

Clearinghouse Rule 10-114

ORDER OF THE STATE OF WISCONSIN NATURAL RESOURCES BOARD AMENDING AND CREATING RULES

The Wisconsin Natural Resources Board proposes an order to **create** NR 27.03 (3)(a) relating to adding cave bats to Wisconsin's threatened species list via **emergency rule**.

ER-37-10(E)

Analysis Prepared by Department of Natural Resources

Statutory Authority: The state statutes that authorize the promulgation of this rule include ss. 29.604, 227.11 and 227.24, Wis. Stats.

Explanation of Agency Authority: These sections grant rule-making authority for the establishment of an endangered and threatened species list to the department.

Statutes Interpreted: In promulgating this rule, s. 227.11(2)(a), Wis. Stats., has been interpreted as allowing the department the authority to create and amend rules. Section 29.604 (3)(b), Wis. Stats., has been interpreted as allowing the department the authority to create and amend the list of Wisconsin's endangered and threatened species, NR 27.03, Wis. Admin. Code.

Related Statute or Rules: Section 29.604 (3), Wis. Stats., requires the Department to establish an endangered and threatened species list. Chapter NR 27, Wis. Admin. Code, provides the list of endangered and threatened species.

Plain Language Analysis: The proposed changes to Ch. NR 27, Wis. Admin. Code, will add the four cave bat species in Wisconsin to the Wisconsin threatened species list. The four species include the little brown bat (*Myotis lucifugus*), big brown bat (*Eptesicus fuscus*), northern long-eared bat (*Myotis septentrionalis*), and eastern pipistrelle (*Perimyotis subflavus*).

Summary of, and Comparison with, Existing or Proposed Federal Regulations: Although several species of cave bats are listed federally by the United States Fish and Wildlife Service (USFWS), we are not aware of any listings that have occurred specifically due to white-nose syndrome. However, USFWS has received a petition to list two cave bat species due to white-nose syndrome and is in the process of reviewing the petition.

Comparison with Rules in Adjacent States: Vermont, New York and Massachusetts are in the process of listing several cave bat species due to white-nose syndrome. The Minnesota Department of Natural Resources has recently proposed the little brown bat (*Myotis lucifugus*) and big brown bat (*Eptesicus fuscus*) as species of special concern because of the eminent threat of white-nose syndrome in the state. The other two species of cave bats in Minnesota, northern long-eared bat (*Myotis septentrionalis*) and eastern pipistrelle (*Perimyotis subflavus*) are already listed as species of special concern in Minnesota.

Summary of Factual Data and Analytical Methodologies: The proposed emergency rule is related to the addition of Wisconsin's four cave bat species to the state's threatened species list. The four species include the little brown bat (*Myotis lucifugus*), big brown bat (*Eptesicus fuscus*), northern long-eared bat (*Myotis septentrionalis*), and eastern pipistrelle (*Perimyotis subflavus*).

The proposed rule change seeks to provide protection to Wisconsin cave bat species, which face the imminent threat of white-nose syndrome. White-nose syndrome has spread across 14 states and 2 Canadian provinces in the last 3 years, spreading up to 800 miles per year. Mortality rates of affected bat

colonies reach 100%. The disease was located last spring within 225 miles of Wisconsin's southern boarder and 300 miles from the northern boarder. Because the known dispersal distance of the little brown bat is 280 miles, an affected cave is now located within the dispersal range of Wisconsin little brown bats. Based on the current location and known rate of spread of the disease, we anticipate the presence of white-nose syndrome in Wisconsin as early as January 2011.

Wisconsin has one of the highest concentrations of cave bat hibernacula in the Midwest and large numbers of cave bats from neighboring states hibernate in Wisconsin. Consequently, Wisconsin's cave bat population, and those of surrounding states, is threatened by this devastating disease. All Wisconsin bat species are among the species fatally affected by the white-nose syndrome.

Cave bats were assessed for changes in population condition, using the following triggers established by the Bureau of Endangered Resources:

1. Significant change in the Natural Heritage Inventory State Rank since 1997
2. Significant change in the Natural Heritage Inventory Global Rank since 1997
3. Change in United States Endangered Species Act status since 1997
4. Is there a need for immediate protection (i.e., new threat)
5. Change in other statuses, e.g., International Union for Conservation of Nature (IUCN), Convention on International Trade in Endangered Species (CITES)
6. New data on population condition available
7. Recommended for listing/delisting since 1997
8. Taxonomic change
9. For currently listed species, have recovery goals been met

All four cave bat species met triggers #1 and #4, and the little brown bat also met trigger #7 (recommended for listing by stakeholders), therefore indicating the need for the emergency rule change.

Listing these species before WNS has been detected in Wisconsin will allow the Department time to work collaboratively with stakeholders to ensure that appropriate conservation measures, such as the protection of refuge hibernacula, are developed and in place in the event that WNS affects Wisconsin.

These rule changes were developed with the assistance of the Bureau of Endangered Resources and Legal Services.

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, wildlife rehabilitators, animal control operators, the agricultural industry, the conservation community, wind utilities, WI Department of Transportation (WDOT) and homeowners. Concerns will likely include how listing the bats will affect current activities. Many of these potential concerns will be addressed through a broad incidental take permit/authorization and voluntary agreements so that the listing does not have a significant economic impact on a substantial number of small businesses.

A broad incidental take permit/authorization would be created, as provided for under s. 29.604, Wis. Stats. The broad incidental take permit/authorization would allow for the incidental taking of state listed cave bats that may occur as a result of specific public health concerns, bat removals, building demolitions, forestry activities, bridge demolitions, miscellaneous building repairs and wind energy development projects (see the "Broad Incidental Take Permit/Authorization for Cave Bats" attachment for more information). Some take of bats may still occur as a result of these activities, however take will be minimized by following specific minimization measures and the department has concluded that the projects covered under this permit are not likely to jeopardize the continued existence and recovery of the state population of these bats or the whole plant-animal community of which they are a part; and has benefit to the public health, safety or welfare that justifies the action. This incidental take

permit/authorization is only needed when a bat is present or suspected to be present (e.g., Natural Heritage Inventory report of bats in the area, evidence of bat presence).

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 27.03 (3)(a) is created to read:

NR 27.03 (3)(a) *Mammals*.

1. Little brown bat – *Myotis lucifugus*.
2. Big brown bat – *Eptesicus fuscus*.
3. Northern long-eared bat – *Myotis septentrionalis*.
4. Eastern pipistrelle – *Perimyotis subflavus*.

Section 2. EFFECTIVE DATE. This rule shall take effect the day of publication in the official state newspaper, as provided in s. 227.24(1), Wis. Stats.

Section 3. STATEMENT OF EMERGENCY. The emergency rule procedure, pursuant to s. 227.24, Wis. Stats., is necessary and justified in establishing rules to protect the public welfare. The proposed rule change seeks to provide protection to Wisconsin cave bat species, which face the imminent threat of white-nose syndrome. White-nose syndrome has spread across 14 states and 2 Canadian provinces in the last 3 years, spreading up to 800 miles per year. Mortality rates of affected bat colonies reach 100%. The disease was located last spring within 225 miles of the Wisconsin's southern boarder and 300 miles from the northern boarder. Because the known dispersal distance of the little brown bat is 280 miles, an affected cave is now located within the dispersal range of Wisconsin little brown bats. Listing the cave bat species before white-nose syndrome has been detected in Wisconsin will allow the Department time to work collaboratively with stakeholders to ensure that appropriate conservation measures are developed and in place when white-nose syndrome is first detected. Because of the speed of white-nose syndrome, the Department would not have time to develop appropriate conservation measures if normal rule-making procedures were used and listing was delayed until after white-nose syndrome was detected in Wisconsin. Based on the current location and known rate of spread of the disease, we anticipate the presence of white-nose syndrome in Wisconsin as early as January 2011.

Section 4. BOARD ADOPTION. This 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)