for identification or disposal purposes. Any other actions should not be allowed. Further, at least with respect to aquatic organisms, control should be extended to the aquarium/aquaculture trade and to the horticulture/agriculture trade.

Response: There are many situations where some discretion and flexibility are needed in order for the rule to be reasonable and effective, but the rule has been modified to limit exceptions by permit for the use of prohibited fish or crayfish species. Under the rule as now drafted, research and public educational displays are the only uses of prohibited fish and crayfish invasive species for which a permit may be issued.

J. Increase staff and funding for implementation, education, training

1. Comment: There were many comments received on the need for increased funding and staff to implement these rules, especially for developing educational materials and conducting training.

Response: The department agrees that extensive education and training efforts will be needed and is seeking grants and other funding. Field staff will be trained to assist with rule implementation. Staff will work with partners such as the boat landing volunteers and Cooperative Weed Management Areas to develop materials to allow them to assist in training at a local level. The department does not have the ability to obtain additional funds or staff by rulemaking.

K. Changes to Greensheet attachments

1. Comment: There was no mention of the benefits of this rule to small businesses and individuals such as lake resorts, marinas, fishing guides, forestry cooperatives, private forest landowners, birdwatchers, hikers, and other "silent sport" participants.

Response: Revisions to the Greensheet package have been made to address this.

II. SPECIES SPECIFIC COMMENTS

A. Plants

1. Comment: Many comments suggested additional species (26) or exempt cultivars (2) to be added to either the prohibited or restricted list.

Response: There are many plants considered by some to be invasive that were not assessed at this time. For this initial rulemaking, the listings were primarily limited to those that did not have significant economic benefits for some sector of society. Others need further research to determine how invasive they might become or to identify which cultivars might be invasive or benign. Many of these species will be assessed in a subsequent revision of the rule.

2. Comment: Suggestions were made to alter species from one category to another, or to alter the dividing line between prohibited and restricted for split-listed species.

Response: Alterations were made to the rule based on information received. However, no new plants were added to or removed from the rule since the public hearings.

3. Comment: Overall, the Green Industry supports the need for this rule and supports the process in which it was developed. The plants listed in the proposed rule have little to no economic value to the Green industry. We believe the science-based process for species assessment developed here in Wisconsin is one of the best and sets a standard that other states can follow, without serious consequences to our industry and growers.

Response: The Green Industry and other stakeholders will be involved in assessments of additional species to be added to the list in the future.

4. Comment: When plants of significant economic value are added to the list of invasive plants in the future, we must see to it that a “compliance period” is developed for nurseries.

Response: Department staff is working with the Wisconsin Green Industry Federation and others to develop reasonable phase-out periods that could be proposed for the next revision of the rule.

5. Comment: Arborists and others were concerned that persons removing invasive species would be in violation.

Response: The rule contains an exemption for possession and transportation when done for control or disposal.

6. Comment: There were many comments supporting the rule and recommending that there be more requirements to control restricted plants, especially on rights-of-way.

Response: The department attempted to draft a rule that is reasonable in what is expected of people and to give priority to control of those species that are not yet widespread and may yet be feasible to control.

7. Comment: Some comments expressed confusion regarding how wetland species were classified.

Response: All plants are now listed alphabetically by scientific name under the broader category of “plants” instead of being separated into “terrestrial” and “aquatic” plant species.

B. Fish, crayfish and aquatic invertebrates

1. Comment: The rule should allow the continued use of outdoor ponds for holding koi carp, goldfish, and other aquarium species.

Response: The rule will allow the continued use of koi carp and goldfish in outdoor ponds. Other restricted fish species may not be held in outdoor ponds. Because of the ubiquity of ponds and the difficulty of assessing their exposure to any stated risk of flooding, it is prudent to limit their use to native species and these two established non-native aquarium species.

2. Comment: *Orconectes propinquus* (an invasive crayfish) and the banded mystery snail (*Viviparus georgianus*) should be listed as restricted species.

Response: The department agrees that these species should be reviewed for inclusion on the restricted list in a future rule revision. There was insufficient evidence to list them at this time..

3. Comment: The department has expanded the definition of “invasive fish species” beyond the intent of the authorizing statutes.

Response: Section 23.22, Stats., defines invasive species as “nonindigenous species whose introduction causes or is likely to cause economic or environmental harm or harm to human health”. Decades of department experience with introduced non-native fish species makes it prudent to assume that any fish species introduced into an ecosystem outside its native range is

likely to cause environmental harm by disrupting the receiving ecosystem. Unlike terrestrial species, even if found at an early stage of invasion, non-native fish are almost impossible to eradicate from a waterbody.

4. Comment: Sections 7 of the background memo and 10 of the rule analysis portion of the rule do not adequately summarize impacts of the rule on aquarium and aquaculture businesses.

Response: Those sections have been re-drafted. Aquarium businesses will be affected by the prohibition of a few currently used viable non-native aquarium species. No currently permitted aquaculture practices will be affected.

5. Comment: Addition of the phrase “and non-viable fish species” to the definition of “fish species in the aquaculture trade” would allow future expansion of the industry and still remain within the authorization of the statute.

Response: The present definition is intended to include all species currently raised on fish farms in Wisconsin. That definition may be expanded in the future by rule when new non-native species are deemed safe. Under the rule non-viable fish species may be used in the aquarium trade, but the rule adds additional protections by requiring that those species be held in “safe facilities”. A parallel allowance for the aquaculture trade is not appropriate because fish in the aquaculture trade may be held in fish farms that do not meet the security requirements required of “safe facilities”.

6. Comment: Listing of mosquitofish as prohibited would pose an unreasonable hardship on some fish farmers. Mosquitofish are imported incidentally from southern states in shipments of minnows, including shipments to department hatcheries where the minnows are used as forage. The mosquitofish appear not to survive in Wisconsin and pose no ecological risk.

Response: The department believes that mosquitofish have the ability to disrupt ecosystems in Wisconsin, so it remains committed to minimizing the risk that they will colonize any waters of the state. However, the department also understands the concern that has been raised by the aquaculture industry. The importation of mosquitofish to fish farms without a department permit for rearing, introduction, or use as bait is currently illegal under s. 29.735, Stats., and the proposed rule does not change that, except to explicitly condone the incidental or unknowing importation of this species when not due to a person’s failure to take reasonable precautions. It is not the intention of the department to curtail current importation practices, but it is interested in working with aquaculture industry organizations and individual fish farmers to develop best management practices that would, if possible, limit the incidental importation of this species and that would minimize or eliminate its dispersal with bait after importation.

7. Comment: Individually marked and USFWS-certified sterile grass carp should be allowed for use on fish farms.

Response: Grass carp of any kind are not allowed in Wisconsin under current rules and policies. The department does not wish to allow grass carp to be imported under any circumstances, and that is codified in NR 40, but if that policy were to change, the importation of grass carp would be possible through an amendment of the new rule.

8. Comment: The rule contradicts Sections 1.02 and 1.035(2) Stats., related to federal activities in waters of the state and on federal lands. It also contradicts tribal jurisdiction.

Response: The State of Wisconsin like all other states does not make it a practice to decide when it is necessary to specifically exempt federal or tribal activities from general state laws. This would be an impossible burden. While recognizing that under some (but not necessarily all) circumstances these exemptions may apply, the state deals with them on a case-by-case basis.

9. Comment: Rainbow and brown trout should not be restricted.

Response: There are no safe and reasonable uses of these species that are not allowed under the rule as drafted.

C. Terrestrial invertebrates and plant disease-causing microorganisms

1. Comment: Terrestrial invertebrates or microorganisms can self-transport to remote locations and their populations may increase exponentially within a very short period of time. Language in the rule should remove the potential liability to private landowners for the control of invertebrates and microorganisms.

Response: Rule language was added to reflect the following: the department will pursue control only if it is feasible and reasonable to control the prohibited species. Language was also added to the rule indicating that if the department determines that the prohibited species is present through no fault of the person, the department may control the prohibited species but will not require the landowner to do so or seek cost recovery.

2. Comment: There is a concern for the unknown cost of control that will be the responsibility of landowners, loggers, and mills.

Response: Rule language was added to reflect the following: the department will pursue control only if it is feasible and reasonable to control the prohibited species. Rule language also states that the department will seek funds to assist in the control.

3. Comment: Any permitting process to move wood from a quarantined area needs to be very easy and expedient.

Response: Additional rule language was added to defer to DATCP's quarantine regulations for quarantined pests so that folks will continue to apply for a compliance agreement for quarantined pests from DATCP and will not need to go through a separate permitting process under ch. NR 40.

D. Terrestrial vertebrates

1. Comment: There were many comments asking that the department not list the mute swan as a prohibited invasive species. They stated that the native/exotic status of mute swans is uncertain and any perceived conflicts with mute swans can be resolved using effective, humane methods. Additionally, some stated that mute swans do not threaten the state's aquatic ecosystems as they eat algae and insects. There were a few comments supporting the listing of mute swans.

Response: Mute swans have been removed from this rule. The department has an indefinite moratorium on its personnel removing mute swans in Kenosha, Racine, and Waukesha counties. The department will continue to pursue regulating mute swans under the captive wildlife law to cover captive specimens. Free-flying swans would not be covered.

2. Comment: There were a number of comments from people wanting the department to list wolf-dog hybrids as prohibited or restricted invasive species. They suggested that since these animals are dangerous both in captivity and when introduced to the wild, this rule would allow the department to require spaying and neutering, pen standards and other limits on ownership.

Response: Wolf-dog hybrids do not appear to meet the definition of invasive species. Wolves are native animals and dogs are domestic animals. The department does not have the authority to regulate either as “invasive species”. The department will continue to pursue regulating them under the captive wildlife law to regulate captive specimens, similar to mute swans as stated above.

3. Comment: House or English sparrows and European starlings should be classified as prohibited.

Response: House or English sparrows and European starlings are so well established and widespread throughout Wisconsin that control of them is virtually impossible. Furthermore, because they are not primarily spread by humans, listing them as restricted generally would not help limit their spread.

4. Comment: Although no one challenged the general idea of classifying all non-native vertebrates, not otherwise exempt, as “prohibited”, this “white list” approach brought up many concerns and questions. There were concerns about the terms ‘captive-bred’, ‘wild animals’, ‘domestic animals’ and ‘pets,’ and how the rule would apply to the pet industry, pet owners, game farms and others.

Response: The draft rule classified all non-native vertebrates, other than those expressly exempt, as prohibited invasive species. That approach has been revised in the rule. Now only those terrestrial vertebrate species specifically listed as prohibited are proposed to be regulated as such. Therefore, the terms “domestic”, “wild animal”, and “captive-bred” are no longer needed.

5. Comment: Some people keep monk parrots, listed as prohibited, as pets.

Response: “Pet” has been defined. Legally obtained non-native wild animals listed as prohibited that are pets may be possessed, transported, or transferred, but not introduced to the wild, without a permit. Listing monk parrots as prohibited will allow for the enforcement of control requirements should monk parrots become established anywhere in Wisconsin.

Modifications Made

The revisions made to the rule following the public hearings include removing the mute swan from rule, combining the lists of aquatic and terrestrial plants under a single list, changing the approach for terrestrial vertebrates from one that deemed all non-native species to be invasive unless exempted in favor of listing individual named species instead, clarifying the exemption for incidental or unknowing violations that were not due to a person’s failure to take reasonable precautions, rewriting the inspection authority, control order and cost recovery provisions, adding a section authorizing the Secretary to issue temporary emergency orders to add species to the prohibited species list, clarifying exemptions where equivalent permits or approvals are issued by other Department programs or by DATCP, revising the preventive measures section of the rule so that it does not overlap or conflict with other rules or statutes, and removing a redundant section that repeated the statutory penalties for violations of the rule or permits issued under the rule.

Appearances at the Public Hearing

Six public hearings were held in August, 2008 in Fitchburg, Milwaukee, Green Bay, La Crosse, Spooner and Wausau.

August 14, 2008, Fitchburg

In support:

Jerry Doll, 7386 Clover Hill Dr., Waunakee
Samara Eisner, Olbrich Botanical Garden, 3330 Atwood Ave., Madison, WI 53590
Samantha Egan, Olbrich Botanical Garden, 3330 Atwood Ave., Madison, WI 53704
Rhonda Witmer, 6790 8th Ave., Platteville, WI 53818
Dan Bohlin, 10854 Robin Ln., Stitzer, WI 53825
Mark Guthmiller, End-O-Way, LLC Property Management, 757 Timber Ride Dr., Oregon, WI 53575
Jeff Epping, Olbrich Botanical Gardens, 3330 Atwood Ave., Madison, WI 53704
Eugene M. Roark, Wisconsin Woodland Owners Assn., 16 Grand Ave., Madison, WI 53705

In opposition – none

As interest may appear:

Priscilla Bondhus, 1320 N. Highpoint Rd., Middleton, WI 53562
Ricardo Espinosa, Northern Natural Gas Co., 700 S. Fillmore Suite 330, Amarillo, TX 79101
Greg Stacey, 6634 Chestnut Circle, Windsor, WI 53598
Mark Garrison, 718 Bear Claw Way #103, Madison, WI 53717
Marla M. Eddy, City of Madison - City Forester, 1402 Wingra Creek Pkwy., Madison, WI 53715
Laurie Yahr, 1710 Redwood Lane, Madison, WI 53711-3330
S. Galen Smith, 218 DuRose Terrace, Madison
Steve Schmieding, 2217 Whitney Way, Madison, WI 53711

August 14, 2008, Milwaukee

In support:

Eric Leifer, 2035 N. Holton St., #1, Milwaukee, WI 53212
Madge A. Malecki, 7134 W. Tripoli Ave., Milwaukee, WI 53220 and 8630 Pinewood Dr., St. Germain, WI

In opposition:

Kim Raper, Save Our Swans, 12428 250th Ave., Trevor, Wis., 53179
Erla Mae Clearmont, 410 Racine St., #6, Waterford, WI 53185
Linda Vilimek, 5708 Scenery Rd., Waterford, WI 53185

As interest may appear:

Jeffrey A. Thornton, 321 Barney Street, Waukesha, WI 53186-2402

Rita L. Hayen, American Transmission Co., LLC, N19 W23993 Ridgeview Pkwy W, PO Box 47, Waukesha, WI
Scott G. Porter, Turtle Lake Assn., Walworth Co., N6575 Anderson Drive, Delavan, WI 53115-2657

August 15, 2008, Green Bay

In support:

Dave Pozorski, Wisconsin Association of Lakes, 8833 Carstens Lk. Rd., Manitowoc, WI
Richard Sachs, PO Box 19015, Green Bay, WI 54307-9015
Diane Schauer, AIS Coordinator, Calumet County, 540 S. Parkway Dr., Brillion, WI 54110

In opposition – none

As interest may appear:

Paul Sponholz, Fond du Lac County Highway Commission, 301 Dixie St., Fond du Lac, WI 54936-1234
Jamie Nuthals, Wisconsin Public Service Corporation (WPSC), 700 N. Adams St., Green Bay, WI 54307
Crystal Koles, American Transmission Company, 801 O'Keefe Rd., DePere, WI 54115
Jeff Edgar, 3914 Gass Lake Rd., Manitowoc, WI, 54220
Al Geurts, Secretary, Wisc., County Highway Assoc. (WCHA), 1313 Holland Road, Appleton, WI 54911
Thomas Ward, Manitowoc County Lakes Association, 3423 HWY H, Reedsville, WI, 54230

August 19, 2008, La Crosse

In support:

Randall Mell, UWEX, 227 S. 11th. St, Black River Falls, WI
Peter J. Murray, E8581 Hogsback Rd, Baraboo, WI 53915
Margaret Farley, 23490 Antioch Lane, Richland Center, WI 53581

In opposition:

James Johnson, Trempeleau Co. Hwy Dept., N36258 CTH QQ, PO Box 97, Whitehall, WI 54773
Jack Dittman, Monroe Co. Hwy Dept., 803 Washington St, Sparta, WI 54656
Dennis Osgood, LaCrosse Co. Hwy Dept., N4922 Carlson Rd., West Salem, WI 54669

As interest may appear:

Jeff Rach, 2630 Fanta Reed Rd, LaCrosse, WI 54650
Bill Cary, 20742 Buokta Hill Rd., Richland Center, WI 53581
Phil Mueller, Star Valley Flowers, Inc., 51468 Co. Rd C, Soldiers Grove, WI 54655

August 20, 2008, Spooner

In support:

Cathie Erickson, Washburn Co. Lakes and Rivers Assn., W550 Walter Rd., Stone Lake, WI 54876
Jerry Schliemann, Sand Lake Mgmt District, 9369 Tewsbury Bend, Maple Grove, MN 55311
Ray Cott-Meissel, Windigo Lk Prop Owners Assn., 7855 N. Thunder Point Rd, Hayward, WI 54843
Ford Elliott, Big Blake Lake PER District, 2035 Richardson Ct., Luck, WI 54853
Don Senler, Whitefish Lake Prop Owners Assn., 6134 N. Morningside Ln., Stone Lake, WI 54876
Fred Kruger, Burnett Co. ILIDS Project, 27102 CTH A, Spooner, WI 54801
Joy Linda Ferris, Shell Lake Protection Adv. Cmtte., PO Box 381, 1453 East Lake Dr., Shell Lake, WI 54871

In opposition – none

As interest may appear:

Lisa Gabriel, Washburn Co. AIS Coordinator, 122 Corbits Ln., Shell Lake, WI 54871
Bill Doeden, Gilmore Lake Assn., 349 Western Dr., North Aurora, IL 60542
Russell Robinson, Gilmore Lake Assn, W7116 CTH I, Minong, WI 54859
Mike Bobin, Washburn Co. Bd. Chair, PO Box 462, Minong, WI 54859
Kurt Schilling, Iron River Fish Hatchery, USFWS, 10325 Fairview Rd., Iron River, WI 54847
Wally Trudeau, 1235 135th St., Amery, WI 54001
Isabel Qualls, 759 E Hwy 12, Hudson, WI 54016
John Ney, Gilmore Lake Assn, 13475 Narrow Trail, Minong, WI 54859
Robert Lepke, N 9008 Down River Rd., Philips, WI 54555
Robert N. Morehouse, Burnett Co. Hwy Dept., 8150 STH 70, Siren, WI 54872
Mary Pople, WI Bird and Game Breeders Assn., 14630 181st St., Chippewa Falls, WI 54729
Robert Pople, West Central Fur and Feather Club, 14630 181 St., Chippewa Falls, WI 54729
Randy Baker, Shell Lake Protection, 122 S. Lake Dr., Shell Lake, WI 54871
Earl L. Cook, Bass Patterson Lake, Washburn Lakes and Rivers, WI Assn of Lakes, PO Box 62, Springbrook, WI 54875

August 26, 2008, Wausau

In support:

Wilbur Petroskey, Oneida Co. Land and Water Conservation Cmtte., 431 Abner St., Rhinelander, WI 54501
B. G. Bill Johnson, N5008 CTH Q, Waupaca, WI 54981
Matt Matteson, Oneida Co. LWCC, 5359 Manor Rd, Rhinelander, WI 54501
Jennifer Holman, Oneida Co. Land and Water Conservation Dept., 213 E. Frederick St., Rhinelander, WI 54501
Laura Herman, 107 Sutliff Ave., Rhinelander, WI 54501
Carolyn Bronston, Two Sisters Lake Property Owners Assn., 1215 Highland Park Blvd., Wausau, WI 54403

In opposition – none

As interest may appear:

Richard Grunewald, Lake Du Bay Property Owners Assn., 585 Seagull Drive, Mosinee, WI 54455
Jan L. Lehrer, WWOA Education Cmtte., N. 10811 Co. Rd. P, Iola, WI 54945
Jolene Plautz, WI Towns Assn., 4741 Hayes Rd., #14, Madison, WI 53704

Jolene Plautz, WI State Horse Council, 4741 Hayes Rd., #14, Madison, WI 53704
Bob Williams, Oneida Co. Lakes and Rivers Assn., 8758 S. Windpudding Dr., Hazelhurst, WI 54531
John P. Czerwonka, 365 S. State Rd. 49, Wittenberg, WI 54499-9631
Leon Moe, Round, Trade Lake Improvement Assn., 11596 Stillson Rd., Luck, WI 54853

Changes to Rule Analysis and Fiscal Estimate

Fiscal Estimate Changes: Under “State”, the response to “Increase Costs – May be possible to absorb within agency’s budget” was changed from “No” to “Yes”, in part due to changes made in the rule to reduce the need for enforcement. Due to concerns from local units of government that they may have compliance costs associated with this rule, the Fiscal Effect under “Local” was changed from “No Local Government Costs” to “Indeterminate”. A paragraph was added to explain this change.

Response to Legislative Council Rules Clearinghouse Report

1. Statutory Authority.

a. The department should explain its statutory and constitutional authority to do the following, as well as any other similar provisions:

(1) require a person to allow department access to property owned, controlled, or managed by the person;

(2) require a person who owns, controls, or manages property to control invasive species that exist on the property, including paying the cost of control where other funding is not available;

(3) recover the reasonable and necessary expenses the department incurs controlling an invasive species. [See s. NR 40.04 (4).]

Department responses: Comment accepted. The Order’s plain language analysis has been revised to better explain the Department’s authority to adopt the rule, and the rule has been revised and no longer requires a person to allow Department access to property. The rule now states that the Department may enter private property to inspect, survey or control prohibited invasive species with consent of the property owner or person in control of the property, or pursuant to an inspection warrant issued by the circuit court, if consent cannot be reasonably obtained. Unless the Department determines that the prohibited species is present through no fault of the land owner or manager, the revised rule allows the Department to unilaterally order a land owner or manager to control a prohibited invasive species on the property, but only after giving the person an opportunity to enter into a consent order. Similarly, the revised rule allows the Department to recover the costs it incurs in controlling prohibited invasive species, but only if the owner or manager of the property was issued an order and failed to comply with it.

b. The department should explain its authority to prohibit the transport of all aquatic plants and all animals on highways, instead of just the transport of invasive species, and the reconciliation of that authority with the more limited prohibition under s. 23.245, Stats. [See s. NR 40.06 (5) (a).]

Department responses: Comment accepted in part. The Department believes that a prohibition on the transport of specific aquatic invasive plants and animals *per se* would be ineffective and nearly impossible to enforce in most circumstances because it would be too difficult for a non-expert to correctly identify even some common invasive aquatic species in the field. In addition, not all invasive aquatic plants can be identified solely using visual characteristics. For example, discerning the highly invasive and prohibited hybrid milfoil (cross between Eurasian and northern watermilfoil) from native northern watermilfoil requires genetic verification. For this reason, a broader ban on the transport of aquatic plants and animals in general is reasonable and necessary in order to control the spread of aquatic invasive species from waterbody to waterbody, especially since they are commonly comingled with native species. A highly relevant example of Legislative recognition of this unavoidable fact appears in s. 30.715, Stats. To prevent the spread of invasive aquatic plants, it prohibits the placement of a boat or boat trailer in navigable water if the boat or trailer has any aquatic plants attached.

The Department does not believe that the prohibition in the rule on the transport of all aquatic plants and all animals on highways needs to be reconciled with the more limited prohibition on the transport of just “invasive species” under s. 23.245, Stats. In promulgating Clearinghouse Rule 08-074, the Department draws its authority from a number of statutes (listed in the plain language analysis of the Order), but it is expressly not relying on, interpreting or implementing either s. 23.225, Stats., relating to invasive fish species (as defined by Department rule), or s. 23.245, Stats., relating to transporting certain boats and equipment on highways with invasive species (as defined by Department rule) in or attached. These 2 statutes were adopted as part of 2007 Wisconsin Act 226, effective June 1, 2008 (the budget repair bill). Both statutes will require further rulemaking by the Department before they become applicable.

c. The department should explain its authority to include wild rice within the definition of “aquatic plant” despite the specific exclusion of wild rice from this term under s. 30.715 (1) (a), Stats. Note that the rule excludes wild rice from the transport prohibition under s. NR 40.06 (5) (a) during the open season for wild rice harvest, but the statute appears to require its exclusion year-round.

Department response: Comment accepted. In promulgating Clearinghouse Rule 08-074, the Department is not interpreting or relying on any express or implied rulemaking authority that might be found in s. 30.715, Stats. Rather, the rule is based primarily on s. 23.22, Stats., which has its own enforcement and penalty provisions, and which was adopted more recently than s. 30.715, Stats. The definition of “aquatic plant” in this rule is not intended to apply to s. 30.715, Stats., and nothing in s. 30.715, Stats., prohibits the Department from adopting a different definition of “aquatic plant” under s. 23.22, Stats., with a different, more stringent exemption for wild rice for purposes of this rule. The Clearinghouse comment appears to be based merely on a possible negative implication arising from the statutory definition, and not on any express language of limitation. In any event, there is no inherent conflict between the two definitions, since a person can easily comply with both the rule and the statute. But to reduce potential confusion, the wild rice exemption from the transport prohibition (now located in s. NR 40.07(4)(a)) has been revised so that it no longer is limited to the open season for wild rice harvest.

2. Form, Style and Placement in Administrative Code.

a. It is suggested that the species lists under the definitions of “Established nonnative fish species and established nonnative crayfish species,” “Fish species in the aquarium trade,” and “Fish species in the aquaculture trade” be taken out of the definitions section and placed directly

in the substantive provisions of the code where applicable. These lists may change in the future and may create confusion and misinterpretation of the rule if contained in the definition section.

Department response: Comment rejected. The Department does not agree that these list definitions are likely to change, or that a change in the definition lists would necessarily create confusion. More importantly, the length of the chapter is measurably shortened by defining terms like these once in the definition section instead of repeating the lists verbatim several times throughout the body of the chapter.

b. The department should review the defined terms in the proposed rule to determine if each are used in the rule text and need to be defined. For instance, see the term, “natural areas.”

Department response: Comment accepted. The rule has been revised to remove unused definitions.

c. In s. NR 40.06 (2) (intro.), “any of the following” should be inserted before the colon. In s. NR 40.05 (3) (intro.), “do any of the following” should be inserted before the colon and in subd. 1., “, or” should be replaced by a period. Section NR 40.07 (intro.) should be sub. (1) and given a subsection title and the remaining subsections should be renumbered. [See s. 1.03 (8), Manual.]

Department response: Comment accepted. The rule has been revised accordingly.

3. Conflict With or Duplication of Existing Rules.

The “preventive measures” section [s. NR 40.06] includes a number of provisions that appear to duplicate or conflict with other provisions of the Administrative Code [see chapters NR 19 and 109]. If it is the department’s intent to repeal the provisions in these existing chapters and replace them in this new chapter, it must expressly do so. Also note that there are multiple differences between these duplicated provisions including the lack of a provision in the proposed rule to allow minnows used for bait to be transported away from a body of water, the lack of some provisions related to Viral Hemorrhagic Septicemia in the proposed rule, the lack of some key definitions that are currently contained in ch. NR 19 like the definition of “live fish,” and provisions governing the use of aquatic invasive plant control equipment under s. NR 109.08 (4) (b) (this last conflict is even pointed out in a note following s. NR 40.06 (5) (b) 6., yet does not appear to be addressed by the proposed rule). Finally, if it is the department’s intent to implement the changes reflected by the differences between the proposed rule and existing rule, it should detail these changes in the plain language analysis of the rule summary.

Department response: Comment accepted. The rule has been revised to avoid duplicating or conflicting with other provisions of the Administrative Code and the statutes. Explanatory notes have been added to the rule to inform the reader of those other relevant code or statutory provisions, and the plain language analysis of the rule summary has been updated accordingly.

[Note, there were no Clearinghouse comments numbered 4.]

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

a. It is recommended that the defined term “category” be changed to something that provides more of an indication of its intended meaning, like “species category.”

Department response: Comment rejected. The term “category” has been retained because it is defined in the rule and its meaning is clear enough as used in the context of the rule. The Department sees no benefit in using two words when one will do.

b. If the department intends the word “species” as used in the definition of “category” to mean the same as “species” as defined later in the section, it should remove the explanatory text relating to the meaning of “species” from the definition of “category.” If that is not the intent, it is not clear what different meaning of “species” is intended.

Department response: Comment accepted. The definition of “category” has been revised as recommended.

c. It is recommended that the definitions of “prohibited invasive species” and “restricted invasive species” be removed and the substance of these definitions be added to s. NR 40.03 (2) because these are not actual definitions of the terms, but instead are criteria that are used in determining how to classify a particular species. If some form of these definitions is retained, under the definition of “prohibited invasive species” the purpose of the last sentence is not clear. Is this included as a simple statement of fact (in which case it should be removed from the definition), or is the “feasibility of statewide eradication or containment” of a species a condition of whether the species is included under this classification (in which case this requirement should be clarified)? The same consideration should be made for the last sentence of the definition of “restricted invasive species” if it is retained.

Department response: Comment accepted in part. These definitions have been clarified instead.

d. It appears that a comma should be inserted between “in this paragraph” and “that have become feral” under s. NR 40.04 (2) (f) 5. r.

Department response: Comment accepted. This provision has been eliminated from the rule, so the Clearinghouse comment is moot.

e. In ss. NR 40.02 (37) and 40.03 (2) (e) (note), the word “currently” should either be removed or replaced by an actual date, such as the effective date of the rule. [See s. 1.01 (9) (b), Manual.]

Department response: Comment accepted. The rule has been revised to eliminate use of the word “currently”.

f. The lists in ss. NR 40.04 and 40.05 should be alphabetized so that a reader may more easily ascertain whether a particular species is included. If it becomes necessary to add a species in the future, this may be done by use of letters; for example, subd. 15m. could be inserted between subds. 15. and 16. [See s.1.03 (7), Manual.]

Department response: Comment accepted. The lists were alphabetized according to the species’ scientific names, although the common names were set out first. The rule has been revised so that scientific names are set out first in each list, in alphabetical order.

g. What procedure will the department use to determine whether ss. NR 40.04 (3) (b) and 40.05 (3) (b) apply to an individual? Some of the species listed under s. NR 40.05 (2) are very common in this state, and are routinely transported and transferred. For example, many of the listed restricted plants could be “knowingly” incorporated into agricultural products such as hay and

silage that are transported and transferred. These agricultural practices appear to require a permit from the department under this rule.

Department response: Comment accepted. The Department will determine whether a person qualifies for the exemptions under ss. NR 40.04 (3) (b) and 40.05 (3) (b), on a case-by-case basis in the course of administering and enforcing the rule. These exemptions provide that the permit requirement does not apply to a person who transports, transfers, possesses or introduces a listed invasive species if the conduct was either unknowing or inadvertent, and if the transport, transfer, possession or introduction was not due to the person's failure to take reasonable precautions to prevent it. The Department intends to identify reasonable precautions in the form of best management practices (BMPs) which would prevent or minimize transport, transfer, possession and introduction of invasives. The BMPs will be identified or developed in collaboration with interested businesses and individuals who routinely handle plants, fish and other items where invasives might unknowingly or inadvertently become part of the mix.

h. Under this rule, it appears that individuals attempting to control restricted plant species would subject themselves to liability if they accidentally allow an invasive species to be "introduced," which is very broadly defined, during their control efforts. [s. NR 40.05 (3) (d)] Section NR 40.05 (3) (b) would not appear to allow the department to look past an inadvertent release that occurs incidental to a control effort because even if the person "introduced" the invasive species accidentally, the person would have still intentionally possessed, and probably intentionally transported, the invasive species in violation of par. (b). Is this the department's intent?

Department response: Comment accepted. This is not the Department's intent. As explained in the previous response, incidental transportation, transfer, possession and introduction of an invasive species do not require a permit and are not a violation of ss. NR 40.04 or 40.05 if the Department determines that the person took reasonable precautions to prevent it, such as by following best management practices in the handling of specimens collected during a control effort.

i. Because of the significance of the meaning of the word "attached" under s. NR 40.06 (5), this term should be defined.

Department response: Comment accepted. A definition of the word "attached" has been added to the rule.

Final Regulatory Flexibility Analysis

The rule does not have a significant economic impact on a substantial number of small businesses. Species assessed and listed in this rule were chosen in part because limiting their use would not cause significant hardships for any sector of society. A few businesses will need to stop the sale of a few species that are not major commodities for them. Some businesses, governmental agencies and individuals will be expected to follow best management practices (BMPs) or take other reasonable precautions when conducting their business to prevent the unknowing or incidental spread of invasive species. Such stakeholder groups are being involved in the development of such BMPs to ensure that they are reasonable and feasible. Department staff met with representatives of most organizations that had significant comments on the draft rule and revised the rule to accommodate their concerns to the extent practicable.

Further justification follows for each group of species.

Terrestrial and Aquatic Plants, Algae and Cyanobacteria:

The Wisconsin Nursery Association surveyed its members and found that there are very few that are growing the plants listed in this rule, so the impacts will be minor. Businesses that have valid reasons to use restricted species in ways that minimize their spread may apply for a permit to allow specific uses. A very small number of floriculture growers, herbalists, nursery growers and others are likely to utilize the permit process. Unless they fit under an exemption or have obtained a permit, any business that sells or uses prohibited or restricted species will need to sell the plants prior to rule implementation, or keep them indefinitely. Department staff will be contacting potentially affected businesses prior to implementation.

Landowners or public land managers whose property contains a prohibited species may be asked to control the species. Department staff or cooperators will work with the landowners to determine the best means to contain the prohibited species. Where possible the Department will assist with the control effort and will seek funding, such as federal grants, to assist in the cost of controls. Landowners that possess restricted species on their property are encouraged to control the invasive species, but are not required to do so.

Boaters, lake associations and state, county, or municipal water resource managers and private consultants, water garden and aquarium industry may be affected by this rule. They will not be allowed to introduce listed species to the environment and will need to take reasonable precautions to avoid transport or introducing aquatic invasive species. Marinas, fishing resorts, lakeshore owners, anglers and others will benefit from the results of this rule as fewer water bodies become infested with invasives.

Utilities, mowing contractors and others who conduct vegetation maintenance or construction activities may need to modify their practices to prevent the inadvertent spread of listed species. Restoration and water resources consultants, vegetation managers, landscape contractors, property managers and landowners all may benefit from this rule.

Fish and aquatic invertebrates:

The rule may affect fish farmers, aquarium-fish stores and crayfish trappers. The rule does not impose any additional reporting or record-keeping requirements on them. No species currently handled on fish farms will be prohibited or further restricted, but new non-native species could not be used for aquaculture under the rule. Grass carp are not currently permitted in Wisconsin and are prohibited under the proposed rule. This may be a point of disagreement with the aquaculture industry. The importation of mosquitofish to fish farms for rearing, introduction, or use as bait is currently illegal without a Department permit under s. 29.735, Stats., and the rule does not change that, except to explicitly condone the incidental or unknowing importation of this species when not due to a person's failure to take reasonable precautions. It is not the intention of the Department to curtail current importation practices, but we are interested in working with the Wisconsin Aquaculture Association and individual fish farmers to develop best management practices that would, if possible, limit the incidental importation of this species and that would minimize or eliminate its dispersal with bait after importation.

The rule prohibits only 2 species now handled in the aquarium trade, the eastern and western mosquitofish, but viable non-native aquarium species not currently in trade would be prohibited and the identified fish species in the aquarium trade would have to be confined to safe facilities. The prohibition of mosquitofish may be a point of disagreement with the aquarium-fish industry. Consistent with the newly approved VHS rules, recreational anglers will be prohibited from

transporting live fish, except under certain defined conditions, and boaters will be required to observe certain safety precautions, including draining all water from boats and containers and clearing all non-native species from their boats and trailers. Crayfish trappers will be required to keep any live rusty crayfish that they have trapped in safe facilities.

Terrestrial Invertebrates and Plant Disease Causing Microorganisms:

No significant new impacts are expected. This rule supports existing authority for prohibitions and quarantine enforcement already in place for DATCP and outlined in ch. ATCP 21, Wis. Adm. Code, and ch. 94, Stats., thus businesses that transport, possess and transfer raw wood products such as pulp and paper mills, sawmills and firewood dealers may be affected by more rigorous enforcement of quarantine rules. Movement of raw, untreated products out of quarantined areas will be restricted. Treatment of raw wood products or restrictions on timing of movement out of a quarantined area may be required.

Terrestrial and Aquatic Vertebrates (except fish):

No significant impact is anticipated for small businesses. Anyone raising Russian boar or other wild swine for meat-production agriculture will be able to continue their business but will be required to secure a DNR permit. Sales and possession of legally obtained monk parrots as pets will not be affected. Existing US Food and Drug Administration regulation 21 CFR § 1240.62 already bans the sale of red-eared slider turtles with carapace lengths less than 4 inches, so this is not a new regulation.

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