

Report From Agency

REPORT TO LEGISLATURE

NR 16, Wis. Adm. Code
Relating to fences for farm-raised white-tailed deer.
Board Order No. WM-13-15
Clearinghouse Rule No. 16-026

Basis and Purpose of the Proposed Rule

These rule changes are proposed in order to provide options for licensed deer farms which are also regulated by United States Department of Agriculture and Wisconsin Department of Agriculture, Trade and Consumer Protection regulations. The rule changes eliminate duplication of health rules and clearly align the department's fence authority per the 2001 passage of ACT 56. Preventing the illegal release or co-mingling of wild and captive deer will reduce the risk of transmitting diseases such as chronic wasting disease and are necessary for the preservation of public peace, health, safety or welfare.

These rules eliminate the requirement for white-tailed deer farms to comply with either of the following as a condition of their fence certificate: enrollment in the chronic wasting disease herd status program which is administered by the Department of Agriculture, Trade, and Consumer Protection or, for farms greater than 80 acres in size, testing 10% of deer that die annually and submit those results to the natural resources department. The Department would still issue fence certificates, which would indicate whether a facility was enclosed by a single fence, doubled fence, or solid fence, according to standards already established in NR16. The chronic wasting disease and other testing requirements established under ATCP 10 would still be in effect. Farms not participating in the herd status program administered by the agriculture department would continue to be ineligible to export live deer.

Farms would still be required to have a certificate from the department for their fence and fences would have to meet the requirements currently in place to be 8 feet high and with special requirements for woven wire versus high tensile material, wood versus steel posts, gates, and corridors. The chronic wasting disease and other testing requirements established under ATCP 10 would still be in effect. Farms not participating in the herd status program administered by the state agriculture department would not be allowed to export live deer.

These rule changes also repeal deadlines for deer farms to come in compliance with certain requirements of this chapter because those deadlines passed in 2004 and the language is no longer relevant.

Appearances at Hearings and Summary of Public Comments

A hearing on the permanent rule was held on the evening of March 9, 2016 and one person was in attendance.

A hearing on an identical emergency rule was held in Portage on the evening of November 18, 2016. Department representatives presented a summary of the related issues and the proposed solution and a representative of the Department of Agriculture, Trade and Consumer Protection was also present for informational purposes. Two members of the public were in attendance and written comments were submitted by two additional people.

Hearing testimony, written comments, and the department's responses are summarized below.

Comment: These rules will be good for the business person because there will be less of the duplicative paperwork for them and for the department to track and are sensible in that respect.

Response: We agree.

Comment: I am opposed to any liberalization of deer farm fence regulations.

Response: We would also be opposed if we were certain that these proposed changes would increase the distribution or frequency of CWD in wild or captive white-tailed deer and would not characterize this as a liberalization.

For example, farmers must still abide by DATCP's regulations for animal movements, testing and overall health management practices as they have in the past. Also, farmers must still build a fence that conforms to the rules and specifications as outlined by law. The only significant change is that the department is proposing to unhinge the requirement that mandates if the farmer builds a single configured fence that they also do not need to meet the requirement of also being enrolled in the herd status program. However, by eliminating the herd status requirement the department is recognizing that the farmer will not be able to export live deer. Not having the ability to move live deer off of a farm essentially makes the farm an end point for live movements which in turn decreases distribution opportunities.

Comment: If these small farms are not financially able, why should the department's job be to keep them in place?

Response: Keeping farm-raised deer is a legal activity in this state under current law and our rules need to both recognize that as well as protect the health of wild and captive deer by assuring that owners maintain good fences.

Comment: I am very concerned about CWD and we should do anything we can to stop the spread.

Response: We are also very concerned about CWD and believe we should do as much as reasonably possible to stop its spread while still recognizing that keeping farm-raised deer is a legal activity.

Comment: We favor the proposed rule changes

Response: Thank you.

Comment: As to the fear that animals will be released, why not look at more significant penalties for unauthorized releases? There is already evidence of unauthorized releases and or escapes.

Response: As the comment observes, there is a need to be concerned over intentional releases. The department's ability to manage intentional releases is conditioned upon its ability to enforce the regulations of introductions, stocking and release of wild animals in s. 169.06. Farm-raised deer are statutorily defined as domestic animals and not recognized in the definition of a "wild animal". Modifications would require statutory changes.

As for escape accountability, the farmer must simply notify the department of the escape within 24 hours after becoming aware of the incident. For non-compliance to occur with this rule, the department must show that the farmer was aware of the incident and that they failed to notify the department within the 24 hour allotted timeframe. So regardless of the amount of time expired surrounding an incident, a farmer unaware of a breach has not violated any rule obligations.

Each year breeches in fences or movement mishaps result in escapes. One of the causes for these unfortunate events is human error. Regardless of the number fences in place or how they are configured, escapes will likely continue to occur.

Comment: The department has never really enforced the requirement to double fence certain farms and is looking for a way out of doing so.

Response: The comment neither accurately reflects the actions of the department nor does it value the intricacies of regulating on the basis of how another agency manages its program. For instance, DATCP oversees the herd status program. If a farmer fails to meet herd status requirements, DATCP can either suspend or revoke the farmer's status. DATCP may also reinstate a herd's enrollment in the herd status program. DATCP laws also allow reinstatement of enrollment to be retroactive following a valid suspension, as it deems appropriate. DATCP's policy of re-instating deer farmers creates a problem for the department's enforcement of the herd status condition. While both conditions (suspended or revoked) theoretically constitute reasonable cause for the department to intervene, because DATCP authorities allow retroactive reinstatement the department could find itself amidst the enforcement and process of gaining compliance for an infraction that no longer exists. As a result, the department has asked DATCP for clarification as to when they interpret a herd status program enrollee to no longer be in compliance. DATCP has advised that once a farmer has been revoked or if a farmer has never been satisfactorily enrolled, DATCP considers the farmer to no longer be in compliance with the program. The department has asked DATCP to notify the department staff when program enrollees fail to meet their consideration for compliance. The department is periodically notified by DATCP about noncompliant herd status enrollees. In turn, the department proceeds in contacting these farmers and applying measures to which the farmer can attain some means of compliance.

Comment: How will this new proposal deal with escapes? I think escapes are probably more of a danger than releases.

Response: This emergency rule does not change regulations or department policy related to deer that escape from deer farms. We do take escapes from deer farms very seriously. We respond to all reported escapes and have issued the appropriate citations. The permanent version of this rule or perhaps a separate rule making process may be a better process if there is a need to change the way the department responds to escapes. The scope of this emergency rule is intentionally narrow so that we can address a specific concern in a timely way.

Modifications Following Hearings and Response to Legislative Council Rules Clearinghouse Report

The department has made modifications which were recommended in the report prepared by Legislative Council Rules Clearinghouse. Those changes are related to form, style, and placement in administrative code. A copy of the report is included in this green sheet package.

Changes to Rule Analysis and Fiscal Estimate

These are the original rule analysis and fiscal estimate and anticipated economic impact of implementing the rule.

Final Regulatory Flexibility Analysis

The department anticipates no significant economic impact as a result of these rules. It is anticipated that most farm owners will make the farm updates necessary to maintain their status in the CWD Herd Certification Program and these rules will not apply.

These proposed rules would benefit some smaller farms which are certified under current rules but for whom recertification or double fencing are not economically feasible. Benefits to the overall economy will be minimal but important to individual farm owners. While they would not be certified and could not sell or transfer live deer, they would be able to continue owning the deer and could continue to realize financial benefit from activities such as game farm hunting.

These rules will not create new compliance or reporting requirements for small businesses. The design and operational standards for deer farms contained in the rule will be a simplification from current federal and state rules.

Pursuant to the Governor's Executive Order 50, Section II, this was a level 3 economic impact analysis for the permanent rule. A notice for solicitation of comments on this analysis was posted on the department's website beginning on February 22.

Response to Small Business Regulatory Review Board Report

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