

SUBJECT: Request adoption of emergency Order IS-49-10(E) and authorization for public hearings on proposed Order IS-47-10, revisions to ch. NR 40, regarding the management of white-nose syndrome in bats

FOR: OCTOBER 2010 BOARD MEETING

TO BE PRESENTED BY:

Erin Crain and Gregor Schuurman, Bureau of Endangered Resources

SUMMARY:

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 initial 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. (By emergency rule, *Geomyces destructans* was just listed as a prohibited invasive species in ch. NR 40. A proposed identical permanent rule is pending.)

To effectively manage WNS, the department proposes additions to ch. NR 40 related to the early detection and monitoring of WNS and preventive measures to limit the potential spread of WNS. Implementing the proposed rules before WNS has been detected in Wisconsin will allow the department time to work collaboratively with stakeholders to ensure that appropriate conservation measures are in place. Because of the rapid spread of WNS, the department would not have time to develop appropriate conservation measures if these rule changes were delayed until after WNS was detected in Wisconsin. 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.

The rule would 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*, exclusion of either bats or humans from caves or mines, and decontamination of gear used in or near caves or mines. Affected parties include commercial caves/mines, private cave/mine owners, active underground mines, recreational cavers, agriculture and forest industries, and the conservation community.

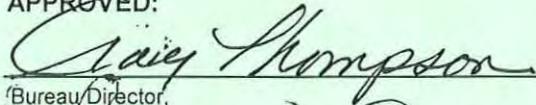
RECOMMENDATION: Request adoption of emergency Order IS-49-10(E) and authorization for public hearings on Order IS-47-10, revision to ch. NR 40, regarding the management of WNS in bats.

LIST OF ATTACHED MATERIALS:

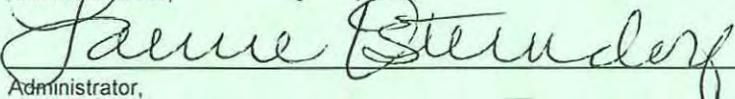
- No Fiscal Estimate Required
- No Environmental Assessment or Impact Statement Required
- No Background Memo

- Yes Attached
- Yes Attached
- Yes Attached

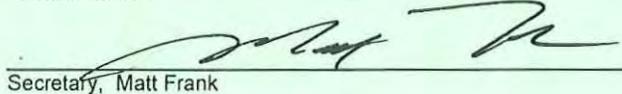
APPROVED:


Bureau Director,

10/14/10
Date


Administrator,

10/14/10
Date


Secretary, Matt Frank

10-15-10
Date

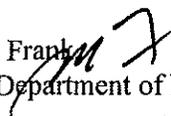
- cc: Laurie J. Ross - AD/8
- Craig Thompson - ER/6
- Erin Crain - ER/6
- Rori Paloski - ER/6
- Tara Bergeson - ER/6

- Lance Potter - ER/6
- Gregor Schuurman - ER/6
- David Redell - ER/6
- Peter Flaherty - LS/8
- Tim Andryk - LS/8

Linda Haddix - LS/8

DATE: October 14, 2010

TO: Natural Resources Board

FROM: Matthew J. Frank 
Secretary, Department of Natural Resources

SUBJECT: Request adoption of emergency Order IS- 49-10(E) and authorization for public hearings on proposed permanent Order IS-47-10, revisions to ch. NR 40, related to white-nose syndrome management in bats

Background

Bats are a vital part of many ecosystems and white-nose syndrome (WNS) has significant environmental, economic, and public health impacts. All bats affected by WNS are insectivorous and a single little brown bat can eat up to 1,000 insects per hour, often consuming large numbers of agricultural pests, which cost the agriculture and forest industry billions of dollars per year. As insect predators, bats also may play an important role in reducing risk of human disease transmitted by flying insects.

Wisconsin has one of the highest concentrations of cave bat hibernacula in the Midwest, and large numbers of cave bats from neighboring states including Illinois, Iowa, Minnesota, Michigan and Indiana hibernate in Wisconsin. Three Wisconsin hibernacula alone house over 300,000 bats. Wisconsin's largest known hibernaculum, Neda Mine, may also be the largest in the Midwest with an estimated population of 150,000.

Bats affected with WNS were first observed in 2006 at a single cave near Albany, New York. WNS has since been found in 14 states and two Canadian provinces, spreading up to 800 miles in the last year. Mortality rates of affected colonies reach 100%. 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. According to a Consensus Statement issued at the WNS Emergency Science Strategy Meeting in May 2009, white-nose syndrome "... has caused the most precipitous decline of North American wildlife in recorded history." Last spring, the disease was detected within 225 miles of Wisconsin's southern border and 300 miles from the northern border. That means a WNS-infected cave is now located within the 280-mile dispersal range of Wisconsin little brown bats. Based on the disease's current location and known rate of spread, we anticipate the detection of WNS in Wisconsin as early as January 2011.

Hibernating bats are susceptible to WNS. Those infected tend to show a white fungal growth on their face, arms, legs, wings, or tail caused by the newly isolated and named fungus, *Geomyces destructans*. Infected bats exhibit atypical behavior such as daytime activity during winter hibernation, which rapidly depletes stored energy reserves. Wing damage and emaciation are also common.

To date, nine species of cave bats are affected by WNS, including the federally endangered Indiana bat, which historically was found in Wisconsin. All Wisconsin cave bats, which include the little brown bat (*Myotis lucifugus*), northern long-eared bat (*Myotis septentrionalis*), eastern pipistrelle (*Perimyotis subflavus*), and big brown bat (*Eptesicus fuscus*), are among the species fatally affected by white-nose syndrome. Consequently, Wisconsin's cave bat population as a whole is threatened by this devastating

disease. The little brown bat is Wisconsin's most common bat species and because this species has seen the greatest mortality rate due to WNS, Wisconsin anticipates significant impacts to its cave bat populations when WNS begins to affect Wisconsin bats. Research published in the journal *Science* (August 2010) states "...we expect a 99% chance of regional extinction of little brown myotis within the next 16 years."

Research conducted at the United States Geological Survey (USGS) Wildlife Health Center has shown that *G. destructans* is transferred from bat to bat, and a multi-agency project demonstrated bats can develop WNS through infection directly from an affected cave environment in the absence of infected bats.

There is also evidence of human transfer of *G. destructans* from site to site and/or bat via contaminated equipment, gear or clothing. There have been long-distance jumps in the spread of WNS, beyond the distance bats would likely transmit the disease. These "jump" sites have been frequently visited caves often with small bat populations. The USGS National Wildlife Health Center has detected *G. destructans* fungal spores in cave sediment demonstrating persistence of the fungus in the absence of bats. The New York Department of Environmental Conservation, Wildlife Pathology Unit has isolated *G. destructans* fungal spores on equipment and clothing after exiting an affected cave.

Even in the face of incomplete information, general epidemiological principles should be used to inform the WNS investigation and response. All available evidence indicates that WNS is caused by an infectious agent and can therefore potentially be spread by all known modes of disease transmission, including direct contact, inhalation, ingestion, fomites (inanimate objects), and human or animal vectors. Wildlife diseases such as WNS spread rapidly when there is a high prevalence of pathogen(s), an efficient chain of transmission, an abundance of susceptible hosts, and/or an environment that allows pathogen persistence without a host. Regardless of the infectious agent (fungus, bacterium, or virus), universal precautions should be implemented. Universal precautions are procedures and guidelines designed to reduce incidence of disease by both preventing infections and breaking chains of transmission.

The department recognizes the critical role that landowners and stakeholders can play in assisting and cooperating with this scientifically grounded approach to conserving Wisconsin's natural heritage and critical ecosystem services in the face of an unprecedented challenge. The department has been establishing volunteer agreements with hibernacula owners, conducting stakeholder meetings, working with volunteer monitors, consulting with the United States Geological Survey and Fish and Wildlife Service, and implementing an education and outreach program.

Rule Summary

Chapter NR 40, Wis. Adm. Code, establishes a system for the identification, classification and control of invasive species and regulates species listed in the prohibited and restricted categories. It also establishes preventive measures that when followed, will help minimize the spread of invasive species into or within Wisconsin. In a previous emergency rule, the department listed *Geomyces destructans* as a prohibited invasive fungus species. *Geomyces destructans* has been identified as the fungus that causes WNS in cave bats. (A proposed identical permanent rule is pending.) Because we have little control over the natural movements of bats, our main focus in WNS management is on limiting the anthropogenic spread of *Geomyces destructans*.

To most effectively manage WNS, the department proposes the following additions to ss. NR 40.04 and 40.07, Wis. Adm. Code, related to early detection of WNS and prevention of the spread of *G. destructans* due to anthropogenic activities:

1. For purposes of early detection, with permission or pursuant to an inspection warrant, department staff may access caves and mines in order to monitor, survey, and inspect for the presence of *G. destructans*.
2. Equipment, gear, clothing and other objects may not be brought or placed into or near a cave or mine if they have been in or near a cave or mine located outside of Wisconsin.
3. Equipment, gear, clothing and other objects that have been in or near a cave or mine in the state must be decontaminated following department-approved WNS decontamination protocols before they can be brought into another state cave or mine.
4. All equipment, gear, clothing and other objects that have been in or near a cave or mine in Wisconsin must be decontaminated immediately upon exit.
5. All equipment, gear, clothing and other objects that will be or have come in contact with bats (including, but not limited to nets, traps, weighing tubes, bat bags, wing punches, rulers, clothing, gloves, electronic equipment and exclusion materials) and all individuals handling bats must be decontaminated prior to and immediately after contact.
6. In the unlikely event that a cave or mine owner refuses to take requested actions to restrict access to caves/mines to either humans or bats, the department may issue an order requiring such action and if compliance is not forthcoming may take such actions itself pursuant to an inspection warrant.

Section 227.24 (1) (a), Stats., authorizes state agencies to promulgate a rule as an emergency rule without complying with the notice, hearing and publication requirements under ch. 227, Stats., if preservation of the public peace, health, safety or welfare necessitates putting the rule into effect prior to the time it would take effect if the agency complied with the procedures. However, s. 23.22 (2t) (a), Stats., authorizes the department to promulgate emergency rules to identify, classify, or control an invasive species without having to provide evidence that an emergency rule is necessary for the preservation of public peace, health, safety, or welfare or to provide a finding of emergency. In addition, such emergency rules may remain in effect until whichever of the following occurs first: the first day of the 25th month beginning after the effective date of the emergency rule, the effective date of the repeal of the emergency rule, or the date on which the permanent rule identifying, classifying, or controlling the invasive species, promulgated under s. 23.22 (2) (b) 6., Stats., takes effect.

Recommended Public Participation

Joint public hearings will be held for the emergency and proposed permanent rule changes to address WNS. Four public hearings will be held around the state. In order to allow stakeholders the ability to comment on all recent rule changes addressing WNS in relation to one another, the department will combine these hearings with those associated with ER-37-10(E), ER-35-10, IS-42-10(E), and IS-41-10.

Rule Development

These rule changes were developed with the assistance of the Bureaus of Endangered Resources and Legal Services. Department of Justice advice was also sought and confirmed the need to put the proposed measures into rule. The department has also recently met with stakeholders, including mine and commercial cave owners to discuss white-nose syndrome and possible management options. All known

cave and mine owners in Wisconsin were contacted this year to provide background information on WNS and cave management.

Small Business and Initial 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 gates or other physical barriers, cost-sharing for conservation actions, providing cave closure signage and decontamination 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 decontamination will be minimal. The cost of excluding bats at a cave with high human visitation would be \$100-\$500. The department is seeking funds to cover these costs. The cost of caving gear typically ranges from \$125-\$750. Very few sites in Wisconsin require vertical climbing gear. The cost of signage at caves and mines would be \$0 because the department will provide the signs.

Under the proposed rules, the department may ask any person who owns, controls, or manages property where a cave or mine may be present to install and properly maintain physical barriers to limit access to the cave or mine by either individuals or bats, in accordance with a plan approved by the department. The department is seeking funding to assist with the installation of barriers, and therefore cost to those parties who install such barriers should be negligible. Additionally, commercial caves will have the option to exclude bats from their cave(s) with the help of the department, allowing them to remain open for tourism, and resulting in no loss of tourism dollars. Finally, the department will work with active mines to develop control plans that will not hinder mining operations.

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.

Environmental Analysis

This rule revision is considered to be a Type III Action under s. NR 150.03 (6) (a) 3. b, and therefore does not require preparation of an environmental assessment. However, in the interest of providing the public with complete information on this rule change, the department has decided to prepare an environmental assessment prior to the public hearings.

Fiscal Estimate — 2009 Session

<input checked="" type="checkbox"/> Original	<input type="checkbox"/> Updated	LRB Number	Amendment Number if Applicable
<input type="checkbox"/> Corrected	<input type="checkbox"/> Supplemental	Bill Number	Administrative Rule Number IS-47-10 and IS-49-10 (E)

Subject

Request adoption of emergency Order IS-49-10(E) and authorization for public hearings on proposed Order IS-47-10, revision to ch. NR 40, regarding the management of white-nose syndrome in bats.

Fiscal Effect

State: No State Fiscal Effect
 Indeterminate

Check columns below only if bill makes a direct appropriation or affects a sum sufficient appropriation.

- Increase Existing Appropriation Increase Existing Revenues
 Decrease Existing Appropriation Decrease Existing Revenues
 Create New Appropriation

Increase Costs — May be possible to absorb within agency's budget.

Yes No

Decrease Costs

Local: No Local Government Costs

Indeterminate

1. Increase Costs
 Permissive Mandatory
 2. Decrease Costs
 Permissive Mandatory

3. Increase Revenues
 Permissive Mandatory
 4. Decrease Revenues
 Permissive Mandatory

5. Types of Local Governmental Units Affected:

- Towns Villages Cities
 Counties Others
 School Districts WTCS Districts

Fund Sources Affected

GPR FED PRO PRS SEG SEG-S

Affected Chapter 20 Appropriations

Assumptions Used in Arriving at Fiscal Estimate

Rule Summary: The rule would 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*, exclusion of either bats or humans from caves or mines, and decontamination of gear used in or near caves or mines. This rule package is being proposed as both an emergency rule, IS-49-10 (E), and a permanent rule, IS-47-10.

State Fiscal Estimate:

The proposed rule package will require time by DNR staff to prepare the rule and administer rule hearings. Endangered Resources staff, as well as other Department staff, may see an increase in time associated with the changes to bat management, especially in the decontamination of equipment and in monitoring. It is assumed there will not be a significant increase in staff time, and that this time can be covered by existing appropriations.

Local Fiscal Estimate:

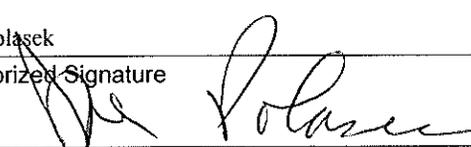
Minimal impact to the few local governments that own caves or mines.

Private Fiscal Impacts:

It is assumed there will be negligible costs associated with this rule. Private landowners with caves may experience some costs associated with restricting cave access, such as posting signs, or with time associated with contractors monitoring on their property, but all potential cost impacts are assumed to be minimal.

The department will also seek funds to assist in the design, installation, and maintenance of physical barriers at all caves.

Long-Range Fiscal Implications

Prepared By: Joe Polasek	Telephone No. 266-2794	Agency Department of Natural Resources
Authorized Signature 	Telephone No. 266-2794	Date (mm/dd/ccyy) 10-14-10

Fiscal Estimate — 2009 Session

**Page 2 Assumptions Narrative
Continued**

LRB Number	Amendment Number if Applicable
Bill Number	Administrative Rule Number IS-47-10 and IS-49-10 (E)

Assumptions Used in Arriving at Fiscal Estimate – Continued

Fiscal Estimate Worksheet — 2009 Session
 Detailed Estimate of Annual Fiscal Effect

Original Updated
 Corrected Supplemental

LRB Number	Amendment Number if Applicable
Bill Number	Administrative Rule Number IS-47-10 and IS-49-10 (E)

Subject

Request adoption of emergency Order IS-49-10(E) and authorization for public hearings on proposed Order IS-47-10, revision to ch. NR 40, regarding the management of white-nose syndrome in bats.

One-time Costs or Revenue Impacts for State and/or Local Government (do not include in annualized fiscal effect):

Annualized Costs:		Annualized Fiscal Impact on State Funds from:	
		Increased Costs	Decreased Costs
A. State Costs by Category			
State Operations — Salaries and Fringes	\$	\$ -	
(FTE Position Changes)	(FTE)	(- FTE)
State Operations — Other Costs		-	
Local Assistance		-	
Aids to Individuals or Organizations		-	
Total State Costs by Category	\$	\$ -	
B. State Costs by Source of Funds			
GPR	\$	\$ -	
FED		-	
PRO/PRS		-	
SEG/SEG-S		-	
State Revenues	<small>Complete this only when proposal will increase or decrease state revenues (e.g., tax increase, decrease in license fee, etc.)</small>	Increased Revenue	Decreased Revenue
GPR Taxes	\$	\$ -	
GPR Earned		-	
FED		-	
PRO/PRS		-	
SEG/SEG-S		-	
Total State Revenues	\$	\$ -	

Net Annualized Fiscal Impact

	<u>State</u>	<u>Local</u>
Net Change in Costs	\$ _____	\$ _____
Net Change in Revenues	\$ _____	\$ _____

Prepared By:	Telephone No.	Agency
Joe Polasek	266-2794	Department of Natural Resources
Authorized Signature	Telephone No.	Date (mm/dd/ccyy)
	266-2794	10-14-10

**ORDER OF THE STATE OF WISCONSIN
NATURAL RESOURCES BOARD
CREATING RULES**

The Wisconsin Natural Resources Board proposes an emergency order to create NR 40.02 (7m), (25m), (28m) and (46m), 40.04 (3m) and 40.07 (8) relating to the identification, classification and control of invasive species.

IS-49-10(E)

Analysis Prepared by Department of Natural Resources

Statutes interpreted: Section 23.22 (2) (a) and 29.924 (5), Stats.

Statutory authority: Sections 23.09 (2) (intro.), 23.091, 23.11 (1), 23.22 (2) (a) and (b) and (2t) (a), 23.28 (3), 27.01 (2) (j), 29.039 (1), 227.11(2) (a) and 227.24 (1) (a), Stats.

Explanation of agency authority: The principal authority for the department's invasive species rules is s. 23.22 (2) (a) and (b) 6., Stats., which requires the department to establish a statewide program to control invasive species in this state and directs the department to promulgate rules to identify, classify and control invasive species for purposes of the program, which may include procedures and requirements for issuing permits to control invasive species. In order to fulfill this broad duty, the department adopted ch. NR 40 to provide it with all of the tools that are required to control invasive species, wherever found in the state, including regulation of the possession, transportation, transfer and introduction of specific invasive species, general preventive measures designed to restrict pathways by which humans commonly spread or introduce invasive species, authority to enter property in order to inspect, survey and control invasive species, and authority to recover the state's costs when it must carry out necessary control measures because responsible parties do not comply with department orders to control invasives themselves.

Section 23.11 (1), Stats., delegates to the department such further powers as may be necessary or convenient to enable it to exercise the functions and perform the duties required of it by ch. 23, Stats., and by other provisions of law.

Invasive species have caused environmental and economic damage and threaten human health, and will continue doing so unless adequate control measures are adopted and implemented. The general legislative delegation to the department of all necessary or convenient powers set out in s. 23.11 (1), Stats., combined with the broad directive in s. 23.22 (2) (a) and (b) 6., Stats., to control invasive species in this state give the department sufficient power to adopt and revise as needed rules for the protection of public health, safety, welfare and the environment, but particularly for the promotion of public welfare, convenience and general prosperity. The department's exercise of legislatively delegated police powers, as embodied in its invasive species rules, has its basis in the inherent power and duty of government to protect and promote the life, comfort, safety and welfare of society.

Section 23.09 (2) (intro), Stats., grants the department general authority to adopt rules for the protection, development and use of forests, fish and game, lakes, streams, plant life, flowers and other outdoor resources in this state. Section 23.091, Stats., authorizes the department to acquire, develop, operate and maintain state recreation areas, to establish use zones within state recreation areas providing for the full range of recreational uses, including hunting and fishing, and to promulgate rules to control uses within

zones and limit the number of persons using any zone. Section 23.11 (1), Stats., gives the department the authority to have and take the general care, protection and supervision of all state parks, of all state fish hatcheries and lands used therewith, of all state forests, and of all lands owned by the state or in which it has any interests.

Section 23.28 (3), Stats., prohibits the department from allowing any use of a designated state natural area which is inconsistent with or injurious to its natural values, and authorizes the department to establish use zones, control uses within a zone and limit the number of persons using zones in designated state natural areas. Section 27.01 (2) (j), Stats., grants the department authority to promulgate rules necessary to govern the conduct of state park visitors, and for the protection of state park property, or the use of facilities, including the use of boats and other watercraft on lakes or rivers within the limits of a state park, and the use of roads, trails or bridle paths.

Section 29.039 (1), Stats., authorizes the department to develop conservation programs to ensure the perpetuation of nongame species, require harvest information and establish limitations relating to taking, possession, transportation, processing and sale or offer for sale, of nongame species. "Nongame species" is defined as any mammal, bird, fish, or other creature of a wild nature endowed with sensation and the power of voluntary motion that is living in the wild and that is not classified as a game fish, game animal, game bird or furbearing animal.

Section 227.11 (2) (a), Stats., expressly confers rulemaking authority on the department to promulgate rules interpreting any statute enforced or administered by it, if the agency considers it necessary to effectuate the purpose of the statute. The department considers the rules created by this Order to be necessary to effectuate the purposes of s. 23.22, Stats.

Section 227.24 (1) (a), Stats., authorizes state agencies to promulgate a rule as an emergency rule without complying with the notice, hearing and publication requirements under ch. 227, Stats., if preservation of the public peace, health, safety or welfare necessitates putting the rule into effect prior to the time it would take effect if the agency complied with the procedures. However, s. 23.22 (2t) (a), Stats., authorizes the department to promulgate emergency rules to identify, classify, or control an invasive species without having to provide evidence that an emergency rule is necessary for the preservation of public peace, health, safety, or welfare or to provide a finding of emergency. In addition, such emergency rules may remain in effect until whichever of the following occurs first: the first day of the 25th month beginning after the effective date of the emergency rule, the effective date of the repeal of the emergency rule, or the date on which the permanent rule identifying, classifying, or controlling the invasive species, promulgated under s. 23.22 (2) (b) 6., Stats., takes effect.

Related statute or rule: Related statutes or rules include but are not limited to the following provisions which, to varying degrees, may apply to the identification, classification, control or other regulation of species that are invasive, or to conduct that may result in the introduction or spread of invasive species:

Statutory section

Title [or subject]

15.347 (18) Invasive species council.
 23.093 Carp control research.
 23.235 Nuisance weeds.
 23.24 Aquatic plants.
 26.20 (4) [Railroad right-of-way annual weed removal]
 26.30 Forest insects and diseases; department jurisdiction; procedure.
 27.019 (7) (c) [County rural planning – highways - only native plantings allowed]

- 27.05 (5) and (7) [County authority to manage plants and control weeds in county waters, parks and county lands]
- 29.011 Title to wild animals.
- 29.047 Interstate transportation of game.
- 29.053 Specific open and closed seasons.
- 29.055 Wild animals; possession in closed season or in excess of bag limit.
- 29.057 Wild animals; possession in open season.
- 29.089 Hunting on land in state parks and state fish hatcheries.
- 29.091 Hunting or trapping in wildlife refuge.
- 29.192 Regulation of takings of certain wild animals.
- 29.301 General restrictions on hunting.
- 29.307 Hunting with aid of aircraft prohibited.
- 29.314 Shining animals.
- 29.327 Regulation of waterfowl blinds.
- 29.331 Trapping regulation.
- 29.334 Hunting and trapping; treatment of wild animals.
- 29.335 Feeding wild animals for nonhunting purposes.
- 29.337 Hunting and trapping by landowners and occupants.
- 29.354 Possession of game birds and animals.
- 29.407 Transportation of fish.
- 29.414 Erection of barriers to exclude rough fish.
- 29.417 Permit to take rough fish.
- 29.421 Removal of rough fish.
- 29.424 Control of detrimental fish.
- 29.509 Bait dealer license.
- 29.516 Fishing with nets and setlines.
- 29.601 Noxious substances.
- 29.604 Endangered and threatened species protected.
- 29.614 Scientific collector permit.
- 29.627 Domestic fur-bearing animal farms.
- 29.701 Propagation of fish; protected wild animals.
- 29.705 Propagation of fish; removal of fish.
- 29.733 Natural waters used in fish farms.
- 29.734 Barriers required for fish farms.
- 29.735 Importation of fish.
- 29.736 Stocking of fish.
- 29.737 Permit for private management.
- 29.738 Private fishing preserves.
- 29.741 Food in the wild for game birds.
- 29.875 Disposal of escaped deer or elk.
- 29.885 Removal of wild animals.
- 29.887 Wildlife control in urban communities.
- 29.924 Investigations; Searches.
- 29.927 Public nuisances.
- 29.931 Seizures.
- 29.934 Sale of confiscated game and objects.
- 30.07 Transportation of aquatic plants and animals; placement of objects in navigable waters.
- 30.1255 Report on control of aquatic nuisance species.
- 59.70 (17) and (18) [County funds, equipment, fees for pest and weed control, plant or animal diseases.]
- 66.0407 Noxious weeds. [local governments]
- 66.0517 Weed commissioner. [local governments]

- 66.0627 Special charges for current services. [charges for weed elimination]
- 84.07 (3) [DOT highway patrol officers to destroy noxious weeds on highways]
- 93.07 Department duties. [Dept. of Agriculture, Trade and Consumer Protection - pests]
- 94.01 Plant inspection and pest control authority.
- 94.02 Abatement of pests.
- 94.03 Shipment of pests and biological control agents; permits.
- 94.10 Nursery stock; inspection and licensing.
- 94.38 Agricultural and vegetable seeds; definitions.
- 94.41 Prohibitions. [Sale or distribution of noxious weed seed]
- 94.45 Powers and authority of the department.
- 94.46 Stop sale; penalties; enforcement.
- 94.69 Pesticides; rules.
- 94.76 Honeybee disease and pest control.
- 146.60 Notice of release of genetically engineered organisms into the environment.
- 169.04 Possession of live wild animals.
- 169.06 Introduction, stocking, and release of wild animals.
- 169.07 Exhibition of live wild animals.
- 169.08 Propagation of wild animals.
- 169.10 Sale and purchase of live wild animals.
- 169.11 Harmful wild animals.
- 169.36 Record-keeping and reporting requirements.
- 182.017 Transmission lines; privileges; damages. [utility weed control along transmission lines]
- 281.17 (2) [DNR to supervise chemical treatment of waters for the suppression of nuisance-producing organisms that are not regulated by the program established under s. 23.24 (2).]
- 237.10 Rapide Croche lock [Fox River lamprey barrier]

Plain language analysis: Chapter NR 40, Wis. Adm. Code, establishes a classification system for invasive species and regulates those in the prohibited and restricted categories. It also establishes preventive measures that when followed, will help minimize the spread of invasive species into or within Wisconsin. In a previous emergency rule, the department listed *Geomyces destructans* as a prohibited invasive fungus species. *Geomyces destructans* has been identified as the fungus that causes white nose syndrome (WNS) in cave bats. Because the department has little if any control over the natural movements of bats, the main focus in WNS management is on limiting the anthropogenic spread of *G. destructans*.

This Order adds provisions to ss. NR 40.04 and 40.07 relating to early detection and prevention of the spread of WNS due to anthropogenic activities, as follows:

1. For purposes of early detection, with permission or pursuant to an inspection warrant, department staff may access caves and mines in order to monitor, survey, and inspect for the presence of *Geomyces destructans*.
2. Equipment, gear, clothing and other objects may not be brought or placed into or near a cave or mine if they have been in or near a cave or mine located outside of Wisconsin.
3. Equipment, gear, clothing and other objects that have been in or near a cave or mine in the state must be decontaminated following department-approved WNS decontamination protocols before they can be brought into another state cave or mine.
4. All equipment, gear, clothing and other objects that have been in or near a cave or mine in Wisconsin must be decontaminated immediately upon exit.

5. All equipment, gear, clothing and other objects that will be or have come in contact with bats (including, but not limited to nets, traps, weighing tubes, bat bags, wing punches, rulers, clothing, gloves, electronic equipment and exclusion materials) and all individuals handling bats must be decontaminated prior to and immediately after contact.
6. The department will work with cave/mine owners to restrict access to caves/mines to either humans or bats.

The Order also adds key definitions and sets out authority for the department to grant written exemptions from the new decontamination requirements if it would not allow WNS to be transported to other locations.

Summary of, and comparison with, existing or proposed federal regulations: None known.

Comparison with rules in adjacent states: The department is not aware of any other states or provinces that have taken similar actions.

Summary of factual data and analytical methodologies: Bats affected with WNS were first observed in 2006 at a single cave near Albany, New York. WNS has since been found in 14 states and 2 Canadian provinces, spreading up to 800 miles in the last year. Mortality rates of affected colonies reach 100%. 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. According to a Consensus Statement issued at the WNS Emergency Science Strategy Meeting in May 2009, white-nose syndrome "... has caused the most precipitous decline of North American wildlife in recorded history." Last spring, the disease was detected within 225 miles of Wisconsin's southern border and 300 miles from the northern border. That means a WNS-infected cave is now located within the 280-mile dispersal range of Wisconsin little brown bats. Based on the disease's current location and known rate of spread, we anticipate the detection of WNS in Wisconsin as early as January, 2011.

Hibernating bats are susceptible to WNS. Those infected tend to show a white fungal growth on their face, arms, legs, wings, and/or tail caused by the newly isolated and named fungus, *Geomyces destructans*. Infected bats exhibit atypical behavior such as daytime activity during winter hibernation, which rapidly depletes stored energy reserves. Wing damage and emaciation are also common.

To date, nine species of cave bats are affected by WNS, including the federally endangered Indiana bat, which historically was found in Wisconsin. All Wisconsin cave bats, which include the little brown bat (*Myotis lucifugus*), northern long-eared bat (*Myotis septentrionalis*), eastern pipistrelle (*Perimyotis subflavus*), and big brown bat (*Eptesicus fuscus*), are among the species fatally affected by WNS. Consequently, Wisconsin's cave bat population as a whole is threatened by this devastating disease. The little brown bat is Wisconsin's most common bat species and because this species has seen the greatest mortality rate due to WNS, Wisconsin anticipates significant impacts to its cave bat populations when WNS begins to affect Wisconsin bats. Research published in the journal *Science* (August 2010) states "...we expect a 99% chance of regional extinction of little brown myotis within the next 16 years."

Research conducted at the United States Geological Survey (USGS) Wildlife Health Center has shown that *G. destructans* is transferred from bat to bat, and a multi-agency project demonstrated bats can develop white nose syndrome (WNS) through infection directly from an affected cave environment, in the absence of infected bats.

There is also evidence of human transfer of *G. destructans* from site to site and/or bat via contaminated equipment, gear or clothing. There have been long-distance jumps in the spread of WNS, beyond the

distance bats would likely transmit the disease. These "jump" sites have been frequently-visited caves, often with small bat populations. The U.S. Geological Survey, National Wildlife Health Center has detected *G. destructans* fungal spores in cave sediment, demonstrating persistence of the fungus in the absence of bats. The New York Department of Environmental Conservation, Wildlife Pathology Unit has isolated *G. destructans* fungal spores on equipment and clothing after exiting an affected cave.

Even in the face of incomplete information, general epidemiological principles should be used to inform the WNS investigation and response. All available evidence indicates that WNS is caused by an infectious agent and can therefore potentially be spread by all known modes of disease transmission, including direct contact, inhalation, ingestion, fomites (inanimate objects), and human or animal vectors. Wildlife diseases such as WNS spread rapidly when there is high prevalence of pathogen(s), efficient chains of transmission, abundant susceptible hosts, and/or environments that allow pathogen persistence without a host. Regardless of the infectious agent (fungus, bacterium, or virus), universal precautions should be implemented. Universal precautions are procedures and guidelines designed to reduce incidence of disease by both preventing infections and breaking chains of transmission.

These rules were developed with the assistance of the Bureaus of Endangered Resources and Legal Services. Department of Justice opinion was also sought and confirmed the need to put the proposed actions into rule. The department has also recently met with stakeholders, including mine and commercial cave owners to discuss WNS and possible management options. All known cave and mine owners in Wisconsin were contacted this year as well to provide background information on WNS and cave management.

Analysis and supporting documents used to determine effect on small business or in preparation of economic impact report: None.

Effect on small business, including how the rule will be enforced: 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 gates or other physical barriers, cost-sharing for conservation actions, providing cave closure signage and decontamination 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 decontamination will be minimal. The cost of excluding bats at a cave with high human visitation would be \$100-\$500. The department is seeking funds to cover these costs. The cost of caving gear typically ranges from \$125-\$750. Very few sites in Wisconsin require vertical climbing gear. The cost of signage at caves and mines would be \$0 because the department will provide the signs.

Under the proposed rules, the department may ask any person who owns, controls, or manages property where a cave or mine may be present to install and properly maintain physical barriers to limit access to

the cave or mine by either individuals or bats, in accordance with a plan approved by the department. The department is seeking funding to assist with the installation of barriers, and therefore cost to those parties who install such barriers should be negligible. Additionally, commercial caves will have the option to exclude bats from their cave(s) with the help of the department, allowing them to remain open for tourism, and resulting in no loss of tourism dollars. Finally, the department will work with active mines to develop control plans that will not hinder mining operations.

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 formal 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.

Under s. 227.19 (3m), Stats., a final regulatory flexibility analysis is not required.

Agency contact person: Erin Crain, 101 S. Webster St., P.O. Box 7921, Madison, WI 53707-7921. (608) 267-7479, email: erin.crain@wisconsin.gov.

SECTION 1. NR 40.02 (7m), (25m), (28m) and (46m) are created to read:

NR 40.02 (7m) "Cave" means any naturally occurring void, cavity, recess or system of interconnected passageways beneath the surface of the earth or in a bluff, cliff or ledge, including pits and sinkholes, but does not include a rock shelter.

(25m) "Mine" means any artificial excavation, shaft, underground passageway, slope, tunnel or working from which ore or mineral is or was extracted, but does not include an open pit mine. However, caves or mines may be located adjacent to open pit mines.

(28m) "Near" means, for purposes of s. NR 40.07 (8), within 100 feet of.

(46m) "Rock shelter" means an overhang or cave-like opening in a bluff, cliff or ledge that is shallow and does not provide an area of substantial daytime darkness.

SECTION 2. NR 40.04 (3m) is created to read:

NR 40.04 (3m) EARLY DETECTION MONITORING. Unless entry is otherwise authorized by law, as part of an invasive species early detection program, the department or its designee may enter property where a cave or mine may be located to monitor, survey or inspect for the presence of the prohibited invasive fungus species *Geomyces destructans* (white nose syndrome) in the cave or mine, with permission of the person who owns, controls or manages the property, but if the person does not grant permission or cannot be located by the department after making reasonable effort, the department may seek an inspection warrant from the appropriate circuit court authorizing entry. Data obtained by the department under this subsection shall be made available to the person who owns, controls or manages the property.

SECTION 3. NR 40.07 (8) is created to read:

NR 40.07 (8) WHITE-NOSE SYNDROME PREVENTION. (a) Entry with imported items prohibited. No person may bring or place any equipment, gear, clothing or other object of any kind in or near a cave or mine if the equipment, gear, clothing or other object has been in or near a cave or mine located outside of Wisconsin.

(b) Decontamination requirements. 1. Except as provided in subd. 4., no person may bring or place any equipment, gear, clothing or other object of any kind in or near a cave or mine if the equipment, gear, clothing or other object has been in or near a cave or mine within the state unless the equipment, gear, clothing or other object has first been decontaminated in accordance with par. (c).

2. Except as provided in subd. 4., any person removing any equipment, gear, clothing or other object of any kind from any cave or mine or from within 100 feet of any cave or mine or exiting any cave or mine or the area within 100 feet of any cave or mine with any equipment, gear, clothing or other object of any kind shall immediately decontaminate the equipment, gear, clothing and other objects in accordance with par. (c).

3. Except as provided in subd. 4., any person who caused or will cause contact to occur between a bat and an individual or object of any kind, including but not limited to a net, trap, weighting tube, bat bag, wing punch, ruler, clothing, glove, electronic equipment or exclusion material shall, prior to and immediately following the contact, decontaminate the individual or object in accordance with par. (c).

4. The decontamination requirements of subs. 1., 2. and 3. do not apply to dedicated equipment, gear, clothing and other objects of any kind that are used exclusively in or near and stored exclusively in or near a single cave or mine.

(c) Decontamination protocols. Individuals, equipment, gear, clothing and other objects of any kind subject to the decontamination requirement of par. (b) 1, 2., or 3. shall be decontaminated in a manner approved by the department.

Note: Detailed information about department-approved methods of decontamination may be obtained at <http://dnr.wi.gov/org/land/er/bats/> or by writing to Wisconsin Department of Natural Resources, Wisconsin Bat Monitoring Program, Bureau of Endangered Resources, P.O. Box 7921, Madison, WI 53707-7921.

(d) Written exemption. The department may exempt any person in writing from par. (a) or (b) if it determines that the exemption will not allow *Geomyces destructans* (white nose syndrome) to be transported to other locations.

(e) Physical exclusion. 1. The department may ask any person who owns, controls or manages property where a cave or mine may be present to install and properly maintain physical barriers to limit access to the cave or mine by either individuals or bats, in accordance with a plan approved by the department. The department will seek funds to assist in design, installation and maintenance of physical barriers such as bat-friendly gates. However, a person who owns, controls or manages property where a cave or mine may be present is responsible for limiting access to the cave or mine by either individuals or bats.

Note: The department anticipates it will request limiting access to a cave or mine by individuals or bats to minimize the risk of white nose syndrome transmission only if it is feasible and reasonable.

2. If voluntary cooperation is not achievable or likely, and it is feasible and reasonable to limit access to the cave or mine by either individuals or bats, the department or its designee may install and maintain physical barriers to limit access to the cave or mine by either individuals or bats or it may offer the person who owns, controls or manages the property the opportunity to negotiate the terms of a consent order for physical exclusion purposes.

3. If a consent order is not achievable or likely, the department may issue a unilateral order requiring the person who owns, controls or manages the property to install and properly maintain physical barriers to limit access to the cave or mine by either individuals or bats in accordance with a plan approved by the department.

4. If the person does not comply with an order issued under subd. 2. or 3., the department or its designee may install and maintain physical barriers to limit access to the cave or mine by either individuals or bats and the department may recover the reasonable and necessary expenses it incurs.

5. Unless entry is otherwise authorized by law, if the person who owns, controls or manages the property does not grant permission for the department or its designee to enter the property for purposes of

this paragraph or cannot be located by the department after making reasonable effort, the department may seek an inspection warrant from the appropriate circuit court authorizing entry.

SECTION 4. EFFECTIVE DATE. This rule shall take effect upon publication, as provided in s. 227.24 (1) (c), Stats.

SECTION 5. BOARD ADOPTION. The foregoing emergency 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)

**ORDER OF THE STATE OF WISCONSIN
NATURAL RESOURCES BOARD
CREATING RULES**

The Wisconsin Natural Resources Board proposes an order to create NR 40.02 (7m), (25m), (28m) and (46m), 40.04 (3m) and 40.07 (8) relating to the identification, classification and control of invasive species.

IS-47-10

Analysis Prepared by Department of Natural Resources

Statutes interpreted: Section 23.22 (2) (a) and 29.924 (5), Stats.

Statutory authority: Sections 23.09 (2) (intro.), 23.091, 23.11 (1), 23.22 (2) (a) and (b), 23.28 (3), 27.01 (2) (j), 29.039 (1) and 227.11(2) (a), Stats.

Explanation of agency authority: The principal authority for the department's invasive species rules is s. 23.22 (2) (a) and (b) 6., Stats., which requires the department to establish a statewide program to control invasive species in this state and directs the department to promulgate rules to identify, classify and control invasive species for purposes of the program, which may include procedures and requirements for issuing permits to control invasive species. In order to fulfill this broad duty, the department adopted ch. NR 40 to provide it with all of the tools that are required to control invasive species, wherever found in the state, including regulation of the possession, transportation, transfer and introduction of specific invasive species, general preventive measures designed to restrict pathways by which humans commonly spread or introduce invasive species, authority to enter property in order to inspect, survey and control invasive species, and authority to recover the state's costs when it must carry out necessary control measures because responsible parties do not comply with department orders to control invasives themselves.

Section 23.11 (1), Stats., delegates to the department such further powers as may be necessary or convenient to enable it to exercise the functions and perform the duties required of it by ch. 23, Stats., and by other provisions of law.

Invasive species have caused environmental and economic damage and threaten human health, and will continue doing so unless adequate control measures are adopted and implemented. The general legislative delegation to the department of all necessary or convenient powers set out in s. 23.11 (1), Stats., combined with the broad directive in s. 23.22 (2) (a) and (b) 6., Stats., to control invasive species in this state give the department sufficient power to adopt and revise as needed rules for the protection of public health, safety, welfare and the environment, but particularly for the promotion of public welfare, convenience and general prosperity. The department's exercise of legislatively delegated police powers, as embodied in its invasive species rules, has its basis in the inherent power and duty of government to protect and promote the life, comfort, safety and welfare of society.

Section 23.09 (2) (intro), Stats., grants the department general authority to adopt rules for the protection, development and use of forests, fish and game, lakes, streams, plant life, flowers and other outdoor resources in this state. Section 23.091, Stats., authorizes the department to acquire, develop, operate and maintain state recreation areas, to establish use zones within state recreation areas providing for the full

range of recreational uses, including hunting and fishing, and to promulgate rules to control uses within zones and limit the number of persons using any zone. Section 23.11 (1), Stats., gives the department the authority to have and take the general care, protection and supervision of all state parks, of all state fish hatcheries and lands used therewith, of all state forests, and of all lands owned by the state or in which it has any interests.

Section 23.28 (3), Stats., prohibits the department from allowing any use of a designated state natural area which is inconsistent with or injurious to its natural values, and authorizes the department to establish use zones, control uses within a zone and limit the number of persons using zones in designated state natural areas. Section 27.01 (2) (j), Stats., grants the department authority to promulgate rules necessary to govern the conduct of state park visitors, and for the protection of state park property, or the use of facilities, including the use of boats and other watercraft on lakes or rivers within the limits of a state park, and the use of roads, trails or bridle paths.

Section 29.039 (1), Stats., authorizes the department to develop conservation programs to ensure the perpetuation of nongame species, require harvest information and establish limitations relating to taking, possession, transportation, processing and sale or offer for sale, of nongame species. "Nongame species" is defined as any mammal, bird, fish, or other creature of a wild nature endowed with sensation and the power of voluntary motion that is living in the wild and that is not classified as a game fish, game animal, game bird or furbearing animal.

Section 227.11 (2) (a), Stats., expressly confers rulemaking authority on the department to promulgate rules interpreting any statute enforced or administered by it, if the agency considers it necessary to effectuate the purpose of the statute. The department considers the rules created by this Order to be necessary to effectuate the purposes of s. 23.22, Stats.

Related statute or rule: Related statutes or rules include but are not limited to the following provisions which, to varying degrees, may apply to the identification, classification, control or other regulation of species that are invasive, or to conduct that may result in the introduction or spread of invasive species:

<u>Statutory section</u>	<u>Title [or subject]</u>
15.347 (18)	Invasive species council.
23.093	Carp control research.
23.235	Nuisance weeds.
23.24	Aquatic plants.
26.20 (4)	[Railroad right-of-way annual weed removal]
26.30	Forest insects and diseases; department jurisdiction; procedure.
27.019 (7) (c)	[County rural planning – highways - only native plantings allowed]
27.05 (5) and (7)	[County authority to manage plants and control weeds in county waters, parks and county lands]
29.011	Title to wild animals.
29.047	Interstate transportation of game.
29.053	Specific open and closed seasons.
29.055	Wild animals; possession in closed season or in excess of bag limit.
29.057	Wild animals; possession in open season.
29.089	Hunting on land in state parks and state fish hatcheries.
29.091	Hunting or trapping in wildlife refuge.
29.192	Regulation of takings of certain wild animals.
29.301	General restrictions on hunting.
29.307	Hunting with aid of aircraft prohibited.

- 29.314 Shining animals.
- 29.327 Regulation of waterfowl blinds.
- 29.331 Trapping regulation.
- 29.334 Hunting and trapping; treatment of wild animals.
- 29.335 Feeding wild animals for nonhunting purposes.
- 29.337 Hunting and trapping by landowners and occupants.
- 29.354 Possession of game birds and animals.
- 29.407 Transportation of fish.
- 29.414 Erection of barriers to exclude rough fish.
- 29.417 Permit to take rough fish.
- 29.421 Removal of rough fish.
- 29.424 Control of detrimental fish.
- 29.509 Bait dealer license.
- 29.516 Fishing with nets and setlines.
- 29.601 Noxious substances.
- 29.604 Endangered and threatened species protected.
- 29.614 Scientific collector permit.
- 29.627 Domestic fur-bearing animal farms.
- 29.701 Propagation of fish; protected wild animals.
- 29.705 Propagation of fish; removal of fish.
- 29.733 Natural waters used in fish farms.
- 29.734 Barriers required for fish farms.
- 29.735 Importation of fish.
- 29.736 Stocking of fish.
- 29.737 Permit for private management.
- 29.738 Private fishing preserves.
- 29.741 Food in the wild for game birds.
- 29.875 Disposal of escaped deer or elk.
- 29.885 Removal of wild animals.
- 29.887 Wildlife control in urban communities.
- 29.924 Investigations; Searches.
- 29.927 Public nuisances.
- 29.931 Seizures.
- 29.934 Sale of confiscated game and objects.
- 30.07 Transportation of aquatic plants and animals; placement of objects in navigable waters.
- 30.1255 Report on control of aquatic nuisance species.
- 59.70 (17) and (18) [County funds, equipment, fees for pest and weed control, plant or animal diseases.]
- 66.0407 Noxious weeds. [local governments]
- 66.0517 Weed commissioner. [local governments]
- 66.0627 Special charges for current services. [charges for weed elimination]
- 84.07 (3) [DOT highway patrol officers to destroy noxious weeds on highways]
- 93.07 Department duties. [Dept. of Agriculture, Trade and Consumer Protection - pests]
- 94.01 Plant inspection and pest control authority.
- 94.02 Abatement of pests.
- 94.03 Shipment of pests and biological control agents; permits.
- 94.10 Nursery stock; inspection and licensing.
- 94.38 Agricultural and vegetable seeds; definitions.
- 94.41 Prohibitions. [Sale or distribution of noxious weed seed]
- 94.45 Powers and authority of the department.
- 94.46 Stop sale; penalties; enforcement.
- 94.69 Pesticides; rules.

- 94.76 Honeybee disease and pest control.
- 146.60 Notice of release of genetically engineered organisms into the environment.
- 169.04 Possession of live wild animals.
- 169.06 Introduction, stocking, and release of wild animals.
- 169.07 Exhibition of live wild animals.
- 169.08 Propagation of wild animals.
- 169.10 Sale and purchase of live wild animals.
- 169.11 Harmful wild animals.
- 169.36 Record-keeping and reporting requirements.
- 182.017 Transmission lines; privileges; damages. [utility weed control along transmission lines]
- 281.17 (2) [DNR to supervise chemical treatment of waters for the suppression of nuisance-producing organisms that are not regulated by the program established under s. 23.24 (2).]
- 237.10 Rapide Croche lock [Fox River lamprey barrier]

Plain language analysis: Chapter NR 40, Wis. Adm. Code, establishes a classification system for invasive species and regulates those in the prohibited and restricted categories. It also establishes preventive measures that when followed, will help minimize the spread of invasive species into or within Wisconsin. In a previous emergency rule, the department listed *Geomyces destructans* as a prohibited invasive fungus species. *Geomyces destructans* has been identified as the fungus that causes white nose syndrome (WNS) in cave bats. Because the department has little if any control over the natural movements of bats, the main focus in WNS management is on limiting the anthropogenic spread of *G. destructans*.

This Order adds provisions to ss. NR 40.04 and 40.07 relating to early detection and prevention of the spread of WNS due to anthropogenic activities, as follows:

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Analysis and supporting documents used to determine effect on small business or in preparation of economic impact report: None.

Effect on small business, including how the rule will be enforced: 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 gates or other physical barriers, cost-sharing for conservation actions, providing cave closure signage and decontamination 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 decontamination will be minimal. The cost of excluding bats at a cave with high human visitation would be \$100-\$500. The department is seeking funds to cover these costs. The cost of caving gear typically ranges from \$125-\$750. Very few sites in Wisconsin require vertical climbing gear. The cost of signage at caves and mines would be \$0 because the department will provide the signs.

Under the proposed rules, the department may ask any person who owns, controls, or manages property where a cave or mine may be present to install and properly maintain physical barriers to limit access to the cave or mine by either individuals or bats, in accordance with a plan approved by the department. The department is seeking funding to assist with the installation of barriers, and therefore cost to those parties who install such barriers should be negligible. Additionally, commercial caves will have the option to exclude bats from their cave(s) with the help of the department, allowing them to remain open for tourism, and resulting in no loss of tourism dollars. Finally, the department will work with active mines to develop control plans that will not hinder mining operations.

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 formal 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.

Under s. 227.19 (3m), Stats., a final regulatory flexibility analysis is not required.

Agency contact person: Erin Crain, 101 S. Webster St., P.O. Box 7921, Madison, WI 53707-7921. (608) 267-7479, email: erin.crain@wisconsin.gov.

Place where comments may be submitted and deadline for submission: Written comments may be submitted to Erin Crain at the above address no later than November 29, 2010.

SECTION 1. NR 40.02 (7m), (25m), (28m) and (46m) are created to read:

NR 40.02 (7m) "Cave" means any naturally occurring void, cavity, recess or system of interconnected passageways beneath the surface of the earth or in a bluff, cliff or ledge, including pits and sinkholes, but does not include a rock shelter.

(25m) "Mine" means any artificial excavation, shaft, underground passageway, slope, tunnel or working from which ore or mineral is or was extracted, but does not include an open pit mine. However, caves or mines may be located adjacent to open pit mines.

(28m) "Near" means, for purposes of s. NR 40.07 (8), within 100 feet of.

(46m) "Rock shelter" means an overhang or cave-like opening in a bluff, cliff or ledge that is shallow and does not provide an area of substantial daytime darkness.

SECTION 2. NR 40.04 (3m) is created to read:

NR 40.04 (3m) EARLY DETECTION MONITORING. Unless entry is otherwise authorized by law, as part of an invasive species early detection program, the department or its designee may enter property where a cave or mine may be located to monitor, survey or inspect for the presence of the prohibited invasive fungus species *Geomyces destructans* (white nose syndrome) in the cave or mine, with permission of the person who owns, controls or manages the property, but if the person does not grant permission or cannot be located by the department after making reasonable effort, the department

may seek an inspection warrant from the appropriate circuit court authorizing entry. Data obtained by the department under this subsection shall be made available to the person who owns, controls or manages the property.

SECTION 3. NR 40.07 (8) is created to read:

NR 40.07 (8) WHITE-NOSE SYNDROME PREVENTION. (a) Entry with imported items prohibited. No person may bring or place any equipment, gear, clothing or other object of any kind in or near a cave or mine if the equipment, gear, clothing or other object has been in or near a cave or mine located outside of Wisconsin.

(b) Decontamination requirements. 1. Except as provided in subd. 4., no person may bring or place any equipment, gear, clothing or other object of any kind in or near a cave or mine if the equipment, gear, clothing or other object has been in or near a cave or mine within the state unless the equipment, gear, clothing or other object has first been decontaminated in accordance with par. (c).

2. Except as provided in subd. 4., any person removing any equipment, gear, clothing or other object of any kind from any cave or mine or from within 100 feet of any cave or mine or exiting any cave or mine or the area within 100 feet of any cave or mine with any equipment, gear, clothing or other object of any kind shall immediately decontaminate the equipment, gear, clothing and other objects in accordance with par. (c).

3. Except as provided in subd. 4., any person who caused or will cause contact to occur between a bat and an individual or object of any kind, including but not limited to a net, trap, weighting tube, bat bag, wing punch, ruler, clothing, glove, electronic equipment or exclusion material shall, prior to and immediately following the contact, decontaminate the individual or object in accordance with par. (c).

4. The decontamination requirements of subsd. 1., 2. and 3. do not apply to dedicated equipment, gear, clothing and other objects of any kind that are used exclusively in or near and stored exclusively in or near a single cave or mine.

(c) Decontamination protocols. Individuals, equipment, gear, clothing and other objects of any kind subject to the decontamination requirement of par. (b) 1., 2., or 3. shall be decontaminated in a manner approved by the department.

Note: Detailed information about department-approved methods of decontamination may be obtained at <http://dnr.wi.gov/org/land/er/bats/> or by writing to Wisconsin Department of Natural Resources, Wisconsin Bat Monitoring Program, Bureau of Endangered Resources, P.O. Box 7921, Madison, WI 53707-7921.

(d) Written exemption. The department may exempt any person in writing from par. (a) or (b) if it determines that the exemption will not allow *Geomyces destructans* (white nose syndrome) to be transported to other locations.

(c) Physical exclusion. 1. The department may ask any person who owns, controls or manages property where a cave or mine may be present to install and properly maintain physical barriers to limit access to the cave or mine by either individuals or bats, in accordance with a plan approved by the department. The department will seek funds to assist in design, installation and maintenance of physical barriers such as bat-friendly gates. However, a person who owns, controls or manages property where a cave or mine may be present is responsible for limiting access to the cave or mine by either individuals or bats.

Note: The department anticipates it will request limiting access to a cave or mine by individuals or bats to minimize the risk of white nose syndrome transmission only if it is feasible and reasonable.

2. If voluntary cooperation is not achievable or likely, and it is feasible and reasonable to limit access to the cave or mine by either individuals or bats, the department or its designee may install and maintain physical barriers to limit access to the cave or mine by either individuals or bats or it may offer the person who owns, controls or manages the property the opportunity to negotiate the terms of a consent order for physical exclusion purposes.

3. If a consent order is not achievable or likely, the department may issue a unilateral order requiring the person who owns, controls or manages the property to install and properly maintain physical barriers to limit access to the cave or mine by either individuals or bats in accordance with a plan approved by the department.

4. If the person does not comply with an order issued under subd. 2. or 3., the department or its designee may install and maintain physical barriers to limit access to the cave or mine by either individuals or bats and the department may recover the reasonable and necessary expenses it incurs.

5. Unless entry is otherwise authorized by law, if the person who owns, controls or manages the property does not grant permission for the department or its designee to enter the property for purposes of this paragraph or cannot be located by the department after making reasonable effort, the department may seek an inspection warrant from the appropriate circuit court authorizing entry.

SECTION 4. EFFECTIVE DATE. The rule contained herein shall take effect on the first day of the month following publication in the Wisconsin administrative register, as provided in s. 227.22 (2) (intro.), Stats.

SECTION 5. **BOARD ADOPTION.** The foregoing 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)