

Report From Agency

REPORT TO LEGISLATURE NR 27, Wis. Adm. Code

Board Order No. ER-35-10
Clearinghouse Rule No. CR 10-114

Basis and Purpose of the Proposed Rule

Chapter NR 27, Wis. Admin. Code lists Wisconsin's endangered and threatened animals and plants. Due to the immediate threat of white-nose syndrome in Wisconsin, the department proposes to add the following cave bat species to Wisconsin's threatened species list, s. NR 27.03 (3), Wis. Admin. Code: little brown bat (*Myotis lucifugus*), northern long-eared bat (*Myotis septentrionalis*), eastern pipistrelle (*Perimyotis subflavus*), and big brown bat (*Eptesicus fuscus*).

In anticipation of listing, DNR has created a "Broad Incidental Take Permit and Authorization" (attached) and a conservation plan to outline minimization measures for cave bats. The process for assessing transportation project impacts to listed species and the associated minimization measures will follow existing protocols. No additional actions, above those currently requested by the department, will be required of the wind industry at this time. The department will hold a stakeholder meeting this winter to further develop and refine minimization measures. A meeting report will be presented to the NRB and used to update the broad incidental take permit/authorization as needed.

Summary of Public Comments

The department held five public hearings on the proposed changes to ch. NR 27, Wis. Admin. Code (Rule Order ER-35-10). Hearings were held on October 26 (Fitchburg) and November 29 (Madison, Green Bay, Eau Claire, Wausau). The October 26 hearing was held concurrently with a hearing to list the fungus, *Geomyces destructans*, as a prohibited invasive species in s. NR 40.04(2), Wis. Admin. Code (Rule Order IS-41-10). The November 29 hearings were held concurrently with hearings to list the fungus, *Geomyces destructans*, as prohibited invasive species in s. NR 40.04(2), Wis. Admin. Code and hearings to revise ch. NR 40, Wis. Admin. Code related to the management of *Geomyces destructans*, the fungus associated with white-nose syndrome (Rule Order IS-47-10).

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

Comment: Public hearings should have been held.

Response: Public hearings were held for the proposed rules. The department held five public hearings on two of the board orders (ER-35-10 and IS-41-10). Hearings were held on October 26 (Fitchburg) and November 29 (Madison, Green Bay, Eau Claire, Wausau). The four November 29 hearings were held concurrently with the remaining board order (IS-47-10).

Comment: Appropriate public comment periods were not held.

Response: The public comment period for board orders ER-35-10 and IS-41-10 was approximately 60 days and the public comment period for board order IS-47-10 was approximately 30 days.

Comment: The DNR should have contacted more stakeholders.

Response: Department staff have provided WNS updates, decontamination protocols, and instructions for public comment on the proposed rules to many stakeholder groups including the caving community, landowners, animal control operators, wildlife rehabilitators, conservation organizations, partner agencies and the agricultural industry. The department has also posted instructional videos regarding decontamination, the proposed regulation and the science concerning white-nose syndrome. It has also worked directly with stakeholders on changes to the broad incidental take permit and has solicited public comment on a voluntary environmental analysis that has been produced regarding the impact of the proposed rules on the environment. Further, the department has worked on an individual basis with commercial cave and mine owners to develop site specific prevention plans.

Comment: The DNR should wait to take action until WNS has been detected in Wisconsin.

Response: Proposing these three rules 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.

Comment: The DNR has stated that based on the current location and known rate of spread of the disease, it is likely that WNS will reach Wisconsin as early as January 2011. Based upon my understanding of the disease, this statement is incorrect. If WNS appears in January 2011, then it is probably already there.

Response: That is correct. We have clarified our language to say that WNS may be *detected* in Wisconsin as early as January 2011.

Comment: The DNR is spending too much (tax) money on this. Money should go to research rather than management.

Response: Approximately 90 percent of DNR WNS activities have been funded through grants and donations. The DNR has been actively involved in both WNS management and WNS research

Comment: The DNR is not considering how much time they will need to devote to this (e.g., teaching DNR scientists to identify bats, inspecting caves, posting signs, enforcement).

Response: All DNR staff and contractors performing fieldwork have received the necessary training and certifications to carry out the work. Work completed in previous months has narrowed the number of caves identified for early detection, monitoring and inspection, etc. to a number that is manageable. There have been no enforcement actions under the current emergency rules and given the positive responses the department has received from landowners, we do not anticipate a significant increase in enforcement workload.

Comment: A strong bat education program should be in place and/or continue.

Response: The Wisconsin Bat Monitoring Program (WBMP) educates citizens on bat biology and conservation through presentations, trainings, workshops, publicly distributed informational packets (Bat House Handbook, Bat Exclusion Guide, Bat Roost Monitoring Pamphlet), public television appearances, public radio appearances, newspaper articles and public service announcements. The WBMP will continue to strive to increase public awareness and education.

Comment: Sources should be cited in the background memos.

Response: The background memos that are included in the green sheet package for the Natural Resources Board typically just contain a summary of the issue. The environmental assessment that is attached to all three

There were 208 comments (75%) in support of the rules and 71 comments (25%) opposed.

Modifications Made

None

Appearances at the Public Hearing

October 26, 2010 – Fitchburg

In support: 1

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

In opposition: 3

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

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

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

As interest may appear: 5

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

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

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

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

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

November 29, 2010 – Wausau

In support: 1

Justin Zweck, 122 Broadway, Wausau, WI 54403

In opposition: 1

Jeff Barry, 2229 Hwy 64, Merrill, WI 54452

As interest may appear: 1

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

November 29, 2010 – Green Bay

In support: 3

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

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

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

In opposition: 0

As interest may appear: 4

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

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

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

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

In addition, one person attended the hearing but did not fill out a hearing appearance slip.

November 29, 2010 – Eau Claire

In support: 0

In opposition: 12

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

As interest may appear: 2

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

November 29, 2010 – Madison

In support: 5

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

In opposition: 4

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

As interest may appear: 7

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

Additional comments were submitted by email and standard mail.

Changes to Rule Analysis and Fiscal Estimate

None

Response to Legislative Council Rules Clearinghouse Report

4. Adequacy of References to Related Statutes, Rules and Forms

a. *The order does not mention s. ATCP 30.19 (2), which provides for the issuance of permits authorizing emergency use of pesticides on bat colonies in specified circumstances.*

Department Response: Comment accepted. A reference to s. ATCP 30.19 has been added to the "Related Statutes or Rules" section of the Rule Order.

b. *The comparison with rules in adjacent states discusses relevant rules in Minnesota, but not in Michigan, Illinois, or Iowa.*

Department Response: Comment accepted. The "Comparison of Rules in Adjacent States" section of the Rule Order was amended to include information for Michigan, Illinois and Iowa.

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

a. *"Wis." should be deleted from SECTION 2 of the proposed rule. Also, the reference should be to the first day of the month after publication in the Wisconsin Administrative Register. [See s. 1.02 (4), Manual.]*

Department Response: Comments accepted. Changes made as suggested.

b. *The department should consider removing the italicized font format, which does not appear in other, similar provisions in s. NR 27.03.*

Department Response: Comments rejected. The italicized font format does appear in other, similar provisions in s. NR 27.03, except for the plant listings.

6. Potential Conflicts With, and Comparability to, Related Federal Regulations

a. *The department should consider making explicit that the federal threatened and endangered species lists do not currently include any of the four species of bats proposed to be protected under the emergency rule.*

Department Response: Comment accepted. The "Summary of, and Comparison with, Existing or Proposed Federal Regulations" section of the Rule Order was amended to state that none of the four cave bat species currently proposed for listing in Wisconsin are currently on the federal endangered or threatened list.

b. *It may be appropriate to mention actions taken this month by the U.S. Fish and Wildlife Service to address the spread of white-nose syndrome in bats. [See http://www.fws.gov/whitenosesyndrome/pdf/NWRS_WNS_Guidance_Final1.pdf.]*

Department Response: Comments rejected. This information is more pertinent to the related ch. NR 40 revisions.

Final Regulatory Flexibility Analysis

Affected constituencies include commercial caves and mines, private cave and mine owners, recreational cavers, wildlife rehabilitators, animal control operators, agricultural and forestry industries, the conservation community, wind utilities, WI Department of Transportation (WDOT) and homeowners. Many of the concerns of these groups 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 has been issued, as provided for under s. 29.604, Wis. Stats. The broad incidental take permit/authorization will 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 Conservation Plan" 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. The department has concluded that the projects covered under this

permit/authorization 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).