

Report From Agency

REPORT TO LEGISLATURE

NR 40, Wis. Adm. Code

Board Order No. IS-47-10
Clearinghouse Rule No. CR 10-123

Basis and Purpose of the Proposed Rule

White-nose syndrome (WNS) is a disease responsible for unprecedented mortality in cave hibernating bats, identified by the white fungus (*Geomyces destructans*) that grows on the nose, ears, and muzzle and/or wing membranes of affected bats. Since detection in 2006, WNS has been found in 14 states and 2 Canadian provinces, spreading up to 800 miles in the last year. WNS has been linked to the death of over one million bats since 2007 and threatens to cause the extinction of several bat species in the near future. Mortality rates of affected colonies reach 100%. All WI cave bat species are mortally affected by WNS.

To effectively manage *G. destructans*, the fungus associated with WNS in bats, the department proposes additions to ch. NR 40 for early detection and monitoring of *G. destructans* and preventive measures to limit its potential spread. Based on the current location and known rate of spread of the disease, it is likely that *G. destructans* will be detected in Wisconsin as early as January 2011.

The proposed rules adds provisions to ss. NR 40.04 and 40.07 relating to early detection and prevention of the introduction and spread of WNS due to anthropogenic activities. They allow specified department actions in the unlikely event that requested voluntary cooperation is not obtained, including access (with a court warrant) to caves or mines to survey for the presence of *G. destructans*. Decontamination of gear used in or near caves or mines and development of prevention plans by certain cave or mine owners are also called for.

Summary of Public Comments

The department held five public hearings on the proposed changes to ch. NR 40, Wis. Admin. Code (Order IS-41-10). 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 on an emergency and proposed permanent rule to list Wisconsin's four cave bat species as threatened in s. NR 27.03(3), Wis. Admin. Code (Order ER-35-10). The November 29 hearings were held concurrently with hearings to list Wisconsin's four cave bat species as threatened in s. NR 27.03(3), Wis. Admin. Code, and hearings to revise ch. NR 40, Wis. Admin. Code, relating to the management of *Geomyces destructans*, the fungus associated with white-nose syndrome (Order IS-47-10).

Comments were combined for all three rule orders (ER-35-10, IS-41-10 and 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 was considered in opposition to the whole group of rules. There were 208 comments (75%) in support of the rules and 71 comments (25%) opposed.

Modifications Made

The proposed rule has been revised from the public hearing version in light of public comments, Rules Clearinghouse comments, meetings with stakeholders and our own continuing review.

A definition has been moved to another section of rule, as recommended by the Rules Clearinghouse.

The common name used to describe *G. destructans*, has been revised in response to a recommendation by the Rules Clearinghouse.

Based on Rules Clearinghouse comments and public comments, proposed procedures by which the department could order owners and operators of caves and mines to exclude either people or bats have been deleted and replaced with a prevention plan requirement under which owners and operators of certain caves and mines must develop and implement department-approved, site-specific plans detailing the practices that

they will use to prevent the introduction and transmission of *G. destructans*. In addition, requirements for the cleaning of equipment, gear and other objects have been modified slightly to further specify that owners and operators of commercial caves and active mines must ensure that persons entering their caves or mines comply with department-approved cleaning protocols.

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

Appearances at the Public Hearing

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

Appearances at the Public Hearing

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.

Appearances at the Public Hearing

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

Appearances at the Public Hearing

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

The Plain Language Analysis in the rulemaking Order was changed to reflect the modifications made to the proposed rule as a result of Rules Clearinghouse comments, public comments, meetings with stakeholders,

and our own continuing review since the rule was first proposed. (See Modifications Made, above.) No significant changes were made to fiscal estimate. The state and local fiscal effects remain "indeterminate".
Response to Legislative Council Rules Clearinghouse Report

Rules Clearinghouse Comments

1. Statutory Authority.

Section 66.0119, Stats., authorizes a state officer, agent, or employee, having statutory authority to inspect real or personal property for environmental purposes, to apply for, obtain, and execute an inspection warrant. A warrant may be issued for inspection of personal or real properties that are not public buildings upon showing consent to entry for inspection purposes has been refused. Section NR 40.07 (8) (e) 2. and 4. provides that the department or its designee may, if it does not receive an owner's consent to enter property, seek an inspection warrant and install and maintain physical barriers to limit access to a cave or mine by either individuals or bats. If the department intends to use a special inspection warrant under s. 66.0119, Stats., it should more fully explain its authority to go beyond the inspection purposes of the warrant and to actually install and maintain physical barriers. If the department intends to ask for an inspection warrant under another section of the statutes, it should describe that statute and explain the purposes for which the inspection warrant may be used.

Department Response: The comment has become moot due to revision of s. NR 40.07 (8) (e). The rule no longer calls for the use of inspection warrants.

2. Form, Style and Placement in Administrative Code

a. Section NR 40.02 (28m) defines the term "near" for purposes of s. NR 40.07 (8). Since this term only appears in s. NR 40.07 (8), the definition should be created in par. (a) of that section.

Paragraph (a) should read: "(a) Definition. In this subsection "near a cave or mine" means within 100 feet of a cave or mine. " The remaining paragraphs should be renumbered accordingly and the titles to the paragraphs should be shown in italics.

b. Section NR 40.07 (8) (b) 1. and 2. should begin with the phrase "Except as provided in subd. 4. and par. (d),". Also, in par. (b) 1., the phrase "the state" should be replaced by the phrase "this state". Finally, in part (b) 3., the phrase "but not limited to" is unnecessary and should be deleted.

c. 111 s. NR 40.07 (8) (c), a comma should be inserted after the reference "1".

d. In s. NR 40.07 (8) (e) 3., the phrase "negotiated under subd. 2. " should be inserted after the phrase "consent order. "

Department Response: The comments have been accepted and the rule has been revised accordingly.

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

a. Sections NR 40.03 (3m) and 40.07 (8) (d) contain the phrase "*Geomyces destructans (white nose syndrome)*". Because the fungus is thought to cause or relate to white nose syndrome, but is not synonymous with it, the phrase "(white nose syndrome)" should be replaced by the phrase "the fungus causing or relating to white nose syndrome".

Department Response: Comment 5.a. has been accepted in part. Rather than follow the exact style suggested by the Clearinghouse, "*Geomyces destructans (white nose syndrome)*" has been replaced in the proposed rule by "*Geomyces destructans (white-nose syndrome fungal pathogen)*" in order to maintain consistency with other ch. NR 40 invasive species scientific and common name descriptions.

b. Section NR 40.07 (8) (e) provides in part that a person who owns, controls, or manages property where a cave or a mine may be present, is responsible for limiting access to

the cave or mine by either individuals or bats. The phrase "*is responsible for limiting*" should be replaced by the phrase "*shall limit*." Also, if the intended meaning of this provision is that an owner or manager will have this duty only if it asks the manager or owner to install and properly maintain physical barriers to limit access, this provision should explicitly so state. Finally, the note to this provision appears to be substantive and should be incorporated as a standard in the text of the rule.

Department Response: has been accepted in part and has become moot in part due to revision of s. NR 40.07 (8) (e).

Final Regulatory Flexibility Analysis

The rule is not expected to have a significant adverse effect on a substantial number of small businesses. Therefore, under s. 227.19 (3m), Stats., a final regulatory flexibility analysis is not required. The rule may have favorable effects on a number of businesses by preventing the introduction or limiting the spread of WNS, thereby preserving the agricultural, economic and environmental benefits associated with healthy bat populations.

There are approximately 120 known bat hibernacula in Wisconsin, and approximately 12 of these are public caves. In addition, less than 20 of the caves and mines in Wisconsin are routinely caved.

Affected constituencies include commercial caves and mines, active underground mines, private cave and mine owners, recreational cavers, agriculture and forest industries, and conservation organizations. Concerns will likely include how the proposed rules will affect current activities. Many of these potential concerns may be addressed through cost-sharing, technical support, and education provided by the department. Examples include: cost-sharing for installation of bat-friendly gates or other physical barriers, cost-sharing for conservation actions, providing cave closure signage and cleaning protocols, and providing locations of caves that may be used for recreational caving activities (where bats are known to have been excluded). Agriculture industries, forest industries and conservation organizations would be negatively affected by not attempting to control or slow the spread of WNS.

The cost of cleaning equipment, gear, clothing and other objects will be minimal. The cost of caving gear typically ranges from \$125-\$750. Very few sites in Wisconsin require vertical climbing gear. The cost of commercially cleaning gear according to department protocols typically ranges from \$10 to \$12 per set of gear. The cost of signage at caves and mines would be \$0 because the department will provide the signs.

Under Current ch. NR 40, the department may ask any person who owns, controls, or manages property where a prohibited species is present to control the prohibited species in accordance with a plan approved by the department. While a person who owns, controls, or manages property where a prohibited species is present is responsible for controlling the prohibited species that exists on the property, the department will seek funds to assist in the control of prohibited species.

The department will normally follow an informal, stepped enforcement process in order to obtain compliance with invasive species rules. This involves informal discussions between department staff and the individual, landowner or company, notifying the person of potential violations and providing guidance on how to comply with the rules. Notices of non-compliance may follow if necessary. If normal enforcement is necessary, ch. NR 40 will be enforced by department conservation wardens, county district attorneys, and circuit courts through the use of citations and civil or criminal complaints. Civil and criminal enforcement may also be carried out by department referral of violations to the Wisconsin Attorney General, with prosecution and abatement actions in the circuit courts. Criminal enforcement will be limited to intentional violations. Finally, violations of the permits issued under ch. NR 40 also may be enforced by administrative permit revocation proceedings.