

# Report From Agency

## REPORT TO LEGISLATURE NR 40, Wis. Adm. Code

### Board Order No. SS-04-12 Clearinghouse Rule No. CR 14-034

#### Basis and Purpose of the Proposed Rule

The Department of Natural Resources's Invasive Species Team worked with the Wisconsin Invasive Species Council and affected stakeholders to review and propose revisions to ch. NR 40, Wis. Admin. Code, relating to the lists of regulated invasive species.

Revisions classify additional invasive species into existing categories established in ch. NR 40, Wis. Admin. Code, making them subject to existing administrative rules and statutes that regulate the introduction, possession, transfer, and transport of invasive species in order to prevent them from becoming established in Wisconsin or to prevent already-established invasive species from spreading within the state.

In 2009, during the public input and initial rule drafting of ch. NR 40, it was recognized that many additional species may need to be evaluated and, if appropriate, categorized and listed under this rule. Most of these species are used by some sector of society and require input from the affected stakeholders. The proposed revisions in this Board Order will add species of plants, vertebrates, and invertebrates to the invasive species rule, and will clarify rule language, facilitate compliance, and improve organization of the rule.

#### Summary of Public Comments

Economic impact comments synopsis – Pursuant to s. 227.127, *Wis. Stats.*, the department is required to solicit comments on the potential economic impact of a proposed rule. The department solicited input on the economic impact of the proposed revisions between October 28 and December 31, 2013. Small businesses, as defined in s. 227.114(1), *Wis. Stats.*, were asked to identify themselves as a small business in their comments. Twenty-eight comments were received during the Economic Impact Analysis public comment period, the majority from individuals representing small businesses in the nursery trade. Following the public comment period on the economic impacts, the preliminary "Fiscal Analysis and Economic Impact Analysis" was revised containing relevant information that the department received.

Prompted by public comments received on the economic impacts of the proposed rule changes, the department determined that the plant bittercress (*Cardamine hirsuta*) does not meet the definition of prohibited under ch. NR 40 because eradication and containment is not feasible. This plant was removed from the proposed list of prohibited species included in the initial board order prior to public hearings.

Public hearing comments synopsis – The Department held two public hearings, and five of the ten hearing attendees spoke and 49 written comments were received, totaling 58 comments from 54 individuals. Of the 58 comments, 15 noted support and 6 noted opposition for all or most of the proposed rule. The majority of comments were specific to a subset of the species proposed for listing as prohibited or restricted. Specific comments were received in opposition of listing the following species that are proposed for prohibited (P) or restricted (R):

Comments received on the following plant species (count of comments in Support:Opposition):

- *Berberis thunbergii* (Japanese barberry) **5:3**
- *Eichhornia crassipes* (Water hyacinth) **0:8**
- *Pistia stratiotes* (Water lettuce) **0:8**
- *Coronilla varia* (Crown vetch) **2:3**
- *Lysimachia nummularia* ("Goldilocks") **2:3**
- *Myosotis sylvatica* (Woodland forget-me-not) **2:3**
- *Robinia pseudoacacia* (Black locust) **4:1**
- *Acer tataricum* subsp. ginnala (Amur maple) **1:3**
- *Iris pseudacorus* (Yellow iris) **1:3**
- *Valeriana officinalis* (Garden valerian) **4:0**
- *Aegopodium podagraria* (Bishop's goutweed) **0:3**
- *Akebia quinata* (Chocolate vine) **0:3**
- *Celastrus loeseneri* (Asian bittersweet) **0:3**

- *Euonymus alatus* (Burning bush) **0:3**
- *Fallopia x bohemicum* (Bohemian knotweed) **0:3**

- *Myosotis scorpioides* (Aquatic forget-me-not) **2:0**

#### Modifications Made

After the close of the public comment period, the department compiled comments received and considered all recommendations and oppositions submitted. The department made the following changes in response to public comments:

- Removed Bittercress or Hairy bittercress (*Cardamine hirsuta*) from the initial draft rule prompted by comments received during the EIA comment period as to its widespread presence in the nursery industry.
- Updated the scientific name of the white-nose syndrome fungal pathogen from *Geomyces destructans* to *Pseudogymnoascus destructans*.
- Corrected the exempt cultivar name of Tansy (*Tanacetum vulgare*).
- Clarified the cultivar exemption for Moneywort (*Lysimachia nummularia*).
- Split-listed the nonnative ecotype of Phragmites (*Phragmites australis*) and listed them in the NR 40 prohibited category in counties where they have not been reported to occur or where there are isolated populations that have been treated or have planned treatments. Created an exemption in the prohibited category, similar to the existing restricted category, which allows this species used in wastewater treatment facilities permitting process under ch. 283, *Wis. Stats.*
- Clarified that the definition of ‘invasive species’ does not apply to dead organisms or parts that not revivable and no longer capable of living, growing, developing, reproducing, and functioning as ‘invasive species’.
- Updated the list of counties for the following split-listed plants: Wild chervil (*Anthriscus sylvestris*) adding Chippewa and Dunn counties; and Amur honeysuckle (*Lonicera maackii*) adding Buffalo County.
- Removed the proposed amendments to the definitions of “nonnative” or “nonnative species”, “nonnative fish species in the aquaculture industry”, “nonnative viable fish species in the aquarium trade”, and “species”. These proposed amendments, which applied to how genetically modified (GM) fish are treated in NR40, were removed because they contained substantive requirements. The department created an exemption for GM fish in the prohibited category, and revised the proposed restricted category to clarify that only viable GM fish, of both native and nonnative species, are classified as restricted.

Prompted by new information received after the public comment period, the department made the following changes to the proposed rule (both changes are not significant and will not pose additional economic, fiscal, and compliance costs).

- Added Golden Mussel (*Limnoperna fortunei*) to the NR 40 Prohibited Category, prompted by a comment outside of the comment period, reminding the department of the state’s commitment to regulate the Council of Great Lakes Governors’ list of ‘least wanted aquatic invasive species’.
- Revised the NR 40 regulated classification of crazy worm (*Amyntas* sp.) from prohibited to restricted based on new information on the presence and spread of these species in the state. When the rule was initially adopted, there were no known occurrences of this species in the state. Since the rule was adopted, crazy worms have been confirmed to occur in five counties and have been reported from several additional locations. Given this new information, the species no longer meets the definition of Prohibited.
- Removed the two prohibited blue-stain fungi (*Grosmannia clavigera* and *Ophiostoma montium*) from the proposed rule, prompted by a request outside of the comment period from the Wisconsin Department of Agriculture, Trade, and Consumer Protection (DATCP). These fungi are associated with the mountain pine beetle and it is believed their spread to the state will be effectively limited by a DATCP quarantine.

### Appearances at the Public Hearing

The Department of Natural Resources (DNR or department) held two public hearings: One on Tuesday June 17<sup>th</sup> at the DNR office building in Madison with the option to participate remotely via MediaSite; and one on Wednesday June 18<sup>th</sup> at the DNR office building in Green Bay. Nine individuals attended the hearings in person and one participated remotely via MediaSite. Five of the ten hearing attendees spoke.

Name	Representing (organization or "self")	Hearing Location	Spoke
Gansberg, Mary	self	Madison	No
Jasik, Michele	self	Madison	No
Kirschner, Lyn	self	Madison	No
Piala, Cathy	Piala's Nursery and Garden Shop, Inc.	Madison	Yes
Piala, James	Piala's Nursery and Garden Shop, Inc.	Madison	Yes
Radtke, Dan	self	Green Bay	Yes
Rebischte, Cody	Timberland Invasives Partnership Coordinator	Green Bay	No
Schumacher, Paul	Wisconsin Invasive Species Council	Green Bay	No
Stenli, Christine	Northern Pines Greenery, Inc.	Madison (Minocqua via MediaSite)	Yes
Swingle, Brian	Wis. Green Industry Federation	Madison	Yes

### Changes to Rule Analysis and Fiscal Estimate

No significant changes were made to the Rule Analysis, Economic Impact Analysis or Fiscal Estimate were made as a result of public comment or new information.

### Response to Legislative Council Rules Clearinghouse Report

The Legislative Council Rules Clearinghouse submitted comments on May 19, 2014.

The majority of comments were recommendations that improve clarity and follow administrative code styles within the Board Order and have been incorporated into the final rule package. Rules Clearinghouse comments on proposed revisions prompted amendments to the following definitions and notes (numbering corresponds with LCRC report numbering):

#### 2. Form, Style and Placement in Administrative Code

a. Definitions should be limited to a statement of what the defined term means and should not include substantive requirements. The latter should be placed into the body of a rule. [s. 1.01 (7) (b), Manual.] See, for example, the following:

- The current definition of "disposal" appears to consist entirely of substance (i.e., it tells the reader what form of disposal is permissible). The amendment to this definition only makes this problem more obvious by adding substantive requirements that appear to have nothing to do with the word "disposal." Rather than amending the definition, the agency should consider repealing the definition and placing these substantive provisions into the body of the rule.
- The language added to s. NR 40.02 (29), (30), (31), and (48) appears to be substantive. A genetically modified arctic char is still an arctic char, but the policy established by this rule is to treat a genetically modified arctic char differently. This distinction should be established in the body of the rule, not in definitions.

*Department response: The department reviewed the definitions that the Clearinghouse identified as containing substantive requirements and made the following changes:*

- *The definition of "disposal" was amended to only include the clarification that consumption as food is disposal. The clause "or use for other purposes that will not lead to the establishment, introduction or spread of the species" was removed from the proposed revision because it was substantive and allowed for interpretation outside of the permitting process.*

• The proposed revisions to definitions NR 40.02 (29) “nonnative” or “nonnative species”, (30) “nonnative fish species in the aquaculture industry”, (31) “nonnative viable fish species in the aquarium trade”, and (48) “species” were removed from the rule for adoption. The proposed definitions, were created to clarify how genetically modified (GM) fish and crayfish are regulated in NR40. The department’s intent was to clarify that both native and nonnative GM fish are nonnative and that viable GM variants be regulated via NR 40 as Restricted. The department concurred with the Clearinghouse and replaced the proposed definition amendments with the language in the body of the rule. The department revised the proposed restricted category of viable GM fish to note that the restriction applies to both native and nonnative fish species and created an exemption for GM fish in the prohibited section.

- Created NR 40.04 (2) (c) 12. e. Genetically modified fish species
- Amended NR 40.05 (2) (c) 5. Viable genetically modified native and nonnative fish species

b. Notes are explanatory and are not enforceable. [s. 1.09 (1), Manual.] The material added to s. NR 40.02 (24) (Note) relates to the applicability of ch. NR 40, though there does not appear to be a provision in that chapter establishing the applicability described in the note. If this is correct, a provision to this effect should be added to that chapter, but not in a note or a definition.

*Response: The department amended the note under the definition of “invasive species” to clarify that the department does not consider organisms that are dead as “invasive species”.*

c. Section NR 40.04 (3) (b) (Note) appears to be substantive; it should be added to s. NR 40.04 (3) (b). In addition, “this paragraph” should be used in place of “this subsection”, and “Wis.” should be omitted. The same applies to s. NR 40.05 (3) (b) (Note).

*Response: The department agrees and has removed the note from the proposed rule. The department instead will create “reasonable precautions” template outside of NR 40, stating that compliance with Chapters 30 and 31 constitute reasonable precautions.*

#### Final Regulatory Flexibility Analysis

A final regulatory flexibility analysis was not prepared since the proposed rule does not impose compliance or reporting requirements for small businesses, and no design or operational standards are contained in the rule. Because this rule does not add any regulatory requirements for small businesses, the proposed rules will not have a significant economic impact on a substantial number of small businesses under 227.114(6) or 227.14(2g).

#### Response to Small Business Regulatory Review Board Report

The Small Business Regulatory Review Board did not prepare a report on this rule proposal.