

SUBJECT: Request adoption of Natural Resources Board Order IS-34-06 -- Creation of ch. NR 40 relating to the identification, classification and control of invasive species

FOR: APRIL 2009 **BOARD MEETING**

TO BE PRESENTED BY: Kelly Kearns

SUMMARY:

Wis. Stat. § 23.22 (2), directs DNR to establish a statewide program to control invasive species. The rule focuses on species that threaten Wisconsin's economy and ecology - and may be approaching but not yet established in the state.

The rules create a comprehensive, science-based system with criteria to classify invasive species into 2 categories: "Prohibited" and "Restricted". With certain exceptions, the transport, possession, transfer and introduction of Prohibited species is limited. Restricted species are also subject to a ban on transport, transfer and introduction, but possession is allowed, with the exception of fish and crayfish. DNR may issue permits for research or public display of any listed invasive species. For species other than invasive fish and crayfish, permits may also be issued for any other purpose.

Incidental or unknowing transport, possession, transfer or introduction of a listed invasive species without a permit is exempt if DNR determines that it was not due to the person's failure to take reasonable precautions.

With landowner permission or a judicial inspection warrant, DNR may inspect for, sample and control Prohibited species only. People found responsible for a Prohibited species presence on property they own, control or manage may be ordered to carry out approved control measures. If a control order is not followed, and DNR takes control measures, DNR may seek cost-recovery. Control of Restricted species is encouraged, but not required.

The rules include preventive measures that are not species-specific but instead address common pathways that may allow invasives to spread. These measures complement existing statutes and rules such as the VHS rules and include requirements to remove aquatic plants and animals and drain water from vehicles, boats, trailers and equipment upon removal from the water and to remove aquatic plants and animals from any vehicle, boat, trailer or equipment before placing it in any water of the state or transporting it on a highway.

The rules were developed with advice from the Wisconsin Invasive Species Council.

RECOMMENDATION: Adopt Order IS-34-06.

LIST OF ATTACHED MATERIALS:

- | | | | | | |
|----|-------------------------------------|---|-----|-------------------------------------|----------|
| No | <input type="checkbox"/> | Fiscal Estimate Required | Yes | <input checked="" type="checkbox"/> | Attached |
| No | <input checked="" type="checkbox"/> | Environmental Assessment or Impact Statement Required | Yes | <input type="checkbox"/> | Attached |
| No | <input type="checkbox"/> | Background Memo | Yes | <input checked="" type="checkbox"/> | Attached |

APPROVED:

_____/s/_____/s/

Administrator, Paul DeLong, Susan Crawford

_____/4/9/09

Date

_____/s/_____/s/

Administrator, Todd Ambs, Laurie Osterndorf

_____/4/9/09

Date

_____/s/

Secretary, Matt Frank

_____/4/9/09

Date

- | | |
|---------------------------|-----------------------------|
| cc: Laurie J. Ross - AD/8 | Jane Cummings Carlson - SCR |
| Peter Flaherty - LS/8 | Tom Boos - FR/4 |
| Bill Horns - FH/4 | Kelly Kearns - ER/6 |
| Jen Hauxwell - SS/RC | |
| Martye Griffin - WT/4 | |

DATE: February 26, 2009

FILE REF: 3600

TO: Natural Resources Board

FROM: Matthew J. Frank

SUBJECT: Request for Adoption of Natural Resources Board Order No. IS-34-06, Invasive Species Identification, Classification and Control

BACKGROUND

Invasive species threaten Wisconsin's traditions, environment and economy in every corner of our lands and waters. State law directs the Department to establish a statewide program to control invasive species, and to promulgate rules to identify, classify and control invasive species for purposes of the program. This proposed comprehensive rule establishes a first-of-its-kind science-based classification system designed to address those invasive species considered most threatening to our environment and economy. The rule provides flexibility allowing citizens, business and government to continue operations without undue restriction. The rule will help the Department and others to prioritize their actions regarding invasive species to be more efficient and cost-effective by ensuring that energy and resources are spent on those species and populations with the greatest likelihood of harm and the greatest opportunity for control. The rule does not require control of species that are already widespread. The program focuses on effective response to species that have the potential for impact in Wisconsin and may be approaching but are not yet established in the state.

Without this rule, different invasive species groups are not treated consistently, making concerted action less likely. Federal and state laws provide regulations and resources for early detection and quarantine for invertebrates and disease-causing organisms. State law limits the release of non-native fish and other vertebrates into the wild. However, there are very few federal or state laws that relate to non-native plants. Local noxious weed ordinances are erratic and often unreasonable in their implementation. This proposed rule allows the Department to have more consistent authority and actions between the species groups and to provide one clear, state-wide law that is reasonable and feasible so that Wisconsinites can help minimize the spread of truly invasive species. Implementation of this rule will focus on education and early detection

What event or action triggered the proposal?

The Order creates a new chapter of the Administrative Code relating to the classification, regulation and control of invasive species, as part of the state-wide program to control invasive species under s. 23.22 (2), Stats. That section states that the Department shall establish a statewide program to control invasive species and shall promulgate rules to identify, classify and control species for purposes of the program.

Rule Development Process and Public Involvement

The Wisconsin Council on Invasive Species (the Council) was created by s. 15.347 (18), Stats., and appointed by the Governor to make recommendations to the Department for classifying invasive species under the invasive species program. The Department and the Council have been working over the last 4 years to develop rules to classify and regulate invasive species. The Council's Research and Regulations committees, consisting of experts and industry and stakeholder representatives, developed the process that the Department followed to assess invasive species for purposes of classification.

The Council consists of representatives of the Departments of Natural Resources, Administration, Agriculture, Trade and Consumer Protection, Commerce, Tourism, and Transportation and 7 other members serving 5-year terms representing public and private interests such as the agriculture, nursery, and commercial fishing industries, landowners, conservation groups and the University. The current members include:

Charles Henriksen - Henriksen Fisheries
Gregory Long - Needles & Leaves Nursery
Peter Murray – retired, landowner
Paul Schumacher - Wisconsin Association of Lakes
Kenneth Raffa - UW Department of Entomology
James Reinartz - UW Milwaukee Biology Department and Field Station
Patricia Morton - The Nature Conservancy
Dennis Seevers - retired
Laurie Osterndorf - Department of Natural Resources
Harald (Jordy) Jordahl - Department of Administration
Brian Kuhn - Department of Agriculture Trade and Consumer Protection
Renee Bashel - Department of Commerce
Will Christianson - Department of Tourism
John Kinar - Department of Transportation

The Council's Research and Regulations committees developed detailed criteria for assessing species for classification. The criteria include:

- a) Potential economic, environmental or human health impacts of the species
- b) Current presence, distribution and abundance in the state
- c) Potential for establishment and spread
- d) Control potential
- e) Socio-economic impacts of the species, both positive and negative

Department staff, with input from the Council and others, developed the lists of species to be assessed based on these criteria. Summaries of the available scientific literature were written on each of those species, specifically with regard to the assessment criteria. These literature summaries were reviewed by land managers and species specialists and knowledgeable stakeholders. Species Assessment Groups (SAGs) were developed to assess the species and to make recommendations to the Council. The SAGs, which were comprised of experts in their respective fields and stakeholder groups, used the criteria for species selection to advise the Council on the placement of species in specific categories. Separate SAGs were developed for specific categories including:

- a) aquatic plants and algae
- b) woody plants
- c) terrestrial herbaceous plants
- d) fish and aquatic invertebrates
- e) terrestrial and aquatic vertebrates
- f) terrestrial invertebrates and plant disease causing microorganisms

For this initial rule development, species that were assessed were generally limited to those that did not have significant socio-economic values to some sector of society. Those species that are widely used or sold will require more extensive review and coordination with affected stakeholders. They will be assessed in a future rule revision that will follow the same SAG process utilized in this effort. The Council met in October, 2007 and discussed the SAGs' recommendations. For a few species the Council revised the classifications recommended by the SAGs. For most species, the Council agreed with the SAG recommendations.

In 2007, the Department prepared a draft rule and conducted informal listening sessions to garner input on the draft rule. Listening sessions for the public were held in Milwaukee, Madison, La Crosse, Spooner, Rhinelander (2), and Green Bay. Listening sessions for Department staff were held in Milwaukee, Madison, Fitchburg, Spooner, Rhinelander and Green Bay. The sessions included a brief overview of the rule and then participants asked questions and provided comments. There was also an opportunity to comment via email, on the Department website and through a printed questionnaire. Several hundred comments were received and Department staff considered the comments in making further revisions to the draft rule.

In 2008 the Natural Resources Board approved public hearings on the proposed rule. Six hearings were held and 129 persons attended. In addition, over 1350 comments were received by mail and email. These comments are summarized in the attached hearing synopsis. Many meetings were held with organizations, companies and individuals who submitted significant comments. The rule was revised accordingly.

What issues are addressed by this rule?

The rule identifies, classifies and regulates invasive species. Invasive species are a known threat to the aquatic and terrestrial resources of Wisconsin. Current state and federal laws on invasive species are inconsistent among species groups. For some, such as fish and forest insects and diseases, there are a number of existing laws that give the Department of Natural Resources (DNR) and the Department of Agriculture, Trade and Consumer Protection (DATCP) authority to regulate them in some ways. For other groups of invasive species, such as terrestrial plants, existing state and federal laws are very limited and there have been no state agencies with regulatory authority.

Invasives have caused environmental and economic damage and threaten human health. Examples include the cost resulting from zebra mussels clogging water intake facilities, depletion of Great Lakes fish populations by the sea lamprey, decreasing forest regeneration, loss of biodiversity, the impacts of cyanobacteria in our waterways, the blistering from wild parsnip, and the threat posed by emerald ash borer (727,000,000 forest ash trees at risk in Wisconsin).

The proposed rule establishes a consistent, science-based classification and regulatory system for all listed invasive species. The rule sets specific restrictions on actions such as possession, sale, transportation and introduction of listed invasive species. It will allow the Department to work with local units of government, state or federal agencies, land managers and landowners to quickly contain new infestations of prohibited species likely to become problematic. It does not require the control of restricted species -- those already widespread. The proposed rule defines *invasive species* to exclude dead specimens and non-viable life stages.

For this initial rule development, the effort focused primarily on listing those species that were clearly invasive and whose trade, propagation or use were not believed to be important to any segment of society. The rule does not address VHS, CWD or certain other fish and wildlife pathogens that are already the subject of specific control programs.

Implementation of this rule will focus on education and early detection. It is important that specific target audiences and the general public learn how they may be affected by invasive species and what they can do to minimize their spread. A stepped enforcement process will be conducted only when attempts at cooperative efforts at prevention and control are unsuccessful.

SUMMARY OF THE RULE

The Order creates rules for the identification, classification and control of invasive species, as part of the Department's state-wide program to control invasive species required under s. 23.22 (2), Stats. Section 23.22 (1) (c), Stats., defines "invasive species" to mean nonindigenous species whose introduction causes or is likely to cause economic or environmental harm or harm to human health.

The proposed rule establishes criteria for classifying invasive species and lists or identifies specific invasive species into 2 categories (prohibited and restricted) according to those criteria. The rule prohibits or restricts the transportation (including importation), possession, transfer (including sale) and introduction of invasive species that are listed or identified as "prohibited", with certain exceptions. Based on input from the public and the Natural Resources Board, a section was added to the rule to allow the Secretary of the Department to temporarily add species to the prohibited category in emergency situations.

"Restricted" invasive species are also subject to a conditional ban on transportation, transfer and introduction, but not possession (except for fish and crayfish), with certain exceptions. The rule also allows transportation, possession, transfer or introduction for research, education, identification, control or disposal or for other specified purposes when authorized by exemption or by a Department permit.

Transportation, possession, transfer and introduction of listed invasive species without a permit are not violations of the chapter if the Department determines that the transportation, possession, transfer or introduction was incidental or unknowing, and was not due to the person's failure to take reasonable precautions. Following Best Management Practices that are currently being developed by stakeholder groups would be one of several means of taking "reasonable precautions". Another rule in the chapter bans transportation out of quarantined areas and DNR infestation control zones of items or host materials that may carry any invasive species and that are subject to a quarantine by the Department, the Wisconsin Department of Agriculture, Trade and Consumer Protection (DATCP) or the United States Department of Agriculture Animal and Plant Health Inspection Service (USDA APHIS), regardless of whether the transportation was incidental or unknowing.

For prohibited species, the goal of the rule is to eradicate, contain or slow the spread of the infestation, regardless of whose property the species is on. Department staff must seek permission before entering any property where they have reason to believe a prohibited species is present. The Department will seek to work cooperatively with the land owner or manager to determine the best means of control and approve a management plan. The Department will seek funds to assist in the control of prohibited species. Control efforts will be attempted only if the Department determines it is feasible and reasonable to control the prohibited species on the property. The rule authorizes the Department, if needed, to enter property for the purpose of inspection, sampling and control of prohibited invasive species. If the inspection finds that the landowner is responsible for the infestation of the prohibited species, the rule allows the Department to order persons who own, control or manage property where prohibited invasive species are present to implement approved control measures. If inspection determines that the landowner is at no fault for the presence of the prohibited species, the Department may conduct the control efforts. If a control order is not complied with and the Department undertakes control measures, the rule allows for cost-recovery by the Department for the expenses it incurred. In contrast, "restricted" species are not subject to any control requirements, except that persons who grow restricted plant species at a nursery are required to make best efforts to destroy them if the nursery closes.

General preventive measures are also required by the rule, without being specific as to species. These measures regulate certain common activities that function as pathways for the inadvertent introduction or

spread of invasive species, unless a permit to engage in the activity has been issued by the Department. The preventive measures have been revised so that they complement and do not conflict with or duplicate other rules or statutes such as the VHS rules in ss. NR 19.05 and 19.055, the rules governing operation and maintenance of dry fire hydrants in s. NR 329.04, the prohibition in s. NR 109.08 (4) against placing equipment used in aquatic plant management in another navigable water, and the “illegal to launch” prohibitions in s. 30.715, Stats., which ban the placement of a boat, trailer or boating equipment in navigable water if there are aquatic plants attached or (for the St. Croix river only) zebra mussels attached.

Preventive measures include requirements to:

- notify the department of the escape of restricted invasive fish species from a safe facility,
- remove all attached aquatic plants and aquatic animals from vehicles, boats, trailers, equipment and gear of any type immediately upon their removal from the water,
- drain all water from any vehicle, equipment other than boating or fishing equipment, or gear of any type immediately upon its removal from the water,
- remove all attached aquatic plants and aquatic animals from vehicles, boats, trailers, equipment and gear of any type before bringing it into the state over land for use on any water of the state or its bank or shore.
- drain all water from any vehicle, equipment other than boating or fishing equipment, or gear of any type before bringing it into the state over land for use on any water of the state or its bank or shore,
- remove attached aquatic plants and aquatic animals from any vehicle, certain boats, boat trailers, and equipment, and gear of any type or from a sea plane before placing it in any water of the state, and before taking off in a seaplane or transporting a vehicle, boat, boat trailer, equipment or gear of any type on a public highway,
- not transport “identified carriers” – materials that are covered by a department infestation control zone designation or a DATCP or USDA APHIS quarantine order,
- not use a prohibited invasive fish or crayfish species as bait,
- not introduce a nonnative aquatic plant, algae or cyanobacteria species into any water of the state.

The preventive measure rules also set out specific exemptions for permitted activities, for movement and cleaning of aquatic plant harvesting equipment, for wild rice, for waterfowl blinds, transport of an identified carrier of an invasive species from a department infestation control zone, a DATCP quarantine area or a United States Department of Agriculture Animal and Plant Health Inspection Service quarantine area pursuant to a DATCP-USDA APHIS compliance agreement, and for other specific situations.

Criteria and procedures for permit application, issuance, administration and revocation are detailed in the rule. Finally, the rule sets out the enforcement procedures available to the Department under the statutes for violations of the rule and of permits issued under the rule.

Fish and aquatic invertebrates

The rule defines all non-native fish species as prohibited invasive species, but identifies non-native species in the aquaculture industry, non-native viable species in the aquarium trade, and established non-native species as “restricted” species that are permissible for certain defined uses. For example, nonnative fish species in the aquaculture industry may be transported, possessed in a safe facility, possessed in a registered fish farm, or transferred without a permit issued by the department under the rule.

In addition certain named species of fish and aquatic invertebrates are classified as “prohibited”: bighead carp, black carp, grass carp, silver carp, eastern mosquitofish, western mosquitofish, red shiner, viable

(i.e., capable of surviving in Wisconsin) snakehead species, tench, zander, Asian clam, bloody shrimp, Chinese mitten crab, New Zealand mud snail, water flea, spiny water flea, fishhook water flea, and faucet snail. Species in this group may not be transported, possessed, transferred, or introduced without a permit issued by the Department.

“Restricted” fish and crayfish invasive species are classified into three groups: non-native viable fish species in the aquarium trade, non-native fish species in the aquaculture industry, and established non-native fish and crayfish species. *Non-native viable fish species in the aquarium trade* are goldfish, koi carp, sterlet, Chinese hi-fin banded shark, bitterling, ide, and weather loach. *Non-viable* fish species are those for which eggs, fry, or adults are not capable of surviving water temperatures below 38 degrees Fahrenheit or not capable of surviving in fresh water. *Non-native viable fish species in the aquarium trade* may, if held in a safe facility, be transported, possessed or transferred, but may not be possessed elsewhere, stocked, or used live as bait without a permit issued by the Department, except that goldfish and koi carp may be transported, possessed, or transferred. For fish, a *safe facility* is one that does not directly drain into a water of the state, is not subject to flooding, is not connected to any water of the state, and is not an open pond. *Non-native fish species in the aquaculture industry* are arctic char, Atlantic salmon, brown trout, chinook salmon, coho salmon, rainbow trout, pink salmon, redear sunfish, tiger trout, and tilapia. Species in this group may be transported (DNR permit required under ch. 29, Stats., for importation), possessed in a *safe facility*, possessed on a registered fish farm, or transferred without a permit issued by the Department under this rule. Stocking is prohibited under current law except by DATCP and DNR permit and use as live bait is prohibited. *Established non-native fish and crayfish species* are alewife, common carp, rainbow smelt, round goby, ruffe, sea lamprey, three-spine stickleback, tubenose goby, white perch, and rusty crayfish. Species in this group may not be transported, possessed, transferred, stocked, or used as live bait without a permit issued by the Department.

Terrestrial and Aquatic Vertebrates (except fish)

Proposed prohibited terrestrial and aquatic vertebrates are Russian boar and other wild swine, feral domestic swine, and monk (Quaker) parrot (parakeet). Red-eared slider turtles with a carapace (top shell) length less than 4 inches are the only restricted terrestrial or aquatic invasive vertebrate. However, legally obtained prohibited or restricted animals that are pets may be possessed, transported, or transferred without a permit issued by the Department.

Terrestrial and Aquatic Plants

There are 27 prohibited species including such species as kudzu and giant hogweed. There are 32 restricted species including such species as garlic mustard, common buckthorn and Canada thistle. There are 12 “split-listed” species including Japanese hedge parsley and black swallow-wort that are prohibited in part of the state and restricted in the remaining part. The split classification is necessary because there are several plants that are located in a part of the state and not in another; therefore it is critical to prevent such species from spreading into uninfested areas of the state. It is likely that permits will be developed for certain species in the plant trade, such as the oriental bittersweet that is grown and exported for the cut flower industry. Some aquatic species were assessed for which there are documented invasions in southern climates, but for which there remains uncertainty about their potential to spread in Wisconsin. Most of these species are not proposed to be regulated unless more information becomes available to suggest a threat in northern climates. In addition, there are many species which have been suggested for addition to the rule as known or potential invasiveness. Many of these will be assessed in a future rule revision.

Terrestrial Invertebrates and Plant Disease Causing Microorganisms

There are 7 prohibited species including hemlock woolly adelgid, emerald ash borer, crazy worms, Asian longhorned beetle, scale from beech bark disease, Asian gypsy moth and sudden oak death pathogen, and one proposed restricted species: European gypsy moth.

Algae and Cyanobacteria

A total of 6 species of algae and cyanobacteria are listed as prohibited species. There are no restricted species.

HOW DOES THIS PROPOSAL AFFECT EXISTING POLICY?

The proposed rule implements existing Legislative policy in s. 23.22, Stats., and is consistent with other statutes and Department rules affecting invasive species.

Fish and aquatic invertebrates

For non-native fish the rule adopts an approach in which any non-native species is regarded as invasive and prohibited unless explicitly allowed by listing in one of the sub-categories of restricted fish species. Existing statutes already prohibit the importation of non-native fish and the introduction of any fish into the wild without a permit.

Terrestrial and Aquatic Vertebrates

The rule complements and is consistent with existing statutes and administrative codes, mainly chs. 29 and 169, Stats., and ch. NR 16, Wis. Adm. Code. The listing of Russian boar and other wild or feral domestic swine is consistent with the Department's efforts to prevent the establishment of these animals in the wild and to eliminate them wherever they occur in the wild. Existing statutes already prevent the introduction of wildlife into the wild without a permit. The rule is consistent with 2007 Wisconsin Act 119, effective April 4, 2008, that requires the Department to designate by rule wild swine and feral swine as "harmful wild animals."

Terrestrial and Aquatic Plants and Algae

Currently there are no statutes or rules regulating most invasive plants in the state. They may be sold, purchased, transported and intentionally introduced to the environment. The Nuisance Weed Law (s. 23.235, Stats.) lists only 2 species, purple loosestrife and multiflora rose, and prohibits their sale. It does not provide a means for adding other species to the list. The Noxious Weed Law (s. 66.0407, Stats.) simply lists 3 species, Canada thistle, leafy spurge and field bindweed, as noxious weeds statewide and provides counties and municipalities the authority to list additional noxious weeds at a local level and require their control. The proposed rule includes 2 of those 3 species in the "restricted" category, restricting the sale and use of these species. The proposed rule does not affect the authority of municipalities to list species locally. However, it will assist municipalities in determining what species would be appropriate to add to their local noxious weed laws. This rule will complement and support the use of the noxious weed law at the local level.

The rule complements s. 23.24, Stats., which lists Eurasian water milfoil, curlyleaf pondweed, and purple loosestrife as invasive aquatic plants, by establishing a more extensive list of potential invaders to Wisconsin waters. Under s. 23.24, Stats., the Department may designate any aquatic plant as an invasive aquatic plant for a water body or group of water bodies. While s. 23.24, Stats., still grants that authority, the proposed rule clarifies the list of species that could cause significant adverse effects and regulates the transport, possession, transfer or introduction of those species. In addition, the rule is consistent with Department policies related to the Clean Boats Clean Waters program, now providing the additional regulatory step banning the transport of boats, trailers and equipment with any aquatic plants or animals attached, or containing water.

Terrestrial Invertebrates and Plant Disease Causing Microorganisms

The proposed rule strengthens the state's authority to enforce quarantines of the organisms that pose the highest risk to Wisconsin's forest ecosystem. Department law enforcement staff will effectively have authority to enforce quarantines set in place by DATCP, increasing the opportunity to contain or slow the spread of high-risk organisms. The prohibition on transporting, transferring, possessing and introducing prohibited species is consistent with DATCP's goals outlined under ch. ATCP 21, Wis. Adm. Code, and ch. 94, Stats.

HEARING SYNOPSIS AND HOW THE RULE WAS REVISED AFTER PUBLIC HEARING

See attached Public Hearing Synopsis for a summary of significant public comments and the department's responses to those comments.

The revisions made to the rule following the public hearings include removing the mute swan from rule, combining the lists of aquatic and terrestrial plants under a single list, changing the approach for terrestrial vertebrates from one that deemed all non-native species to be invasive unless exempted in favor of listing individual named species instead, clarifying the exemption for incidental or unknowing violations that were not due to a person's failure to take reasonable precautions, rewriting the inspection authority, control order and cost recovery provisions, adding a section authorizing the Secretary to issue temporary emergency orders to add species to the prohibited species list, clarifying exemptions where equivalent permits or approvals are issued by other Department programs or by DATCP, revising the preventive measures section of the rule so that it does not overlap or conflict with other rules or statutes, and removing a redundant section that repeated the statutory penalties for violations of the rule or permits issued under the rule.

RULES CLEARINGHOUSE COMMENTS

1. Statutory Authority.

a. The department should explain its statutory and constitutional authority to do the following, as well as any other similar provisions:

(1) require a person to allow department access to property owned, controlled, or managed by the person;

(2) require a person who owns, controls, or manages property to control invasive species that exist on the property, including paying the cost of control where other funding is not available;

(3) recover the reasonable and necessary expenses the department incurs controlling an invasive species. [See s. NR 40.04 (4).]

Department responses: Comment accepted. The Order's plain language analysis has been revised to better explain the Department's authority to adopt the rule, and the rule has been revised and no longer requires a person to allow Department access to property. The rule now states that the Department may enter private property to inspect, survey or control prohibited invasive species with consent of the property owner or person in control of the property, or pursuant to an inspection warrant issued by the circuit court, if consent cannot be reasonably obtained. Unless the Department determines that the prohibited species is present through no fault of the land owner or manager, the revised rule allows the

Department to unilaterally order a land owner or manager to control a prohibited invasive species on the property, but only after giving the person an opportunity to enter into a consent order. Similarly, the revised rule allows the Department to recover the costs it incurs in controlling prohibited invasive species, but only if the owner or manager of the property was issued an order and failed to comply with it.

b. The department should explain its authority to prohibit the transport of all aquatic plants and all animals on highways, instead of just the transport of invasive species, and the reconciliation of that authority with the more limited prohibition under s. 23.245, Stats. [See s. NR 40.06 (5) (a).]

Department responses: Comment accepted in part. The Department believes that a prohibition on the transport of specific aquatic invasive plants and animals *per se* would be ineffective and nearly impossible to enforce in most circumstances because it would be too difficult for a non-expert to correctly identify even some common invasive aquatic species in the field. In addition, not all invasive aquatic plants can be identified solely using visual characteristics. For example, discerning the highly invasive and prohibited hybrid milfoil (cross between Eurasian and northern watermilfoil) from native northern watermilfoil requires genetic verification. For this reason, a broader ban on the transport of aquatic plants and animals in general is reasonable and necessary in order to control the spread of aquatic invasive species from waterbody to waterbody, especially since they are commonly comingled with native species. A highly relevant example of Legislative recognition of this unavoidable fact appears in s. 30.715, Stats. To prevent the spread of invasive aquatic plants, it prohibits the placement of a boat or boat trailer in navigable water if the boat or trailer has any aquatic plants attached.

The Department does not believe that the prohibition in the rule on the transport of all aquatic plants and all animals on highways needs to be reconciled with the more limited prohibition on the transport of just “invasive species” under s. 23.245, Stats. In promulgating Clearinghouse Rule 08-074, the Department draws its authority from a number of statutes (listed in the plain language analysis of the Order), but it is expressly not relying on, interpreting or implementing either s. 23.225, Stats., relating to invasive fish species (as defined by Department rule), or s. 23.245, Stats., relating to transporting certain boats and equipment on highways with invasive species (as defined by Department rule) in or attached. These 2 statutes were adopted as part of 2007 Wisconsin Act 226, effective June 1, 2008 (the budget repair bill). Both statutes will require further rulemaking by the Department before they become applicable.

c. The department should explain its authority to include wild rice within the definition of “aquatic plant” despite the specific exclusion of wild rice from this term under s. 30.715 (1) (a), Stats. Note that the rule excludes wild rice from the transport prohibition under s. NR 40.06 (5) (a) during the open season for wild rice harvest, but the statute appears to require its exclusion year-round.

Department response: Comment accepted. In promulgating Clearinghouse Rule 08-074, the Department is not interpreting or relying on any express or implied rulemaking authority that might be found in s. 30.715, Stats. Rather, the rule is based primarily on s. 23.22, Stats., which has its own enforcement and penalty provisions, and which was adopted more recently than s. 30.715, Stats. The definition of “aquatic plant” in this rule is not intended to apply to s. 30.715, Stats., and nothing in s. 30.715, Stats., prohibits the Department from adopting a different definition of “aquatic plant” under s. 23.22, Stats., with a different, more stringent exemption for wild rice for purposes of this rule. The Clearinghouse comment appears to be based merely on a possible negative implication arising from the statutory definition, and not on any express language of limitation. In any event, there is no inherent conflict between the two definitions, since a person can easily comply with both the rule and the statute.

But to reduce potential confusion, the wild rice exemption from the transport prohibition (now located in s. NR 40.07(4)(a)) has been revised so that it no longer is limited to the open season for wild rice harvest.

2. Form, Style and Placement in Administrative Code.

a. It is suggested that the species lists under the definitions of “Established nonnative fish species and established nonnative crayfish species,” “Fish species in the aquarium trade,” and “Fish species in the aquaculture trade” be taken out of the definitions section and placed directly in the substantive provisions of the code where applicable. These lists may change in the future and may create confusion and misinterpretation of the rule if contained in the definition section.

Department response: Comment rejected. The Department does not agree that these list definitions are likely to change, or that a change in the definition lists would necessarily create confusion. More importantly, the length of the chapter is measurably shortened by defining terms like these once in the definition section instead of repeating the lists verbatim several times throughout the body of the chapter.

b. The department should review the defined terms in the proposed rule to determine if each are used in the rule text and need to be defined. For instance, see the term, “natural areas.”

Department response: Comment accepted. The rule has been revised to remove unused definitions.

c. In s. NR 40.06 (2) (intro.), “any of the following” should be inserted before the colon. In s. NR 40.05 (3) (intro.), “do any of the following” should be inserted before the colon and in subd. 1., “, or” should be replaced by a period. Section NR 40.07 (intro.) should be sub. (1) and given a subsection title and the remaining subsections should be renumbered. [See s. 1.03 (8), Manual.]

Department response: Comment accepted. The rule has been revised accordingly.

3. Conflict With or Duplication of Existing Rules.

The “preventive measures” section [s. NR 40.06] includes a number of provisions that appear to duplicate or conflict with other provisions of the Administrative Code [see chapters NR 19 and 109]. If it is the department’s intent to repeal the provisions in these existing chapters and replace them in this new chapter, it must expressly do so. Also note that there are multiple differences between these duplicated provisions including the lack of a provision in the proposed rule to allow minnows used for bait to be transported away from a body of water, the lack of some provisions related to Viral Hemorrhagic Septicemia in the proposed rule, the lack of some key definitions that are currently contained in ch. NR 19 like the definition of “live fish,” and provisions governing the use of aquatic invasive plant control equipment under s. NR 109.08 (4) (b) (this last conflict is even pointed out in a note following s. NR 40.06 (5) (b) 6., yet does not appear to be addressed by the proposed rule). Finally, if it is the department’s intent to implement the changes reflected by the differences between the proposed rule and existing rule, it should detail these changes in the plain language analysis of the rule summary.

Department response: Comment accepted. The rule has been revised to avoid duplicating or conflicting with other provisions of the Administrative Code and the statutes. Explanatory notes have been added to the rule to inform the reader of those other relevant code or statutory provisions, and the plain language analysis of the rule summary has been updated accordingly.

[Note, there were no Clearinghouse comments numbered 4.]

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

a. It is recommended that the defined term “category” be changed to something that provides more of an indication of its intended meaning, like “species category.”

Department response: Comment rejected. The term “category” has been retained because it is defined in the rule and its meaning is clear enough as used in the context of the rule. The Department sees no benefit in using two words when one will do.

b. If the department intends the word “species” as used in the definition of “category” to mean the same as “species” as defined later in the section, it should remove the explanatory text relating to the meaning of “species” from the definition of “category.” If that is not the intent, it is not clear what different meaning of “species” is intended.

Department response: Comment accepted. The definition of “category” has been revised as recommended.

c. It is recommended that the definitions of “prohibited invasive species” and “restricted invasive species” be removed and the substance of these definitions be added to s. NR 40.03 (2) because these are not actual definitions of the terms, but instead are criteria that are used in determining how to classify a particular species. If some form of these definitions is retained, under the definition of “prohibited invasive species” the purpose of the last sentence is not clear. Is this included as a simple statement of fact (in which case it should be removed from the definition), or is the “feasibility of statewide eradication or containment” of a species a condition of whether the species is included under this classification (in which case this requirement should be clarified)? The same consideration should be made for the last sentence of the definition of “restricted invasive species” if it is retained.

Department response: Comment accepted in part. These definitions have been clarified instead.

d. It appears that a comma should be inserted between “in this paragraph” and “that have become feral” under s. NR 40.04 (2) (f) 5. r.

Department response: Comment accepted. This provision has been eliminated from the rule, so the Clearinghouse comment is moot.

e. In ss. NR 40.02 (37) and 40.03 (2) (e) (note), the word “currently” should either be removed or replaced by an actual date, such as the effective date of the rule. [See s. 1.01 (9) (b), Manual.]

Department response: Comment accepted. The rule has been revised to eliminate use of the word “currently”.

f. The lists in ss. NR 40.04 and 40.05 should be alphabetized so that a reader may more easily ascertain whether a particular species is included. If it becomes necessary to add a species in the future, this may be done by use of letters; for example, subd. 15m. could be inserted between subds. 15. and 16. [See s.1.03 (7), Manual.]

Department response: Comment accepted. The lists were alphabetized according to the species' scientific names, although the common names were set out first. The rule has been revised so that scientific names are set out first in each list, in alphabetical order.

g. What procedure will the department use to determine whether ss. NR 40.04 (3) (b) and 40.05 (3) (b) apply to an individual? Some of the species listed under s. NR 40.05 (2) are very common in this state, and are routinely transported and transferred. For example, many of the listed restricted plants could be “knowingly” incorporated into agricultural products such as hay and silage that are transported and transferred. These agricultural practices appear to require a permit from the department under this rule.

Department response: Comment accepted. The Department will determine whether a person qualifies for the exemptions under ss. NR 40.04 (3) (b) and 40.05 (3) (b) on a case-by-case basis in the course of administering and enforcing the rule. These exemptions provide that the permit requirement does not apply to a person who transports, transfers, possesses or introduces a listed invasive species if the conduct was either unknowing or inadvertent, and if the transport, transfer, possession or introduction was not due to the person's failure to take reasonable precautions to prevent it. The Department intends to identify reasonable precautions in the form of best management practices (BMPs) which would prevent or minimize transport, transfer, possession and introduction of invasives. The BMPs will be identified or developed in collaboration with interested businesses and individuals who routinely handle plants, fish and other items where invasives might unknowingly or inadvertently become part of the mix.

h. Under this rule, it appears that individuals attempting to control restricted plant species would subject themselves to liability if they accidentally allow an invasive species to be “introduced,” which is very broadly defined, during their control efforts. [s. NR 40.05 (3) (d)] Section NR 40.05 (3) (b) would not appear to allow the department to look past an inadvertent release that occurs incidental to a control effort because even if the person “introduced” the invasive species accidentally, the person would have still intentionally possessed, and probably intentionally transported, the invasive species in violation of par. (b). Is this the department's intent?

Department response: Comment accepted. This is not the Department's intent. As explained in the previous response, incidental transportation, transfer, possession and introduction of an invasive species do not require a permit and are not a violation of ss. NR 40.04 or 40.05 if the Department determines that the person took reasonable precautions to prevent it, such as by following best management practices in the handling of specimens collected during a control effort.

i. Because of the significance of the meaning of the word “attached” under s. NR 40.06 (5), this term should be defined.

Department response: Comment accepted. A definition of the word “attached” has been added to the rule.

INFORMATION ON ENVIRONMENTAL ANALYSIS, IF NEEDED.

This is a Type III action under Chapter NR 150, Wis. Admin. Code. No Environmental Assessment is required.

FINAL REGULATORY FLEXIBILITY ANALYSIS

The rule does not have a significant economic impact on a substantial number of small businesses. Species assessed and listed in this rule were chosen in part because limiting their use would not cause significant hardships for any sector of society. A few businesses will need to stop the sale of a few species that are not major commodities for them. Some businesses, governmental agencies and individuals will be expected to follow best management practices (BMPs) or take other reasonable precautions when conducting their business to prevent the unknowing or incidental spread of invasive species. Such stakeholder groups are being involved in the development of such BMPs to ensure that they are reasonable and feasible. Department staff met with representatives of most organizations that had significant comments on the draft rule and revised the rule to accommodate their concerns to the extent practicable.

Further justification follows for each group of species.

Terrestrial and Aquatic Plants, Algae and Cyanobacteria:

The Wisconsin Nursery Association surveyed its members and found that there are very few that are growing the plants listed in this rule, so the impacts will be minor. Businesses that have valid reasons to use restricted species in ways that minimize their spread may apply for a permit to allow specific uses. A very small number of floriculture growers, herbalists, nursery growers and others are likely to utilize the permit process. Unless they fit under an exemption or have obtained a permit, any business that sells or uses prohibited or restricted species will need to sell the plants prior to rule implementation, or keep them indefinitely. Department staff will be contacting potentially affected businesses prior to implementation.

Landowners or public land managers whose property contains a prohibited species may be asked to control the species. Department staff or cooperators will work with the landowners to determine the best means to contain the prohibited species. Where possible the Department will assist with the control effort and will seek funding, such as federal grants, to assist in the cost of controls. Landowners that possess restricted species on their property are encouraged to control the invasive species, but are not required to do so.

Boaters, lake associations and state, county, or municipal water resource managers and private consultants, water garden and aquarium industry may be affected by this rule. They will not be allowed to introduce listed species to the environment and will need to take reasonable precautions to avoid transport or introducing aquatic invasive species. Marinas, fishing resorts, lakeshore owners, anglers and others will benefit from the results of this rule as fewer water bodies become infested with invasives.

Utilities, mowing contractors and others who conduct vegetation maintenance or construction activities may need to modify their practices to prevent the inadvertent spread of listed species. Restoration and water resources consultants, vegetation managers, landscape contractors, property managers and landowners all may benefit from this rule.

Fish and aquatic invertebrates:

The rule may affect fish farmers, aquarium-fish stores and crayfish trappers. The rule does not impose any additional reporting or record-keeping requirements on them. No species currently handled on fish farms will be prohibited or further restricted, but new non-native species could not be used for aquaculture under the rule. Grass carp are not currently permitted in Wisconsin and are prohibited under the proposed rule. This may be a point of disagreement with the aquaculture industry. The importation of mosquitofish to fish farms for rearing, introduction, or use as bait is currently illegal without a Department permit under s. 29.735, Stats., and the rule does not change that, except to explicitly condone

the incidental or unknowing importation of this species when not due to a person's failure to take reasonable precautions. It is not the intention of the Department to curtail current importation practices, but we are interested in working with the Wisconsin Aquaculture Association and individual fish farmers to develop best management practices that would, if possible, limit the incidental importation of this species and that would minimize or eliminate its dispersal with bait after importation.

The rule prohibits only 2 species now handled in the aquarium trade, the eastern and western mosquitofish, but viable non-native aquarium species not currently in trade would be prohibited and the identified fish species in the aquarium trade would have to be confined to safe facilities. The prohibition of mosquitofish may be a point of disagreement with the aquarium-fish industry. Consistent with the newly approved VHS rules, recreational anglers will be prohibited from transporting live fish, except under certain defined conditions, and boaters will be required to observe certain safety precautions, including draining all water from boats and containers and clearing all non-native species from their boats and trailers. Crayfish trappers will be required to keep any live rusty crayfish that they have trapped in safe facilities.

Terrestrial Invertebrates and Plant Disease Causing Microorganisms:

No significant new impacts are expected. This rule supports existing authority for prohibitions and quarantine enforcement already in place for DATCP and outlined in ch. ATCP 21, Wis. Adm. Code, and ch. 94, Stats., thus businesses that transport, possess and transfer raw wood products such as pulp and paper mills, sawmills and firewood dealers may be affected by more rigorous enforcement of quarantine rules. Movement of raw, untreated products out of quarantined areas will be restricted. Treatment of raw wood products or restrictions on timing of movement out of a quarantined area may be required.

Terrestrial and Aquatic Vertebrates (except fish):

No significant impact is anticipated for small businesses. Anyone raising Russian boar or other wild swine for meat-production agriculture will be able to continue their business but will be required to secure a DNR permit. Sales and possession of legally obtained monk parrots as pets will not be affected. Existing US Food and Drug Administration regulation 21 CFR § 1240.62 already bans the sale of red-eared slider turtles with carapace lengths less than 4 inches, so this is not a new regulation.

Guidance for implementation:

Since this is a new program, case-by-case decisions will be the norm during initial implementation. As experience is gained with the rule, the Department intends to draft guidance for staff implementation as needed.

ATTACHMENTS:

Public Hearing Synopsis
Wisconsin Statutes Section 23.22, **Invasive Species.**

HEARING SYNOPSIS
SUMMARY OF PUBLIC COMMENTS AND DEPARTMENT RESPONSES
IS-34-08

Six public hearings were held in August, 2008 in Fitchburg, Milwaukee, Green Bay, La Crosse, Spooner and Wausau.

	Attendance	Appearance slips	Speakers
Fitchburg	27	15	3
Milwaukee	18	8	4
Green Bay	25	9	5
La Crosse	14	8	3
Spooner	34	17	6
Wausau	28	12	6
Totals	146	69	27

In addition, there were approximately 1,350 written comments submitted by email or mail. The majority of these comments (over 1,000) were regarding mute swans. There were several other issues that elicited a number of similar comments. However, there were also over 200 unique comments that have been taken into account in the revision of the rule. Department staff met with or called most organizations that submitted significant comments to answer their questions and revised the rule accordingly. Department staff compiled all the comments and responses to each in a separate document that is available upon request.

I. GENERAL COMMENTS

A. Rule revision process

1. Comment: The proposed rule should describe the process that will be followed to revise the rule in the future, e.g., to add or remove species to the lists or change a species' classification. DNR should also describe how its non-regulatory "caution", "non-restricted" and "pending" lists will be revised.

Response: Chapter 227, Stats., sets out in detail the procedures that agencies such as the department must follow in order to revise administrative rules. Chapter 227, Stats., and ch. NR 2, Wis. Adm. Code, set out the procedure by which citizens may formally petition the department for a rule change. There is no need to restate these procedures in ch. NR 40. However, the proposed rule includes a new procedure where, in an emergency, the department may issue a temporary order that effectively adds a species to the prohibited list until the Administrative Code can be revised.

Since ch. NR 40 is being promulgated under the authority of the invasive species law, s. 23.22, Stats., the Wisconsin Invasive Species Council is charged with advising the department regarding invasive species classifications. It is up to the Council – not the department – to determine what process it will follow in the future to develop its recommendations, but the department anticipates that the Council will again use Species Assessment Groups, including stakeholders that might be affected, to evaluate proposed changes to the prohibited and restricted invasive species lists. The department will work with the Council to develop guidance on the assessment process if requested.

The department plans to issue a guidance document that will explain how its 3 non-regulatory lists will be developed, maintained and revised.

B. Department entry on private land, control requirements, cost recovery

1. Comment: There were some concerns that overly broad powers have been given to the DNR. Private landowners and public land managers cannot be expected to pay for the control of invasive species nor required to allow state employees entry onto private property to inspect for or control invasive species. Eradication or control of invasive species is an unreasonable expectation as the spread of invasive species is of no fault of the landowner. Control requirements need to consider the extent of the infestations. If the department orders control of a prohibited species, the department plan must include the entire infested area and all associated landowners.

Response: Control will not be required for the more common “restricted” species. The department intends to work cooperatively with landowners to identify and contain newly emerging infestations of “prohibited” species when it is reasonable to do so, and when control methods are sufficiently effective to feasibly contain the new infestation. Department staff will work with landowners to develop a management plan that outlines the best means of control and, where possible, will seek funding to pay for the control work. Unless entry is otherwise authorized by law, entry onto private property will be made only with permission of the landowner or a court-issued inspection warrant if permission is not obtainable. Language was added to the rule to clarify that infestations would be assessed and control efforts would only be undertaken if it is reasonable and feasible to effectively contain the species. When determining feasibility of control, the potential cost of control activities and the benefits of such activities will be taken into account. Entire infestations will be addressed for prohibited species

The rule has been revised to clarify that a control order can be issued by the department only if there is evidence that the landowner has some responsibility for the presence of the prohibited invasive species, and that the department can recover its costs only if the order is violated and the department carries out control measures.

2. Comment: DNR language regarding cost recovery is vague and open to interpretation, specifically the term “reasonable and necessary expenses”.

Response: Reasonable and necessary expenses are those expenses that the department actually incurred and that a court would agree were appropriate under the specific circumstances of any particular case.

C. Potential costs to local governments, loggers, landowners and others.

1. Comment: Will the rule be effective and reasonable with respect to the “cost-benefit” for the stake holders?

Response: Rule language was revised to state that control would only be expected for prohibited species where it is reasonable and feasible to do so.

2. Comment: Consider the cost-benefit, hurdles to implementing “control” measures in land management, transportation of forest products, and the immense responsibility that timberland

owners enrolled in the MFL open designation have to people who use our lands for recreation – both motorized and non-motorized.

Response: Rule language was revised to clarify that control would only be expected for prohibited species where it is reasonable and feasible. Best management practices (BMPs) are also being developed together with stakeholders, for forestry, recreation, and rights-of ways and are now referenced in the rule as examples of reasonable precautions landowners and recreation users can take.

3. Comment: Invasive species travel via wind, insects, birds, vertebrates, and adjacent public and other private lands. Neighboring properties can contain different habitats which can trigger the need for different control methods and landowner resources may differ significantly. Will criteria be developed that will address invasive species that cross property boundaries?

Response: Yes, on a case-by-case basis, depending on the landowners and if it is a prohibited species. The staff team will work with the landowners to develop a management plan for each situation after discussions with affected landowners.

4. Comment: The primary cost of adopting the rule for invasive species will be borne by loggers, landowners, and forest practitioners who make their living from the forest. Is there no public interest involved in bearing costs?

Response: In general the costs will be fairly minimal. Loggers, landowners and forest practitioners will be asked to follow best management practices but these will generally alter the timing or method of an activity, and will not greatly add to operating costs. For actual control practices, costs generally will be incurred only if a prohibited species is found on property owned or managed by those persons mentioned, the person has some culpability for the presence of the prohibited species, and the department orders control with no other assistance, which is not the intention. The department will try to find funding and assistance to control prohibited species, however, it will be on a case-by-case basis. The public interest is involved and the department will do all it can to secure funds for control.

5. Comment: Implementation of the rule will be challenging for loggers, forest managers, and landowners. The Natural Resources Board is urged to refer to the extensive work that has been accomplished by the Governor’s Council on Forestry’s Advisory Committee that developed draft Best Management Practices for Invasive Species. The NRB should consider who will enforce this rule and where the funds will come from to pay for eradication of prohibited species when they are discovered on public or private lands. Does the state have sufficient dollars to deal with populations of “prohibited” invasive species on state lands? Will the DNR have employees to police and eradicate invasive species?

Response: Best Management Practices are now referenced in the rule as a reasonable precaution. The department intends to search for funding sources to control prohibited species. The department does not intend to “police” private lands, and will work with landowners when the presence of a prohibited species has been reported.

6. Comment: There is not enough money in the state budget nor a private landowner’s to control or eradicate some of these invasive species or ones coming in the future.

Response: The cost to control or eradicate prohibited species is extremely difficult to predict as there are so many unknowns, for instance, it could be 1 plant or 1,000, upon discovery, which

would impact cost. Several years of experience have shown that usually control costs for new infestations of these prohibited plant species is very low and cost-effective. Control of restricted species, which are more wide spread, is not required under the rule.

7. Comment: We do not feel that private landowners will self-report nor request permits to deal with invasives found on their land based on the language in this proposed chapter. To do so would open them up to a significant financial bill for control or eradication.

Response: The department will develop the management plan with the landowner. Controls will only be expected where it is reasonable and feasible to contain the population. This process will be clearly addressed in outreach materials so landowners understand what the process will entail. Permits will not be needed unless a person wishes to intentionally utilize a listed species. Permits are not required for control efforts. The department would not be able to seek cost recovery, unless landowner culpability exists, a control order is issued but not complied with, and the department actually undertakes the control measures at its expense.

8. Comment: The “No Local Government costs” statement in the Notice of Public Hearings IS-34-06 on page 3 is a false statement and it needs to be addressed with facts. A phased-in approach over several years to implement would give the opportunity for local units of government to provide more input in the development, give them an opportunity to serve the public to the maximum degree possible, and afford more input to the DNR as more information and unforeseen consequences arise.

Response: The fiscal estimate only considered the governmental costs of administering the rule, and only the department will administer the rule. However, it has been revised to show that there may be costs to state and local government to comply with the rule. In general the costs to local governments will be fairly minimal. They will be asked to follow best management practices for right-of-way management and other activities, but these will generally alter the timing or method of an activity, and will not greatly add to costs. As the first phase will be focused on education, the enforcement aspect of the rule will be phased in. There will be extensive department outreach, especially to those target audiences likely to be affected by the rule.

D. Accidental transport – Delayed implementation of enforcement, BMPs

1. Comment: Right-of-way managers are concerned that they will be in violation of the law by conducting normal practices such as roadside mowing. They are concerned that enforcement actions may be taken against them for accidentally transporting listed species and that their employees could be cited for criminal violations. They recommend a phased approach to implementation of the rule.

Response: A phased approach is customary with new rules in regard to enforcement. The normal practice of implementing a rule is to start with education. Highway departments will be trained on species ID, control and best management practices to minimize spread. Enforcement is a stepped process of informal contacts by staff, followed by notices of violations. Only if the landowner or manager refuses to return to compliance will a citation be considered. Imprisonment and fines are only for intentional criminal violations with sentences that would be issued only by a Court.

2. Comment: Several right-of-way managers suggested that additional language be added to indicate that the implementation of best management practices in the maintenance of roadsides should be considered as taking reasonable precautions.

Response: The rule has been revised by defining reasonable precautions and referencing best management practices as one of several ways to be taking reasonable precautions.

3. Comment: How will the BMPs for invasive species be integrated into the rule and be considered as “reasonable precautions”?

Response: Language was added to rule as a note that provides examples of reasonable precautions and includes BMPs for invasive species.

E. Enforcement

1. Comment: NR 40.08 Enforcement: How can a penalty be enforced on a person based on a "determination" made by the department. What criteria will the department use to determine the violation?

Response: The department cannot impose a penalty – only a Court can impose a fine or forfeiture, but the department can issue a citation (which is prosecuted by the District Attorney) or refer a violation to the Attorney General for prosecution. In all enforcement actions the department is required to make a determination of whether or not the department feels a violation has occurred. The facts related to the matter are reviewed to determine if there appears to be a violation. Based on all available information, the department then decides what course of action it will take. For purposes of this rule, department staff will follow normal stepped enforcement procedures and the program staff will be heavily involved in the determination of a violation. When necessary or beneficial, guidance documents may be developed to assure the intent of the rule is followed consistently.

2. Comment: Who will be responsible for inspecting to determine compliance?

Response: The department’s program staff and Conservation Wardens will be involved in compliance determinations, and the department will develop a Memorandum of Agreement with DATCP so it can conduct compliance checks in concert with its normal duties.

3. Comment: What criteria will the department use to determine a violation?

Response: Department staff with expertise regarding the prohibited species involved will discuss potential violations with potential violators. Discussion will focus on what precautions the individual took (BMPs or other department-accepted guidance, examples of which were added to the rule) to limit potential of introduction or spread of prohibited species. Questions regarding whether or not the action was incidental or unknowing will also be explored.

4. Comment: What is considered incidental or unknowing transport?

Response: Definitions of incidental and unknowing were added to rule.

5. Comment: We are not supportive of either citations or imprisonment being included in this rule. It is unnecessary to have fines and prison hanging over the heads of Wisconsin’s public servant’s heads, imposing fear while performing their daily duties.

Response: The Legislature adopted this enforcement language and the department cannot change it. Imprisonment and fines can only be sought for intentional criminal violations, not for

unintentional or inadvertent acts. These concerns should be resolved by the exemption for inadvertent or unknowing transport, transfer, possession or introduction if reasonable precautions are taken.

6. Comment: Our primary interest in the rule is that it be implemented in a manner that recognizes all reasonable efforts to practically manage for invasive species. We believe that the rule must provide adequate protections for affected sources that take reasonable precautions against the introduction and spread of invasive species. This will be especially important to utilities and other entities responsible for building and maintaining public infrastructure. Utility companies as well as other private and government entities often need to obtain temporary or permanent property easements with private landowners and customers. We need to be able to manage any liabilities and resulting costs associated with construction activities and invasive species implications on these properties.

Response: The department concurs with this concern and feels that this rule does take into account when an individual or company has taken reasonable precautions. The determination of responsibility will be made on a case-by-case basis and all factors will be looked at and considered to make a decision.

7. Comment: Is it the landowner's or the logger's responsibility to inspect wood products for restricted species before transportation?

Response: This depends on the specific situation. But generally, under this rule, it would be the responsibility of the person transporting the materials to assure that they are in compliance with the rule.

8. Comment: Per the "Summary of major public comments for draft rule package 6-5-08", WWOA would like to reiterate that "the rule appeared to be too focused on enforcement for prohibited species, allowing the department to order controls, enter onto land to inspect, control or monitor and to charge the landowner for the control efforts..." The DNR's response is "The Department's goal is to focus on education and cooperation to identify and control prohibited species...Department staff will work with landowners or land managers with prohibited species to cooperatively control them, regardless of where they are found..." yet language to this effect does not appear in the proposed rule.

Response: Substantial changes have been made to the rule to clarify the focus on education, cooperative prevention and remediation.

9. Comment: Reporting and control requirements. The rule language limits reporting of invasive species activities when associated with a permit (NR 40.07 (4)) or transporting, possessing or give away a prohibited invasive species for the purpose of identification or disposal without a permit issued by the department under this chapter, if the person reports the location of origin of the prohibited invasive species to the department and no individual specimens or propagules are allowed to escape or be introduced (NR 40.04 (3) (e)). ATC collects a large amount of field data to support applications to the Public Service Commission of Wisconsin for CA or CPCN authority and permit applications to DNR, including information on invasive species. By submitting this data to the department, ATC is essentially reporting invasive species infestations both in areas where DNR may have jurisdiction for permit issuance and in areas where no DNR permit authority exists. This situation could cause conflict between ATC and the landowners where ATC has an easement but does not own or control the land. If a prohibited invasive species is encountered, the department may order control. ATC is suggesting the

department consider this situation and clarify who is the responsible party for control of these species and to define what the reporting expectations are.

Response: The department is asking that all prohibited species infestations be reported so it can work with the landowner or manager to initiate control. However, reporting of prohibited species is mandatory only if required by a specific permit or if a person does not have a permit but is transporting, transferring or possessing specimens for purposes of identification or disposal. The department will conduct an investigation to determine the responsible party in each individual case. Regardless, the department's objective would be to cooperatively develop a plan to control the prohibited species.

F. Restricting public access

1. Comment: There were several comments that companies or individuals with lands enrolled in the Managed Forest Law would be required to restrict public access to their lands in order to minimize the spread of invasive species.

Response: The revised rule does not require limiting public access. The department is working with all the major outdoor recreation groups to develop BMPs for preventing the spread of invasive species through recreational activities.

G. The rule needs to be stricter

1. Comment: The rule should be stricter in mandating controls of prohibited and restricted species. Preventive measures proposed in sections NR 40.04(4) and NR 40.06(3) should be required.

Response: The intent of this rule is to work cooperatively with landowners and land managers. It is critical to maintain flexibility in the implementation of the rule in order to best evaluate each situation. Priorities for control efforts will be placed on the newly emerging prohibited species rather than the widespread restricted species. Preventive measures outlined in NR 40.07 are mandatory.

2. Comment: Make it possible for parks to pursue neighbors to eliminate encroaching invasives. Mandate and educate county road workers to spot and eliminate problem plants. Those who have forest tax breaks should have to eliminate invasives.

Response: Most of these recommendations were considered and rejected by the department as being unreasonable, unduly burdensome or too costly for both private and public lands.

3. Comment: Suggested additions: Road construction or new road development should not be allowed near or through an existing population of prohibited species. Following road construction or development, encourage planting and propagation of native species. Restrict recreation (boat traffic, hiking, etc.) in public areas with prohibited species.

Response: The department may not have the authority to prevent road work near a prohibited species. Restricting access to areas with prohibited species was included in the first draft of the rule, but was widely opposed and objectors argued that the department did not have authority to do so on any land other than department-managed lands.

H. Preventive measures

1. Comment: Many comments expressed concern about the spread of invasive aquatic plants and animals via the transfer of water, sediment, or aquatic plants between different waterbodies associated with certain activities such as boating, diversions, dredging, and operation of dry hydrants.

Response: Section NR 40.07 “Preventive measures” includes requirements for the removal of aquatic plants and animals and the drainage of water from vehicles, boats, boat trailers, equipment and gear under various circumstances, such as immediately after removing them from a waterbody. The preventive measures have been revised so that they compliment and do not conflict with or duplicate other rules or statutes such as the VHS rules in ss. NR 19.05 and 19.055, the rules governing operation and maintenance of dry fire hydrants in s. NR 329.04, the prohibition in s. NR 109.08 (4) against placing equipment used in aquatic plant management in another navigable water, and the “illegal to launch” prohibitions in s. 30.715, Stats., which ban the placement of a boat, trailer or boating equipment in navigable water if there are aquatic plants attached or (for the St. Croix river only) zebra mussels attached. Notes were added to the rule that inform readers of the requirements of the other rules or statutes, e.g., that decontamination standards already exist in administrative rules that govern dredging, replacement or maintenance of structures in waterways for the purposes of controlling the spread of invasive species, and that water diversions are regulated by a different administrative code and that the regulatory process allows for consideration of the risk of invasive species transfer before pumping is permitted.

2. Comment: Several comments indicated confusion regarding the exemption from prohibited activities if “reasonable precautions” had been taken with regard to the preventive measures that control the spread of aquatic invasive plants and animals.

Response: This exemption does not apply to the preventive measures. A note of clarification has been added to the rule on this point. In addition, under the definition of “reasonable precautions” language was added regarding best management practices and requirements for the sale and purchase of aquatic plants.

I. Permitting

1. Comment: Companies and individuals frequently obtain DNR permits which contain conditions regarding invasive species. There is confusion about the potential overlap of language in the proposed rule and existing permit requirements. Clarification of potential “double regulation” is needed.

Response: The rule has been revised to address permit overlap as much as possible by working with other programs to ensure ch. NR 40 is considered in other permits and the addition of exemptions in ch. NR 40 where other equivalent permits are issued.

2. Comment: A person or entity following established best management practices (BMPs) should be exempted from permit requirements.

Response: The rule now references BMPs as a way of taking “reasonable precautions”. Permits will generally only be required when a person intends to utilize a listed invasive species by intentionally transporting, possessing, transferring or introducing it. These permits will be specific to the permit application.

3. Comment: There currently are wastewater treatment facilities in the state that use Phragmites reed beds for sludge treatment. The department already has a permitting process in place to regulate these reed beds.

Response: The rule has been revised to specifically exempt from permit requirements Phragmites beds approved by a WPDES permit for sludge treatment.

4. Comment: The requirements of the rule should not be subject to discretion or exemption, other than the provisions that allow transportation for identification or disposal purposes. Any other actions should not be allowed. Further, at least with respect to aquatic organisms, control should be extended to the aquarium/aquaculture trade and to the horticulture/agriculture trade.

Response: There are many situations where some discretion and flexibility are needed in order for the rule to be reasonable and effective, but the rule has been modified to limit exceptions by permit for the use of prohibited fish or crayfish species. Under the rule as now drafted, research and public educational displays are the only uses of prohibited fish and crayfish invasive species for which a permit may be issued.

J. Increase staff and funding for implementation, education, training

1. Comment: There were many comments received on the need for increased funding and staff to implement these rules, especially for developing educational materials and conducting training.

Response: The department agrees that extensive education and training efforts will be needed and is seeking grants and other funding. Field staff will be trained to assist with rule implementation. Staff will work with partners such as the boat landing volunteers and Cooperative Weed Management Areas to develop materials to allow them to assist in training at a local level. The department does not have the ability to obtain additional funds or staff by rulemaking.

K. Changes to Greensheet attachments

1. Comment: There was no mention of the benefits of this rule to small businesses and individuals such as lake resorts, marinas, fishing guides, forestry cooperatives, private forest landowners, birdwatchers, hikers, and other "silent sport" participants.

Response: Revisions to the Greensheet package have been made to address this.

II. SPECIES SPECIFIC COMMENTS

A. Plants

1. Comment: Many comments suggested additional species (26) or exempt cultivars (2) to be added to either the prohibited or restricted list.

Response: There are many plants considered by some to be invasive that were not assessed at this time. For this initial rulemaking, the listings were primarily limited to those that did not have significant economic benefits for some sector of society. Others need further research to determine how invasive they might become or to identify which cultivars might be invasive or benign. Many of these species will be assessed in a subsequent revision of the rule.

2. Comment: Suggestions were made to alter species from one category to another, or to alter the dividing line between prohibited and restricted for split-listed species.

Response: Alterations were made to the rule based on information received. However, no new plants were added to or removed from the rule since the public hearings.

3. Comment: Overall, the Green Industry supports the need for this rule and supports the process in which it was developed. The plants listed in the proposed rule have little to no economic value to the Green industry. We believe the science-based process for species assessment developed here in Wisconsin is one of the best and sets a standard that other states can follow, without serious consequences to our industry and growers.

Response: The Green Industry and other stakeholders will be involved in assessments of additional species to be added to the list in the future.

4. Comment: When plants of significant economic value are added to the list of invasive plants in the future, we must see to it that a “compliance period” is developed for nurseries.

Response: Department staff is working with the Wisconsin Green Industry Federation and others to develop reasonable phase-out periods that could be proposed for the next revision of the rule.

5. Comment: Arborists and others were concerned that persons removing invasive species would be in violation.

Response: The rule contains an exemption for possession and transportation when done for control or disposal.

6. Comment: There were many comments supporting the rule and recommending that there be more requirements to control restricted plants, especially on rights-of-way.

Response: The department attempted to draft a rule that is reasonable in what is expected of people and to give priority to control of those species that are not yet widespread and may yet be feasible to control.

7. Comment: Some comments expressed confusion regarding how wetland species were classified.

Response: All plants are now listed alphabetically by scientific name under the broader category of “plants” instead of being separated into “terrestrial” and “aquatic” plant species.

B. Fish, crayfish and aquatic invertebrates

1. Comment: The rule should allow the continued use of outdoor ponds for holding koi carp, goldfish, and other aquarium species.

Response: The rule will allow the continued use of koi carp and goldfish in outdoor ponds. Other restricted fish species may not be held in outdoor ponds. Because of the ubiquity of ponds and the difficulty of assessing their exposure to any stated risk of flooding, it is prudent to limit their use to native species and these two established non-native aquarium species.

2. Comment: Orconectes propinquus (an invasive crayfish) and the banded mystery snail (Viviparus georgianus) should be listed as restricted species.

Response: The department agrees that these species should be reviewed for inclusion on the restricted list in a future rule revision. There was insufficient evidence to list them at this time..

3. Comment: The department has expanded the definition of “invasive fish species” beyond the intent of the authorizing statutes.

Response: Section 23.22, Stats., defines invasive species as “nonindigenous species whose introduction causes or is likely to cause economic or environmental harm or harm to human health”. Decades of department experience with introduced non-native fish species makes it prudent to assume that any fish species introduced into an ecosystem outside its native range is likely to cause environmental harm by disrupting the receiving ecosystem. Unlike terrestrial species, even if found at an early stage of invasion, non-native fish are almost impossible to eradicate from a waterbody.

4. Comment: Sections 7 of the background memo and 10 of the rule analysis portion of the rule do not adequately summarize impacts of the rule on aquarium and aquaculture businesses.

Response: Those sections have been re-drafted. Aquarium businesses will be affected by the prohibition of a few currently used viable non-native aquarium species. No currently permitted aquaculture practices will be affected.

5. Comment: Addition of the phrase “and non-viable fish species” to the definition of “fish species in the aquaculture trade” would allow future expansion of the industry and still remain within the authorization of the statute.

Response: The present definition is intended to include all species currently raised on fish farms in Wisconsin. That definition may be expanded in the future by rule when new non-native species are deemed safe. Under the rule non-viable fish species may be used in the aquarium trade, but the rule adds additional protections by requiring that those species be held in “safe facilities”. A parallel allowance for the aquaculture trade is not appropriate because fish in the aquaculture trade may be held in fish farms that do not meet the security requirements required of “safe facilities”.

6. Comment: Listing of mosquitofish as prohibited would pose an unreasonable hardship on some fish farmers. Mosquitofish are imported incidentally from southern states in shipments of minnows, including shipments to department hatcheries where the minnows are used as forage. The mosquitofish appear not to survive in Wisconsin and pose no ecological risk.

Response: The department believes that mosquitofish have the ability to disrupt ecosystems in Wisconsin, so it remains committed to minimizing the risk that they will colonize any waters of the state. However, the department also understands the concern that has been raised by the aquaculture industry. The importation of mosquitofish to fish farms without a department permit for rearing, introduction, or use as bait is currently illegal under s. 29.735, Stats., and the proposed rule does not change that, except to explicitly condone the incidental or unknowing importation of this species when not due to a person’s failure to take reasonable precautions. It is not the intention of the department to curtail current importation practices, but it is interested in working with aquaculture industry organizations and individual fish farmers to develop best

management practices that would, if possible, limit the incidental importation of this species and that would minimize or eliminate its dispersal with bait after importation.

7. Comment: Individually marked and USFWS-certified sterile grass carp should be allowed for use on fish farms.

Response: Grass carp of any kind are not allowed in Wisconsin under current rules and policies. The department does not wish to allow grass carp to be imported under any circumstances, and that is codified in NR 40, but if that policy were to change, the importation of grass carp would be possible through an amendment of the new rule.

8. Comment: The rule contradicts Sections 1.02 and 1.035(2) Stats., related to federal activities in waters of the state and on federal lands. It also contradicts tribal jurisdiction.

Response: The State of Wisconsin like all other states does not make it a practice to decide when it is necessary to specifically exempt federal or tribal activities from general state laws. This would be an impossible burden. While recognizing that under some (but not necessarily all) circumstances these exemptions may apply, the state deals with them on a case-by-case basis.

9. Comment: Rainbow and brown trout should not be restricted.

Response: There are no safe and reasonable uses of these species that are not allowed under the rule as drafted.

C. Terrestrial invertebrates and plant disease-causing microorganisms

1. Comment: Terrestrial invertebrates or microorganisms can self-transport to remote locations and their populations may increase exponentially within a very short period of time. Language in the rule should remove the potential liability to private landowners for the control of invertebrates and microorganisms.

Response: Rule language was added to reflect the following: the department will pursue control only if it is feasible and reasonable to control the prohibited species. Language was also added to the rule indicating that if the department determines that the prohibited species is present through no fault of the person, the department may control the prohibited species but will not require the landowner to do so or seek cost recovery.

2. Comment: There is a concern for the unknown cost of control that will be the responsibility of landowners, loggers, and mills.

Response: Rule language was added to reflect the following: the department will pursue control only if it is feasible and reasonable to control the prohibited species. Rule language also states that the department will seek funds to assist in the control.

3. Comment: Any permitting process to move wood from a quarantined area needs to be very easy and expedient.

Response: Additional rule language was added to defer to DATCP's quarantine regulations for quarantined pests so that folks will continue to apply for a compliance agreement for quarantined pests from DATCP and will not need to go through a separate permitting process under ch. NR 40.

D. Terrestrial vertebrates

1. Comment: There were many comments asking that the department not list the mute swan as a prohibited invasive species. They stated that the native/exotic status of mute swans is uncertain and any perceived conflicts with mute swans can be resolved using effective, humane methods. Additionally, some stated that mute swans do not threaten the state's aquatic ecosystems as they eat algae and insects. There were a few comments supporting the listing of mute swans.

Response: Mute swans have been removed from this rule. The department has an indefinite moratorium on its personnel removing mute swans in Kenosha, Racine, and Waukesha counties. The department will continue to pursue regulating mute swans under the captive wildlife law to cover captive specimens. Free-flying swans would not be covered.

2. Comment: There were a number of comments from people wanting the department to list wolf-dog hybrids as prohibited or restricted invasive species. They suggested that since these animals are dangerous both in captivity and when introduced to the wild, this rule would allow the department to require spaying and neutering, pen standards and other limits on ownership.

Response: Wolf-dog hybrids do not appear to meet the definition of invasive species. Wolves are native animals and dogs are domestic animals. The department does not have the authority to regulate either as "invasive species". The department will continue to pursue regulating them under the captive wildlife law to regulate captive specimens, similar to mute swans as stated above.

3. Comment: House or English sparrows and European starlings should be classified as prohibited.

Response: House or English sparrows and European starlings are so well established and widespread throughout Wisconsin that control of them is virtually impossible. Furthermore, because they are not primarily spread by humans, listing them as restricted generally would not help limit their spread.

4. Comment: Although no one challenged the general idea of classifying all non-native vertebrates, not otherwise exempt, as "prohibited", this "white list" approach brought up many concerns and questions. There were concerns about the terms 'captive-bred', 'wild animals', 'domestic animals' and 'pets,' and how the rule would apply to the pet industry, pet owners, game farms and others.

Response: The draft rule classified all non-native vertebrates, other than those expressly exempt, as prohibited invasive species. That approach has been revised in the rule. Now only those terrestrial vertebrate species specifically listed as prohibited are proposed to be regulated as such. Therefore, the terms "domestic", "wild animal", and "captive-bred" are no longer needed.

5. Comment: Some people keep monk parrots, listed as prohibited, as pets.

Response: "Pet" has been defined. Legally obtained non-native wild animals listed as prohibited that are pets may be possessed, transported, or transferred, but not introduced to the wild, without a permit. Listing monk parrots as prohibited will allow for the enforcement of control requirements should monk parrots become established anywhere in Wisconsin.

WISCONSIN STATUTES

23.22 Invasive species. (1) DEFINITIONS. In this section:

(a) "Control" means to cut, remove, destroy, suppress, or prevent the introduction or spread of.

(b) "Council" means the invasive species council.

(c) "Invasive species" means nonindigenous species whose introduction causes or is likely to cause economic or environmental harm or harm to human health.

(d) "State agency" means a board, commission, committee, department, or office in the state government.

(2) DEPARTMENT RESPONSIBILITIES. (a) The department shall establish a statewide program to control invasive species in this state.

(b) As part of the program established under par. (a), the department shall do all of the following:

1. Create and implement a statewide management plan to control invasive species in this state, which shall include inspections as specified under sub. (5).

2. Administer the program established under s. 23.24 as it relates to invasive aquatic plants.

3. Encourage cooperation among state agencies and other entities to control invasive species in this state.

4. Seek public and private funding for the program.

5. Provide education and encourage and conduct research concerning invasive species.

6. Promulgate rules to identify, classify, and control invasive species for purposes of the program. In promulgating these rules, the department shall consider the recommendations of the council under sub. (3) (a). As part of these rules, the department may establish procedures and requirements for issuing permits to control invasive species.

(c) Under the program established under par. (a), the department shall promulgate rules to establish a procedure to award cost-sharing grants to public and private entities for up to 75 percent of the costs of projects to control invasive species. The rules promulgated under this paragraph shall establish criteria for determining eligible projects and eligible grant recipients. Eligible projects shall include education and inspection activities at boat landings. The rules shall allow cost-share contributions to be in the form of money or in-kind goods or services or any combination thereof. In promulgating these rules, the department shall consider the recommendations of the council under sub. (3) (c).

Cross Reference: See also ch. NR 198, Wis. adm. code.

(3) COUNCIL DUTIES. (a) The council shall make recommendations to the department for a system for classifying invasive species under the program established under sub. (2). The recommendations shall contain criteria for each classification to be used, the allowed activities associated with each classification, criteria for determining state priorities for controlling invasive species under each classification, and criteria for determining the types of actions to be taken in response to the introduction or spread of an invasive species under each classification.

(b) Under the program established under sub. (2), the council shall conduct studies of issues related to controlling invasive species. The studies shall address all of the following:

1. The effect of the state's bait industry on the introduction and spread of invasive species.

2. The effect of the state's pet industry on the introduction and spread of invasive species.

3. The acquisition of invasive species through mail order and Internet sales.

4. Any other issue as determined by the council.

(c) The council shall make recommendations to the department on the establishment of a procedure for awarding cost-sharing grants under sub. (2) (c) to public and private entities for up

to 50% of the costs of eligible projects to control invasive species. The recommendations shall contain criteria for determining eligibility for these grants and for determining which applicants should be awarded the grants.

(d) To assist the council in its work, the council shall create 4 subcommittees on the subjects of education, research, regulation, and interagency coordination. The council may create additional subcommittees on other subjects.

[Note – there is no subsection (4).]

(5) INSPECTIONS. As part of the statewide management plan, the department shall create a watercraft inspection program under which the department shall conduct periodic inspections of boats, boating equipment, and boat trailers entering and leaving navigable waters and shall educate boaters about the threat of invasive species that are aquatic species. The department shall encourage the use of volunteers or may use department employees for these inspections.

(6) REPORTS. (a) The department shall submit to the legislature under s. 13.172 (2), and to the governor and the council, a biennial report that includes all of the following:

1. Details on the administration of the program established under sub. (2), including an assessment as to the progress that is being made in controlling invasive species in this state.
2. A description of state funding that has been expended under the program.
3. A description of funding from other sources that has been expended to control invasive species in this state.
4. An assessment of the future needs of the program.

(b) The department shall submit the biennial report under par. (a) before July 1 of each even-numbered year. The first biennial report shall be submitted no later than July 1, 2004. Each report shall cover the 24-month period ending on the March 31 that immediately precedes the date of the report.

(c) In addition to the report required under par. (a), the department shall submit an interim performance report to the legislature under s. 13.172 (2), and to the governor and the council, on the progress that has been made on the control of invasive species. The department shall submit this interim performance report before July 1 of each odd-numbered year. The first interim performance report shall be submitted no later than July 1, 2005. Each interim performance report shall cover the 12-month period ending on the March 31 that immediately precedes the date of the interim performance report.

(7) APPEARANCE BEFORE LEGISLATURE. Upon request of a standing committee of the legislature with jurisdiction over matters related to the environment, natural resources, or agriculture, the director of the program shall appear to testify.

(8) PENALTIES. (a) Except as provided in pars. (b) and (c), any person who violates a rule promulgated under sub. (2) (b) 6., or any permit issued under those rules, shall forfeit not more than \$200.

(b) Any person who intentionally violates any rule promulgated under sub. (2) (b) 6. or any permit issued under those rules shall be fined not less than \$1,000 nor more than \$5,000, or shall be imprisoned for not less than 6 months nor more than 9 months or both.

(c) A person who violates a rule promulgated under sub. (2) (b) 6. or any permit issued under those rules and who, within 5 years before the arrest of the current conviction, was previously convicted of a violation of a rule promulgated under sub. (2) (b) 6. or any permit issued under those rules shall be fined not less than \$700 nor more than \$2,000 or shall be imprisoned for not less than 6 months nor more than 9 months or both.

(d) The court may order a person who is convicted under par. (a), (b), or (c) to abate any nuisance caused by the violation, restore any natural resource damaged by the violation, or take other appropriate action to eliminate or minimize any environmental damage caused by the violation.

(9) ENFORCEMENT. (a) If the department of natural resources finds that any person is violating a rule promulgated under sub. (2) (b) 6. or a permit issued under those rules for which the person is subject to a forfeiture under sub. (8) (a), the department of natural resources may do one or more of the following:

1. Issue a citation pursuant to s. 23.50 to 23.99.
2. Refer the matter to the department of justice for enforcement under par. (b).
3. Revoke a permit issued under the rules promulgated under sub. (2) (b) 6., after notice and opportunity for hearing.

(b) The department of justice shall initiate an enforcement action requested by the department under par. (a) 2. The enforcement action may include a request for injunctive relief. In any action initiated by it under this paragraph, the department of justice shall, prior to stipulation, consent order, judgment, or other final disposition of the case, consult with the department of natural resources for the purpose of determining the department's views on final disposition. The department of justice shall not enter into a final disposition different than that previously discussed without first informing the department of natural resources.

(c) In an action initiated pursuant to a citation or initiated under par. (b), the court may award, as an additional penalty, an amount equal to all or a portion of the costs of investigation, including any monitoring, incurred by the department of natural resources or the department of justice, which led to the establishment of the violation. The court may also award the department of justice the reasonable and necessary expenses of the prosecution, including attorney fees. The department of justice shall deposit in the state treasury for deposit into the general fund all moneys that the court awards to the department of justice under this paragraph. These moneys shall be credited to the appropriation account under s. 20.455 (1) (gh).

History: 2001 a. 109 ss. 72t, 72xd; 2003 a. 33; 2005 a. 25, 160; 2007 a. 20.

February 4, 2009 from <http://www.legis.state.wi.us/statutes/Stat0023.pdf> *Not certified under s. 35.18 (2), stats. Text from the 2007-08 Wis. Stats. database updated by the Legislative Reference Bureau. Only printed statutes are certified under s. 35.18 (2), stats. Statutory changes effective prior to 1-1-09 are printed as if currently in effect. Statutory changes effective on or after 1-1-09 are designated by NOTES. Report errors at (608) 266-3561, FAX 264-6948, <http://www.legis.state.wi.us/rsb/stats.html>*

Fiscal Estimate — 2007 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-34-06

Subject
 Creation of NR 40 -- Invasive Species Identification, Classification, and Control

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 statutes require the Department to establish a statewide program to control invasive species in this state, including a statewide management plan and rules to identify, classify and control invasive species and to establish procedures and requirements for issuing permits to control invasive species. The proposed rules identify, classify and control invasive species, and lists specific invasive species into two specific categories: prohibited and restricted. The rules prohibit or restrict the transportation (including importation) possession, transfer (including sale) and introduction of invasive species that are listed or identified as "prohibited", with certain exceptions. "Restricted" invasive species are also subject to a conditional ban on transportation, transfer and introduction, but not possession, with certain exceptions.

This estimate focuses on the fiscal effect resulting from implementing NR 40, as distinguished from the effect associated with the underlying authorizing statutory language.

Fiscal Effect-DNR: This rule will be implemented across several Department programs, including Bureaus in the divisions of Land, Forestry, Enforcement & Science, and Water. The Department's costs associated with implementing NR 40 are primarily associated with the permitting, site inspection, monitoring and technical assistance activities inherent in the rule. The Department estimates the workload associated with these tasks across the Department to roughly equal the equivalent of 2.00 FTE and \$120,000 annually in position-related costs. In addition, the Department assumes it will incur \$40,000 annually to supply public informational and educational materials regarding the requirements of the rule.

Fiscal Effect-Local Government & Other State Agencies: Municipalities will incur costs for complying with the rule, while other state agencies that own land may incur compliance costs by following best management practices or very occasionally needing to control prohibited species. Since it is not possible to estimate these additional costs with any degree of specificity, the Department characterizes the impact as "indeterminate".

Long-Range Fiscal Implications

There will also be positive long-term fiscal effects on landowners, land managers, lake users, anglers, and others.

Prepared By:	Telephone No.	Agency
Joe Polasek	266-2794	Department of Natural Resources
Authorized Signature	Telephone No.	Date (mm/dd/ccyy)
	266-2794	21/60/9

Fiscal Estimate — 2007 Session

Page 2 Assumptions Narrative Continued

LRB Number	Amendment Number if Applicable
Bill Number	Administrative Rule Number IS-34-06

Assumptions Used in Arriving at Fiscal Estimate – Continued

Fiscal Estimate Worksheet — 2007 Session
 Detailed Estimate of Annual Fiscal Effect

Original Updated
 Corrected Supplemental

LRB Number	Amendment Number if Applicable
Bill Number	Administrative Rule Number IS-34-06

Subject
 Creation of NR 40 -- Invasive Species Identification, Classification, and Control

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		\$ 120,000	\$ -
(FTE Position Changes)		(2.00 FTE)	(- FTE)
State Operations — Other Costs		40,000	-
Local Assistance			-
Aids to Individuals or Organizations			-
Total State Costs by Category		\$ 160,000	\$ -
B. State Costs by Source of Funds		Increased Costs	Decreased Costs
GPR		\$	\$ -
FED			-
PRO/PRS			-
SEG/SEG-S		160,000	-
State Revenues	Complete this only when proposal will increase or decrease state revenues (e.g., tax increase, decrease in license fee, etc.)	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	\$ 160,000	\$
Net Change in Revenues	\$	\$

Prepared By: Joe Polasek	Telephone No. 266-2794	Agency Department of Natural Resources
Authorized Signature	Telephone No. 266-2794	Date (mm/dd/ccyy) 2/16/09

ORDER OF
THE STATE OF WISCONSIN NATURAL RESOURCES BOARD
CREATING RULES

The Wisconsin Natural Resources Board proposes an order to create ch. NR 40 relating to the identification, classification and control of invasive species

IS-34-06

Analysis Prepared by Department of Natural Resources

1. Statutes interpreted.

Section 23.22 (2) (a), Stats.

2. Statutory authority.

Sections 23.09 (2) (intro), 23.091, 23.11 (1), 23.22 (2) (a) and (b) 6., 23.28 (3), 27.01 (2) (j), 29.014 (1), 29.039 (1) 29.041, and 227.11 (2) (a), Stats.

3. Explanation of agency authority to promulgate the proposed rules under the statutory authority.

The principal authority for these 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 must adopt rules that 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.

The Department believes that a prohibition on the transport of specific aquatic invasive plants and animals *per se* would be ineffective and nearly impossible to enforce in most circumstances because it would be too difficult for a non-expert to correctly identify even some common invasive aquatic species in the field. For this reason, a broader ban on the transport of aquatic plants and animals in general is reasonable and necessary in order to control the spread of aquatic invasive species from waterbody to waterbody, especially since they are commonly comingled with native species. Legislative recognition of this need appears in s. 30.715, Stats. To prevent the spread of invasive aquatic plants, it prohibits the placement of a boat or boat trailer in navigable water if the boat or trailer has any aquatic plants attached.

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 the rules created by this Order 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 these rules, has its basis in the inherent power and duty of government to protect and promote the life, comfort, safety and welfare of society.

Reserved to the states by the 10th Amendment to the U. S. Constitution, the state's police power is vested in the Legislature and delegated to the department for purposes of controlling invasive species. It is the governmental power of self-protection, permitting reasonable regulation of rights and property in matters essential to preservation of the public from injury. The police power is a necessary attribute of every sovereign state, inherent in the states of the United States, and is not a grant derived from or under a written Constitution, but is founded upon the necessities of the existence of government. As stated in s. 227.19 (1) (a) and (b), Stats., Article IV of the Wisconsin Constitution vests in the Legislature the power to make laws, and thereby to establish agencies such as the department and to designate agency functions, and purposes, such as the control of invasive species. In creating agencies and designating their functions and purposes, the Legislature may delegate rule-making authority to these agencies to facilitate administration of legislative policy.

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 29.014 (1), Stats., directs the department to establish and maintain any bag limits and conditions governing the taking of fish that will conserve the fish supply and ensure the citizens of this state continued opportunities for good fishing. 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 29.041, Stats., provides that the department may regulate fishing on and in all interstate boundary waters, and outlying waters.

Finally, s. 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.

In adopting the rules set out in this Order, it should be noted that the department is expressly not relying on, interpreting or implementing either s. 23.225, Stats., relating to invasive fish species (as defined by department rule), or s. 23.245, Stats., relating to transporting certain boats and equipment on highways with invasive species (as defined by department rule) in or attached. These provisions were adopted as part of 2007 Wisconsin Act 226, effective June 1, 2008 (the budget repair bill). Both statutes will require rulemaking by the department before they become applicable.

4. 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.
- 30.1255 Report on control of aquatic nuisance species.
- 30.715 Placement of boats, trailers, and equipment in navigable waters.
- 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]

5. Plain language analysis of the proposed rules.

The order creates rules for the identification, classification and control of invasive species, as part of the department's state-wide program to control invasive species required under s. 23.22 (2), Stats. Section 23.22 (1) (c), Stats., defines "invasive species" to mean nonindigenous species whose introduction causes or is likely to cause economic or environmental harm or harm to human health.

The rules establish criteria for classifying invasive species and list or identify specific invasive species into 2 regulated categories (prohibited and restricted) according to those criteria (giving consideration to recommendations from the Wisconsin Council on Invasive Species). The rules ban the transportation (including importation), possession, transfer (including sale) and introduction of invasive species that are listed or identified as "prohibited", with certain exceptions. The department may, by special order, temporarily identify additional species as invasive and classify them into the prohibited invasive species category if the secretary determines that certain criteria described in the rule are met. "Restricted" invasive species are also subject to a conditional ban on transportation, transfer and introduction, but not possession (except for fish and crayfish), with certain exceptions. The rules also set out exemptions and allow permits for transportation, possession, transfer or introduction for research or for other specified purposes and allow the department to recognize other equivalent department permits or approvals in lieu of issuing a permit under these rules.

Transportation, possession, transfer and introduction without a permit are exempt if the department determines that the transportation, possession, transfer or introduction was incidental or unknowing, and was not due to the person's failure to take reasonable precautions. However, the rules also ban transportation of "identified carriers" – items or host materials that may carry any invasive species and that are subject to a quarantine by the department, the Wisconsin department of agriculture, trade and consumer protection (DATCP) or the United States department of agriculture animal and plant health inspection service (USDA APHIS) – regardless of whether the transportation was incidental or unknowing.

The rules authorize the department to enter property with the permission of the owner or person in control of the property and, if permission cannot be obtained, to seek an inspection warrant from the Circuit Court. Entry is only for the purpose of inspection, sampling or control of prohibited invasive species. The

rules also allow the department to enter into consent orders with persons who own, control or manage property where prohibited invasive species are present to implement approved control measures, and to issue unilateral orders for control purposes unless the person was not responsible for the presence of the prohibited invasive species. If a control order is not complied with and the department undertakes control measures, the rules allow for cost-recovery by the department for the expenses it incurred. In contrast, “restricted” species are not subject to any control requirements, except that persons who grow restricted plant species at a nursery are required to destroy them if the nursery closes.

The rules also include general preventive measures to curb the spread or introduction of invasive species. They limit certain common activities that may function as vectors or pathways for the inadvertent introduction or spread of invasive species, especially when in the form of eggs, seeds, propagules, pathogens, and other life forms or stages too small to see, unless a permit to engage in the activity has been issued by the department. These preventive measures are not specific as to species, and are written so that they complement and do not conflict with or duplicate other rules or statutes with similar objectives such as the VHS rules in ss. NR 19.05 and 19.055, the rules governing operation and maintenance of dry fire hydrants in s. NR 329.04, the “illegal to launch” prohibitions in s. 30.715, Stats., and the prohibition in s. NR 109.08 (4) against placing equipment used in aquatic plant management in another navigable water.

Preventive measures include requirements to:

- notify the department of the escape of restricted invasive fish species from a safe facility,
- remove all attached aquatic plants and aquatic animals from vehicles, boats, trailers, equipment and gear of any type immediately upon their removal from the water,
- drain all water from any vehicle, equipment other than boating or fishing equipment, or gear of any type immediately upon its removal from the water,
- remove all attached aquatic plants and aquatic animals from vehicles, boats, trailers, equipment and gear of any type before bringing it into the state over land for use on any water of the state or its bank or shore.
- drain all water from any vehicle, equipment other than boating or fishing equipment, or gear of any type before bringing it into the state over land for use on any water of the state or its bank or shore,
- remove attached aquatic plants and aquatic animals from any vehicle, certain boats, boat trailers, and equipment, and gear of any type or from a sea plane before placing it in any water of the state, and before taking off a in a seaplane or transporting a vehicle, boat, boat trailer, equipment or gear of any type on a public highway,
- not transport “identified carriers” – materials that are covered by a department infestation control zone designation or a DATCP or USDA APHIS quarantine order,
- not use a prohibited invasive fish or crayfish species as bait,
- not introduce a nonnative aquatic plant, algae or cyanobacteria species into any water of the state.

The preventive measure rules also set out specific exemptions for permitted activities, for movement and cleaning of aquatic plant harvesting equipment, for wild rice and duckweed, for waterfowl blinds, for transport of an identified carrier of an invasive species from a department infestation control zone, a DATCP quarantine area or a United States Department of Agriculture Animal and Plant Health Inspection Service quarantine area pursuant to a DATCP-USDA APHIS compliance agreement, and for other specific situations.

Criteria and procedures for invasive species permit application, issuance, administration and revocation are detailed in the rules.

Finally, the rules set out the procedures available to the department under the statutes for enforcement of the rules and of permits issued under the rules.

6. Summary of and preliminary comparison with existing or proposed federal regulation that is intended to address the activities to be regulated by the proposed rules.

There are no directly comparable federal regulations that address the activities regulated by the proposed rules.

7. Comparison with similar rules in adjacent states (Minnesota, Iowa, Illinois, and Michigan).

Minnesota has invasive species regulations that make it unlawful to possess, import, purchase, transport, or introduce these species except under a permit for disposal, control, research, or education. Minnesota also has a regulated and unlisted species regulation that states “Regulated and unlisted invasive species are legal to possess, sell, buy, and transport, but they may not be introduced into a free-living state, such as being released or planted in public waters.” Minnesota’s classifications include aquatic plants, fish, invertebrates, mammals and birds. The invasive species laws are similar in scope to Wisconsin’s proposed rules, minus the inclusion of terrestrial plants. Minnesota maintains a list of “prohibited invasive species” in its administrative code, along with lists of “regulated invasive species” and “unregulated nonnative species”. The term “unlisted species” is defined in Minnesota statutes. Although not limited to invasive (i.e., nonnative) plant species, Minnesota has a noxious weed law that lists a number of widespread weeds as prohibited and requires landowners to control them. County Agriculture Inspectors have primary authority to order controls. They also have 2 species listed as restricted noxious weeds that are not required to be controlled but may not be imported, sold or transported. An additional group of species are called secondary noxious weeds and are not regulated by the state but may be added to a county prohibited or restricted noxious weed list.

Iowa law makes it illegal to 1) possess, introduce, purchase, sell, propagate, or transport aquatic invasive species in Iowa, 2) place a trailer or launch a watercraft with aquatic invasive species attached in public waters, and 3) operate a watercraft in a marked aquatic invasive species infestation. The law also requires the DNR to identify waterbodies infested with aquatic invasive species and post signs alerting boaters. The DNR may restrict boating, fishing, swimming, and trapping in infested waters. Iowa also has regulations on crop seed content, noxious weeds and plant pests. Its noxious weed law is similar to Minnesota’s, but includes many more plant species (25+). The Iowa law is rather involved, including roads and railroad regulations, removal and cost issues. County weed commissioners are authorized to enter private lands to perform their duties and supervise the control and destruction of all noxious weeds in the county. Weed commissioners are required to undergo training and do extensive reporting of all duties performed. They can order controls on any private or public lands. Landowners or managers pay the costs of control.

Illinois does not have an inter-organizational council or statewide plan to address all categories of invasives; however, it has established an interagency task force, which has developed a statewide management plan for aquatic nuisance species. Illinois has a noxious weed law similar to Wisconsin’s noxious weed law, but more complex. It defines noxious weed “as any plant which is determined by the

State Director of Agriculture, the Dean of the College of Agriculture of the University of Illinois and the Director of the Agricultural Experiment Station at the University of Illinois, to be injurious to public health, crops, livestock, land or other property.” They have a weed control fund that can be used to help with the cost of control. There is a clean list of birds and mammals that may be brought into Illinois to hold, release, propagate, or sell. 1. A permit is needed to import all animals not on the list. 2. The permit will be granted after proof that the animals intended to be imported are free of communicable disease, will not become a nuisance, and will not damage any existing wild or domestic species. 3. Animals imported for a zoo or other public display are exempt from the permitting requirements. 4. Animals on the list cannot be released without permission from the department. 5. Before any person may propagate, release, import, export, or transport any exotic wildlife species on the list, he must provide the department upon request with evidence that the animals have been inspected and certified disease free.

There is an aquatic life approved species list. 1. The following aquatic life categories are considered approved for aquaculture, transportation, stocking, importation, and possession in Illinois: amphibians, reptiles, crustaceans, mollusks, gastropods, fish, and plants. 2. Any species not on the aquatic life approved species list may not be imported or possessed alive without a letter of authorization, except saltwater species commonly used as seafood which will not survive in freshwater. 3. It is unlawful to release any aquatic life into the waters of Illinois without first securing permission of the department, except for aquatic life on the aquatic life approved species list into waters wholly on one's property. 4. Permission will be based on the potential detriment to the aquatic resource. 5. A restricted species transportation permit is needed to transport or ship within Illinois any live grass carp or white amur, bighead carp, silver carp, or hybrid grass carp. 6. A salmonid import permit is needed for a source hatchery to transport or ship live trout, salmon, or char into Illinois. 7. A copy of the salmonid import permit must accompany each shipment. 8. A salmonid import permit will be issued only if the source hatchery has been inspected within the last 12 months and found free of specified diseases. 9. Except in the case of injurious species, such as rusty crayfish and zebra mussel, as determined by the Department of Conservation based on the potential threat to indigenous aquatic life or habitat, these regulations do not apply to state agencies or universities as long as they are operating in a manner to prevent escape. 10. The Department of Conservation may remove and dispose of any aquatic life from any Illinois waters to maintain the biological balance of aquatic life. 11. After any investigation when it is found by the director that there is imminent danger of loss of aquatic life, the director may authorize the taking of aquatic life from any area to salvage imperiled aquatic life. 12. The department may examine all buildings, vessels, bags, or other receptacles that it believes contain aquatic life bought, sold, shipped, or in possession contrary to the Code.

Michigan has an old (1941) noxious weed law similar to Wisconsin's that lists more species, several of which are native. They also have a new law titled *Transgenic and Nonnative Organisms* which lists prohibited and restricted aquatic plants, fish and insects. It seems similar to the proposed rules, minus the terrestrial plants and vertebrates. It includes a fund specifically for administration of the law and for education. Michigan maintains a list of “prohibited fish species” in statutes. In addition, species may be prohibited by Order of the DNR Director. A list of “approved species for aquaculture production” is also maintained in statutes. Before importing an exotic animal species, the director may require a physical examination, negative test results, and an official interstate health certificate. Live feral swine and San Juan rabbits may not be imported or released in Michigan without permission from the director. If an animal is imported into Michigan without the required official tests or document, the director may quarantine, return, or destroy the animal; perform the test; allow a direct movement of the animal to slaughter; or allow legal importation into another state.

8. Summary of the factual data and analytical methodologies that the agency used in support of the proposed rules and how any related findings support the regulatory approach chosen for the proposed rules.

The department and the Wisconsin Council on Invasive Species (Council) have been working over the last 3 ½ years to develop rules to classify and regulate invasive species. The Research Subcommittee of the Council developed a detailed set of criteria for assessing the species to be classified. The criteria include:

- a) Potential economic, environmental or human health impacts of the species
- b) Current presence, distribution and abundance in the state
- c) Potential for establishment and spread
- d) Control potential
- e) Socio-economic impacts of the species, both positive and negative

Department staff, with input from the Council and others, developed the lists of species to be assessed based on these criteria. Literature reviews were conducted on each of those species, specifically with regard to the assessment criteria. These literature summaries were reviewed by land managers and species specialists. Species Assessment Groups (SAGs) were developed to assess the species and to make recommendations to the Council. The SAGs, which were comprised of experts in their respective fields and stakeholder groups, used the criteria for species selection to advise the Council on the placement of species in specific categories. Separate SAGs were developed for specific categories including:

- a) aquatic plants and algae
- b) woody plants
- c) terrestrial herbaceous plants
- d) fish and aquatic invertebrates
- e) terrestrial vertebrates
- f) terrestrial invertebrates and forest pests

The Council met in October, 2007 and discussed the SAGs' recommendations. For a few species the Council revised the classification recommended by the SAGs. For most species, it agreed with the SAG recommendations. The draft rules went out for informal public input in December 2007. Meetings were held around the state to gather input on the process used, the rule language and the species to be listed. Revisions were made, and the Natural Resources Board authorized public hearings which were held in August of 2008. After public hearing, comments were compiled and the Council met again to hear of possible revisions to the rules. This species assessment process was generally agreed to be a scientifically sound and effective method to evaluate invasive species and solicit input from the public and affected stakeholders. It is anticipated that a similar process, with only minor revisions, will be used for future rule changes that might revise the listed species and rule language.

9. Analysis and supporting documentation that the agency used in support of the agency's determination of the rules' effect on small businesses under s. 227.114, Stats., or that was used when the agency prepared an economic impact report.

The Wisconsin Council on Invasive Species' Research Subcommittee identified economics as a criterion for species classifications. Therefore, the literature reviews conducted for each species include an evaluation of socio-economic effects. The evaluation includes: positive aspects the species has on the

economy/society; potential socio-economic effects of restricting use or requiring control; direct and indirect socio-economic effects of proposed species; increased cost to sectors caused by the species; and effects on human health. The data collected varies greatly by species and is generally qualitative as quantitative data is difficult to acquire.

Most invasive species with high economic importance to agriculture or other businesses are not being proposed for classification or regulation at this time, but may be assessed in the future. Department staff has been consulting with industry groups to assess potential impacts of the proposed rules on businesses, landowners and local units of government and to develop solutions to minimize potential adverse impacts. Permits and exemptions will be allowed for the 2 regulated categories of invasive species (prohibited and restricted) where appropriate.

Species Assessment Groups were established to advise the Council on the classification of invasive species. These groups included representatives of industries affected by the species and those potentially affected by any regulations limiting the use of these species. During the Species Assessment Group meetings, economics were addressed for most species. For instance, in the woody plants group, decisions were in large part based on the number of nurseries that grow a particular plant and how much income they produce from a particular plant or its cultivars. If the number of nurseries that grow a plant was very low or none, the decision was easier to come to consensus on. For example, for the variegated cultivar of Porcelain berry, it was stated that there is only one known Wisconsin grower. That grower makes \$500 per year on the plant and had already stated that it will not be burdensome if the plant were prohibited.

For some plant species, certain cultivars that are not known to be invasive will be exempted from restrictions. For species that are proposed for the prohibited or restricted listing, permits are available for persons or businesses that have a valid use for the species and can minimize its potential spread. One example is the Asian bittersweet, which is not widely sold as an ornamental, but there are several cut flower farms that have large acreages of this plant for cutting and selling as cut stems. These businesses will be able to apply for permits to continue their activities with some requirement to minimize spread of the seeds.

10. Effects on small business, including how the rules will be enforced.

The rules may have favorable effects on a number of businesses; others may have some costs involved. For example, there has been an enormous increase in the number of ecological restoration businesses starting because of the public awareness of invasive species. They primarily focus on invasive species control. Landscape contractors, arborists, aquatic plant and pest control companies, as well as others, will have increased business opportunities when landowners and businesses choose to remove listed invasive species from their property. Businesses that depend on a healthy, sustainable environment will also benefit when the rules help to minimize the spread of invasives. Marinas, boating, fishing gear and bait stores, resorts, fishing guides and others are significantly affected by invasive aquatic species, so keeping these species out of the waters will benefit them. The entire forestry and outdoor recreation industries, as well as many aspects of agriculture will benefit in the long-term from these rules, although they may need to follow some best management practices to avoid spreading invasives.

Landowners and managers of both public and private lands will benefit greatly from decreased spread of invasives. A few landowners, managers and small businesses will find that they have prohibited species that need to be controlled, and they will be expected to control the infestations. However, innocent

landowners are not likely to have to bear the costs of the control efforts.

Some small business owners may have to learn to identify some of the prohibited or restricted invasive species. For some businesses, the effects of the rules may also include the need to stop importing, buying, selling, growing or otherwise using certain species, or to potentially replace the prohibited or restricted species with other species. Some small businesses may experience a loss of revenue if a particular species in their inventory is regulated by the rules and the business's inventory is not sold prior to the rules' effective date. This may include nurseries, aquaculture operations, bait dealers, pet shops and game farms. Species have been selected for these rules to minimize these potential impacts. A very few small businesses may need to apply for a free permit to transport, possess, transfer or introduce listed species, and to comply with its requirements. Department staff will work with individuals and businesses to develop a permit specific to their situation and needs. There may be a requirement for permittees to report in a predetermined amount of time. Where other department permits or approvals already apply, efforts will be made to avoid requiring additional permits.

Enforcement will vary depending on the species being regulated and the applicability of other rules and statutes. For forest or plant pests and aquaculture, the department and DATCP share regulatory responsibility. The department has (or will develop) memoranda of agreement with DATCP to clarify what aspects of this and related rules will be enforced by each agency.

The department anticipates that it will normally follow an informal, stepped enforcement process in order to obtain compliance with the rules. This involves informal discussions between department staff and the 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, these rules and permits issued under the rules 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 the rules also may be enforced by administrative permit revocation proceedings.

11. Agency contact person (including e-mail and telephone number).

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SECTION 1. Chapter NR 40 is created to read:

Chapter NR 40
INVASIVE SPECIES IDENTIFICATION,
CLASSIFICATION AND CONTROL

NR 40.01 Purpose.

NR 40.02 Definitions.

NR 40.03 Classifications.

NR 40.04 Prohibited category.

NR 40.045 Emergency additions to prohibited category.

NR 40.05 Restricted category.

NR 40.06 Invasive species permits.

NR 40.07 Preventive measures.

NR 40.08 Enforcement.

NR 40.01 Purpose. The purpose of this chapter is to identify, classify and control invasive species in Wisconsin as part of the department's statewide program required by s. 23.22 (2) (a), Stats.

NR 40.02 Definitions. For purposes of this chapter,

(1) "Algae" means a predominately photosynthetic eukaryotic organism ranging from unicellular to macroscopic forms, lacking true roots, stems, leaves, and embryos.

(2) "Animal" means all vertebrate and invertebrate species, including but not limited to mammals, birds, reptiles, amphibians, fish, mollusks, arthropods, insects, and their the eggs, larvae or young, but excluding humans.

(3) "Aquatic animal" means any vertebrate or invertebrate species that lives or grows only in water during any life stage, and includes the eggs, larvae or young of those species.

(4) "Aquatic plant" means a submergent, emergent, free-floating or floating-leaf plant and includes any part of the plant.

(5) "Attached" means in, on, or physically connected to in any way.

(6) "Boat" means any device capable of being used as a means of transportation on water.

(7) "Category" means a grouping of species designated by administrative rule for which there are specific legal requirements or restrictions.

(8) "Contain" or "containment" means to prevent spread beyond a designated boundary.

(9) "Control" has the meaning given it in s. 23.22 (1) (a), Stats. In addition, "control" includes activities to eliminate or reduce the adverse effects of invasive species including decreasing or eradicating their population or limiting their introduction or spread, and includes destroying the aboveground, and

when necessary, the belowground portions of a plant in a manner and at the proper time to prevent the development and distribution of viable seeds or other propagules. For plants that reproduce vegetatively, “control” includes the use of methods that contain or reduce the vegetative spread of the plant.

Note. Section 23.22 (1) (a), Stats., states that “control” means to cut, remove, destroy, suppress, or prevent the introduction or spread of.

(10) “Cultivate” means, for plants, intentionally maintaining an individual or population of a plant.

(11) “Cyanobacteria” means a predominately photosynthetic prokaryotic organism occurring singly or in colonies.

(12) “DATCP” means the Wisconsin department of agriculture, trade and consumer protection.

(13) “Department” means the Wisconsin department of natural resources.

(14) “Disposal” means the lawful discharge, deposit, dumping or placing of any invasive species into or on any land or water in a manner that prevents the establishment, introduction or spread of the disposed species.

(15) “Eradicate” means to remove an entire population of an invasive species and all its propagules from an area of infestation.

(16) “Established” means, for plants and terrestrial invertebrates and disease causing organisms, present in an area as a self-sustaining population that is dispersed to the extent that eradication is either infeasible or will take a significant effort over a period of several years.

(17) “Established nonnative fish species and established nonnative crayfish species” means alewife (*Alosa pseudoharengus*), common carp (*Cyprinus carpio*), rainbow smelt (*Osmerus mordax*), round goby (*Neogobius melanostomus*), ruffe (*Gymnocephalus cernuus*), sea lamprey (*Petromyzon marinus*), three-spine stickleback (*Gasterosteus aculeatus*), tubenose goby (*Proterorhinus marmoratus*), white perch (*Morone americana*), and rusty crayfish (*Orconectes rusticus*).

(18) “Feral” means existing in an untamed or wild, unconfined state, having returned to such a state from domestication.

(19) “Genetically-modified” refers to an organism whose genome, chromosomal or extrachromosomal, is modified permanently and heritably, using recombinant nucleic acid techniques, and includes the progeny of any genetically modified organism.

(20) "Identified carrier of an invasive species" means any material identified in a department infestation control designation under s. 26.30 (7), Stats., a DATCP quarantine under s. 94.01, Stats., or a

United States Department of Agriculture Animal and Plant Health Inspection Service quarantine declaration under 7 USC § 7714 or 7715 as potentially carrying an invasive species.

(21) “Import” means to bring into Wisconsin or to arrange for another person to bring into Wisconsin.

(22) “Incidental” means something is done inadvertently when performing an otherwise legal activity.

(23) “Introduce” means to stock, plant, release or otherwise put an invasive species into the outdoor environment or use an invasive species in this state anywhere except within an indoor facility which is designed to physically contain the organism, including but not limited to a laboratory, greenhouse, growth chamber or fermenter.

(24) “Invasive species” has the meaning given it in s. 23.22 (1) (c), Stats. In addition, “invasive species” means nonnative species including hybrids, cultivars, subspecific taxa, and genetically modified variants whose introduction causes or is likely to cause economic or environmental harm or harm to human health, and includes individual specimens, eggs, larvae, seeds, propagules and any other viable life-stages of such species. For fish, “invasive species” includes all nonnative species.

Note: Section 23.22 (1) (c), Stats., states that “invasive species” means nonindigenous species whose introduction causes or is likely to cause economic or environmental harm or harm to human health.

(25) “Management action” means limiting the spread of established populations or abating harmful ecological, economic, social and public health impacts associated with invasive species introductions.

(26) “Native duckweed” means any of the following: *Lemna aequinoctialis* (lesser duckweed, three-nerved duckweed), *Lemna minor* (common duckweed), *Lemna obscura* (little duckweed, purple duckweed), *Lemna perpusilla* (least duckweed, minute duckweed), *Lemna trisulca* (forked duckweed, star duckweed), *Lemna turionifera* (perennial duckweed, turion duckweed), *Spirodela polyrrhiza* (giant duckweed), *Wolffia borealis* (northern watermeal), *Wolffia brasiliensis* (Brazilian watermeal), and *Wolffia columbiana* (Columbian watermeal).

(27) “Native species” means a species indigenous to Wisconsin, and includes an individual specimen. For fish, “native species” means those fish species identified as native fish species in *Wisconsin Fishes 2000: Status and Distribution*, by Lyons, J., P. A. Cochran, and D. Fago, published by University of Wisconsin Sea Grant Institute, and includes an individual specimen, regardless of the specimen’s origin.

(28) “Natural areas” means undeveloped or wild lands and those lands preserved or restored and managed for their natural features, including but not limited to parks, forests, refuges, grasslands, wetlands and shorelines on public and private lands.

(29) “Nonnative” or “nonnative species” means a species not indigenous to Wisconsin, and includes an individual specimen.

(30) “Nonnative fish species in the aquaculture industry” means arctic char (*Salvelinus alpinus*), Atlantic salmon (*Salmo salar*), brown trout (*Salmo trutta*), chinook salmon (*Oncorhynchus tshawytscha*), coho salmon (*Oncorhynchus kisutch*), rainbow trout (*Oncorhynchus mykiss*), pink salmon (*Oncorhynchus gorbuscha*), redear sunfish (*Lepomis microlophus*), tiger trout (a hybrid of *Salvelinus fontinalis* and *Salmo trutta*) and tilapia (*Tilapia* spp).

(31) “Nonnative viable fish species in the aquarium trade” means goldfish (*Carassius auratus*), koi carp (*Cyprinus carpio*), sterlet (*Acipenser ruthenus*), Chinese hi-fin banded shark (*Myxocyprinus asiaticus*), bitterling (*Rhodeus* spp.), ide (*Leuciscus idus*) and weather loach (*Misgurnus anguillicaudatus*).

(32) “Non-reproductive” means, for plants, not capable of reproduction sexually or asexually.

(33) “Nonviable” means, with respect to aquatic vertebrates including fish species, species for which eggs, fry, or adults are not capable of surviving water temperature below 38 degrees Fahrenheit or not capable of surviving in fresh water. “Nonviable” means, with respect to terrestrial vertebrates, species that are not capable of living, growing, developing, and functioning successfully in Wisconsin’s outdoor environment.

(34) “Open pond” means an outdoor pond that is not entirely covered to prevent the escape of fish.

(35) “Order” means an element of the Linnean taxonomic classification system, unless the context indicates otherwise.

(36) “Person” means an individual, partnership, corporation, society, association, firm, unit of government, public agency or public institution, and includes an agent of one of these entities.

(37) “Pet” means an animal raised or kept for companionship and generally kept indoors, in an enclosure or otherwise confined or restrained, and not allowed to roam freely out-of-doors.

(38) “Plant” means, as a verb, to place entire live plants, plant parts or seeds into the water, the ground or a planter out of doors for the purpose of growing them. “Plant”, as a noun, means any member of the Kingdom Plantae, lichens, algae and cyanobacteria, and any varieties, cultivars, hybrids or

genetically modified variants thereof, and includes any plant parts capable of vegetative or sexual reproduction.

(39) “Plant taxa” mean taxonomic categories or units of plant classification, such as family, genus, species, variety and cultivar.

(40) “Possess” means to own, maintain control over, restrain, hold, grow, raise or keep.

(41) “Prohibited invasive species” or “prohibited species” means an invasive species that the department, at the time of listing under s. NR 40.04 (2), has determined is likely to survive and spread if introduced into the state, potentially causing economic or environmental harm or harm to human health, but which is not found in the state or in that region of the state where the species is listed as prohibited in s. NR 40.04 (2), with the exception of isolated individuals, small populations or small pioneer stands of terrestrial species, or in the case of aquatic species, that are isolated to a specific watershed in the state or the Great Lakes, and for which statewide or regional eradication or containment may be feasible.

(42) “Propagules” means parts of a plant that are capable of producing additional plants through either sexual or asexual reproduction, including but not limited to seeds, roots, stems, rhizomes, tubers and spores.

(43) “Public highway” means every public street, alley, road, highway or thoroughfare of any kind, except waterways, in this state while open to public travel and use, but does not include public boat access sites and associated parking areas.

(44) “Reasonable precautions” means intentional actions that prevent or minimize the transport, introduction, possession or transfer of invasive species. Reasonable precautions include but are not limited to best management practices (BMPs) for invasive species approved by the department, practices recommended by the “Wisconsin Clean Boats, Clean Waters” program and “Stop Aquatic Hitchhikers” campaign, and compliance with DATCP quarantine regulations imposed under s. 94.01, Stats., or a United States Department of Agriculture Animal and Plant Health Inspection Service quarantine declared under 7 USC § 7714 or 7715. For the transfer of aquatic plants, reasonable precautions include verifying that the species transferred is identified correctly and is not listed in s. NR 40.04 or 40.05 as prohibited or restricted, and that there are no other listed invasive species comingled with the species being transferred.

(45) “Recombinant nucleic acid techniques” means laboratory techniques through which genetic material is isolated and manipulated in vitro and then inserted into an organism, resulting in a transgenic organism.

(46) “Restricted invasive species” or “restricted species” means an invasive species that the department, at the time of listing under s. NR 40.05 (2), has determined is already established in the state

or in that region of the state where the species is listed as restricted in s. NR 40.05 (2) and that causes or has the potential to cause economic or environmental harm or harm to human health, and for which statewide or regional eradication or containment may not be feasible.

(47) “Safe facility” means, for fish, an aquarium or container that does not directly drain into a water of the state, is not subject to intermittent or periodic flooding, is not connected to any water of the state, and is not an open pond. For crayfish and other aquatic invertebrates, "safe facility" means an aquarium or container that prevents the escape of the aquatic invertebrates and that does not directly drain into a water of the state.

(48) “Species” means monera, protista, fungi, plantae, animalia, viruses, phytoplasmas, mycoplasma-like organisms and prions and includes seeds, propagules and individual living specimens, eggs, larvae, and any other viable life-stages of such species. “Species” includes genetically modified species, cultivars, hybrids and sub-specific taxa.

(49) “Transfer” means to buy, sell, trade, barter, exchange, give or receive or to offer to buy, sell, trade, barter, exchange, give or receive.

(50) “Transport” means to cause, or attempt to cause, an invasive species to be imported or carried or moved within the state, and includes accepting or receiving a specimen for the purpose of transportation or shipment.

(51) “Unknowing” means unaware of the presence of a prohibited or restricted invasive species.

(52) “Waters of the state” has the meaning given it in s. 281.01 (18), Stats.

Note: Section 281.01 (18), Stats., provides as follows: “Waters of the state” includes those portions of Lake Michigan and Lake Superior within the boundaries of this state, and all lakes, bays, rivers, streams, springs, ponds, wells, impounding reservoirs, marshes, watercourses, drainage systems and other surface water or groundwater, natural or artificial, public or private, within this state or its jurisdiction.

(53) “Wild animal” means any mammal, bird, or other creature of a wild nature endowed with sensation and the power of voluntary motion, except fish.

NR 40.03 Classifications. (1) CLASSIFICATION CATEGORIES. For purposes of this chapter, invasive species are classified into the following categories: prohibited and restricted.

Note: For informational and educational purposes, the department informally maintains and updates as needed a caution list of invasive species and a list of non-restricted invasive species. Caution list invasive species are either not found in the state, or if they are, the extent of their presence or impact

is not sufficiently documented. Caution list species may have shown evidence of invasiveness in similar environments in other states and could potentially spread in Wisconsin. Unlike the prohibited and restricted categories, caution list category invasive species are not regulated under this chapter.

Additional information is needed to determine if caution list species belong in another category. Any person finding a caution list species or knowing of its spread or lack thereof is encouraged to report the location, spread and impact (if known) to the department and to contain the spread of the species. Any person selling or distributing a caution list plant species is encouraged to distribute educational materials asking that the plants not be planted near wild, natural or environmentally sensitive areas. Non-restricted invasive species may have beneficial uses, but they also may have adverse environmental, recreational or economic impacts or cause harm to human health. Most of the non-restricted species are already integrated into Wisconsin's ecosystems, and state-wide control or eradication is not practical or feasible. Non-restricted category invasive species are not regulated under this chapter. All other non-native species recommended for listing as invasive but not yet assessed for this rule are put on an informal pending list. Future rule revisions will involve assessing some species from this list.

Note: A copy of the latest caution list and non-restricted list may be obtained at no cost at <http://dnr.wi.gov/invasives> or by writing to the department at the following address:

Invasive Plant Coordinator – ER/6

Wisconsin Department of Natural Resources

PO Box 7921

Madison, WI 53707-7921

(2) CRITERIA. The department shall consider the following criteria in classifying a nonnative species as an invasive species for the purpose of this chapter:

(a) The species' potential to directly or indirectly cause economic or environmental harm or harm to human health, including harm to native species, biodiversity, natural scenic beauty and natural ecosystem structure, function or sustainability; harm to the long-term genetic integrity of native species; harm to recreational, commercial, industrial and other uses of natural resources in the state; and harm to the safety or well being of humans, including vulnerable or sensitive individuals.

(b) The extent to which the species is already present in the state, or in portions of the state, including whether there are isolated pioneer stands.

(c) The likelihood that the species, upon introduction, will become established and spread within the state.

(d) The potential for eradicating the species or controlling the species' spread within the state, including the technological and economic feasibility of eradication or control.

(e) The socio-economic value afforded by the species, including any beneficial uses or values the species may provide for recreation, commerce, agriculture or industry within the state.

NR 40.04 Prohibited category. (1) PROHIBITED INVASIVE SPECIES. Prohibited invasive species are identified in this section by common and scientific names and by specific categories of species.

(2) IDENTIFICATION OF PROHIBITED SPECIES. (a) Algae and cyanobacteria. The following algae and cyanobacteria invasive species are prohibited:

1. *Cylindrospermopsis raciborskii* (Cylindro)
2. *Didymosphenia geminata* (Didymo or rock snot), except in Lake Superior
3. *Nitellopsis obtusa* (Starry stonewort)
4. Novel cyanobacterial epiphyte of the order Stigonematales linked with avian vacuolar

myelinopathy

5. *Prymnesium parvum* (Golden alga)
6. *Ulva* species, including species previously known as *Enteromorpha* species

(b) Plants. The following plant invasive species are prohibited:

1. *Ampelopsis brevipedunculata* (Porcelain berry) including the variegated cultivar
2. *Anthriscus sylvestris* (Wild chervil) except in Barron, Columbia, Dane, Milwaukee, Polk and

Walworth counties

3. *Bunias orientalis* (Hill mustard) except in Green and Lafayette counties.
4. *Cabomba caroliniana* (Fanwort)
5. *Centaurea solstitialis* (Yellow star thistle)
6. *Chelidonium majus* (Celandine) north of state highway 64
7. *Cirsium palustre* (European marsh thistle) west of state highway 13 and south of state

highway 29, excluding Door county

8. *Conium maculatum* (Poison hemlock) except Iowa and Grant counties
9. *Crassula helmsii* (Australian swamp crop or New Zealand pygmyweed)
10. *Cytisus scoparius* (Scotch broom)
11. *Dioscorea oppositifolia* (Chinese yam)
12. *Egeria densa* (Brazilian waterweed)

13. *Epilobium hirsutum* (Hairy willow herb) except in Kenosha county
14. *Glyceria maxima* (Tall or reed mannagrass) west of a line formed by state highway 22 from Oconto to Arlington, then state highway 51 from Arlington to the Illinois state line.
15. *Heracleum mantegazzianum* (Giant hogweed)
16. *Humulus japonicus* (Japanese hops) except in Grant and Crawford counties
17. *Hydrilla verticillata* (Hydrilla)
18. *Hydrocharis morsus-ranae* (European frogbit)
19. *Lagarosiphon major* (Oxygen-weed, African elodea or African waterweed)
20. *Lepidium latifolium* (Perennial or broadleaved pepperweed)
21. *Lespedeza cuneata* or *Lespedeza sericea* (Sericea or Chinese lespedeza)
22. *Lonicera japonica* (Japanese honeysuckle)
23. *Lonicera maackii* (Amur honeysuckle) north of state highway 21 from LaCrosse to Wautoma and state highway 22 from Wautoma to Oconto
24. *Leymus arenarius* or *Elymus arenarius* (Lyme grass or sand ryegrass) except in Door, Kewaunee, Manitowoc, Sheboygan and Racine counties
25. *Microstegium vimineum* (Japanese stilt grass)
26. *Myriophyllum aquaticum* (Parrot feather)
27. *Najas minor* (Brittle naiad, or Lesser, Bushy, Slender, Spiny or Minor naiad or waternymph)
28. *Nymphoides peltata* (Yellow floating heart)
29. *Paulownia tomentosa* (Princess tree)
30. *Polygonum perfoliatum* (Mile-a-minute vine)
31. *Polygonum sachalinense* (Giant knotweed)
32. *Pueraria montana* (Kudzu)
33. *Quercus acutissima* (Sawtooth oak)
34. *Rubus phoenicolasius* (Wineberry or wine raspberry)
35. *Torilis arvensis* (Spreading hedgeparsley)
36. *Torilis japonica* (Japanese hedgeparsley or erect hedgeparsley) north of the line formed by state highway 21 from La Crosse to Coloma, north on state highway 51 to Heafford Junction, east on state highway 8 to the Michigan state line
37. *Trapa natans* (Water chestnut)

38. *Vincetoxicum nigrum* or *Cynanchum louiseae* (Black or Louise's swallow-wort) north and east of a line formed by interstate highways 90 from La Crosse to Madison and 94 from Madison to Milwaukee

39. *Vincetoxicum rossicum* or *Cynanchum rossicum* (Pale or European swallow-wort)

(c) Fish and crayfish. The following fish invasive species and crayfish invasive species are prohibited:

1. *Ctenopharyngodon idella* (grass carp)
2. *Cyprinella lutrensis* (Red shiner)
3. *Gambusia affinis* (Western mosquitofish)
4. *Gambusia holbrooki* (Eastern mosquitofish)
5. *Hypophthalmichthys molitrix* (silver carp)
6. *Hypophthalmichthys nobilis* (bighead carp)
7. *Mylopharyngodon piceus* (black carp)
8. *Sander lucioperca* (Zander)
9. *Scardinius erythrophthalmus* (Rudd)
10. *Synbranchidae* (Snakehead) except nonviable species of the family
11. *Tinca tinca* (Tench)
12. All other nonnative fish and nonnative crayfish except:
 - a. Established nonnative fish species and established nonnative crayfish species
 - b. Nonnative viable fish species in the aquarium trade
 - c. Nonnative fish species in the aquaculture industry
 - d. Nonviable fish species

(d) Aquatic invertebrates except crayfish. The following aquatic invertebrate invasive species are prohibited:

1. *Bithynia tentaculata* (Faucet snail)
2. *Bythotrephes cederstroemi* (Spiny water flea)
3. *Cercopagis pengoi* (Fishhook water flea)
4. *Corbicula fluminea* (Asian clam)
5. *Daphnia lumholtzi* (Water flea)
6. *Dreissena rostriformis* (Quagga mussel)
7. *Eriocheir sinensi* (Chinese mitten crabs)
8. *Hemimysis anomala* (Bloody shrimp)

9. *Potamopyrgus antipodarum* (New Zealand mud snail)

(e) Terrestrial invertebrates and plant disease-causing microorganisms. The following terrestrial invertebrate invasive species and plant disease-causing microorganism invasive species are prohibited:

1. *Adelges tsugae* (Hemlock woolly adelgid)
2. *Agrilus planipennis* (Emerald ash borer)
3. *Amyntas* or *Amyntus* species (Crazy worm)
4. *Anoplophora glabripennis* (Asian longhorned beetle)
5. *Cryptococcus fagisuga* (Scale associated with beech bark disease)
6. *Lymantria dispar* Asian race (Asian Gypsy moth)
7. *Phytophthora ramorum* (Sudden oak death pathogen)

Note: These terrestrial invertebrates and plant disease-causing microorganisms are also regulated by the department under s. NR 45.04 and by DATCP under ch. ATCP 21 and ch. 94, Stats.

(f) Terrestrial and aquatic vertebrates except fish. The following terrestrial and aquatic vertebrate invasive species are prohibited:

1. *Myiopsitta monachus* (Monk or Quaker parakeet or parrot)
2. *Sus domestica* (Feral domestic swine)
3. *Sus scrofa* (Russian boar) and other wild swine

(3) ACTIONS PROHIBITED BY THIS CLASSIFICATION; EXEMPTIONS. (a) Except as otherwise provided in pars. (b) to (h), no person may transport, possess, transfer or introduce a prohibited invasive species identified or listed under sub. (2).

(b) Paragraph (a) does not apply to a person who transports, possesses, transfers or introduces a prohibited invasive species identified or listed under sub. (2) if the department determines that the transportation, possession, transfer or introduction was incidental or unknowing, and was not due to the person's failure to take reasonable precautions.

Note: Paragraph (b) does not apply to preventive measures set out in s. NR 40.07.

(c) If authorized by a permit issued by the department under this chapter, a person may transport, possess, transfer or introduce a prohibited invasive species for research, public display, or, if the species is not a fish or crayfish, for other purposes specified by the department in the permit.

(d) A legally obtained nonnative wild animal that is a pet may be possessed, transported or transferred without a permit issued by the department under this chapter, but may not be introduced.

(e) Paragraph (a) does not apply to a person who transports, possesses, transfers or introduces a terrestrial invertebrate or plant disease-causing microorganism that is regulated under a quarantine

imposed by DATCP under s. 94.01, Stats., or a United States Department of Agriculture Animal and Plant Health Inspection Service quarantine area declared under 7 USC § 7714 or 7715 if the person is in compliance with a DATCP-USDA APHIS compliance agreement applicable to the terrestrial invertebrate or plant disease-causing microorganism.

(f) Paragraph (a) does not apply to a person who has a permit issued by DATCP under s. ATCP 21.04 for importation, movement, distribution or release of a pest or biological control agent that is a prohibited invasive species identified or listed under sub. (2).

(g) A person may transport, possess or give away a prohibited invasive species for the purpose of identification or disposal without a permit issued by the department under this chapter, if the person reports the location of origin of the prohibited invasive species to the department and no individual specimens or propagules are allowed to escape or be introduced. Reports shall be submitted within 30 days of the person taking possession and shall include contact and property owner information, type and detailed location of the species, the purpose for transporting, possessing or giving away the invasive species, and the final disposition of the invasive species. This paragraph does not apply to terrestrial and aquatic vertebrates or fish species.

Note: Paragraph (g) does not apply to transport of identified carriers of invasive species as described in s. NR 40.07 (5) (a).

Note: Reports for fish and aquatic invertebrates may be sent to:

Attn: FH/4
Wisconsin Department of Natural Resources
PO Box 7921
Madison, WI 53707-7921

Reports for other invertebrates may be sent to:

Attn: Wildlife Regulation Policy Specialist, WM/6
Wisconsin Department of Natural Resources
PO Box 7921
Madison, WI 53707-7921

Reports for plants may be sent to:

Attn: FR/4
Wisconsin Department of Natural Resources
PO Box 7921
Madison, WI 53707-7921

Reports for terrestrial invertebrates and plant disease-causing microorganisms may be sent to:

Forest Health Protection Program Coordinator
Wisconsin Department of Natural Resources
3911 Fish Hatchery Rd.
Fitchburg, WI 53711

Reports may also be sent by email to Bureau.EndangeredResources@wisconsin.gov

(h) Paragraph (a) does not apply to any of the following:

1. A person who holds a scientific collector permit for the invasive species under s. 29.614, Stats.
2. A person who, while lawfully fishing, inadvertently catches a fish invasive species.

Note: Section NR 20.20 (73) (c) 1. sets a bag limit of 0 for nonindigenous detrimental fish, but allows one such fish to be taken by hook and line if it is killed immediately and delivered immediately to a department service center or regional office. All nonindigenous fish species are declared under s. NR 20.38 (6) to be detrimental fish if the fish were imported without a permit in violation of s. 29.735, Stats., or are found in any water where their presence is not specifically permitted by the department.

(4) CONTROL REQUIREMENTS. (a) Unless entry is otherwise authorized by law, if the department has reason to believe that a prohibited species is present, the department or its designee may enter property to inspect for, survey or control prohibited species 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.

(b) 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. The department will seek funds to assist in the control of prohibited species. However, 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.

Note: The department anticipates it will request control of a prohibited invasive species only if it is feasible and reasonable to control the prohibited species on the property.

(c) If voluntary cooperation is not achievable or likely, and it is feasible and reasonable to control the prohibited species on the property, the department or its designee may control the prohibited species or it may offer the person the opportunity to negotiate the terms of a consent order for control purposes.

(d) If a consent order is not achievable or likely, the department may issue a unilateral order requiring that the person who owns, controls or manages the property control the prohibited species in accordance with a plan approved by the department unless the department determines that the prohibited species is present through no fault of the person. If the department determines that the prohibited species is present through no fault of the person, the department or its designee may control the prohibited species.

(e) If the person does not control the prohibited species upon order of the department, the department or its designee may control the prohibited species and the department may recover the reasonable and necessary expenses it incurs.

(f) The department may remove, or cause to be removed any detrimental fish or other aquatic invasive species from waters of the state.

Note: All nonindigenous fish species are declared under s. NR 20.38 (6) to be detrimental fish if the fish were imported without a permit in violation of s. 29.735, Stats., or are found in any water where their presence is not specifically permitted by the department.

Note: Persons finding any prohibited species are encouraged to report the species and its location to the department.

NR 40.045 Emergency additions to prohibited category. (1) The department may temporarily identify an additional species as an invasive species and may classify it into the prohibited category of s. NR 40.04 (2) if the secretary determines that all of the following are met:

(a) The species meets the definition of invasive species in s. NR 40.02 (24).

(b) Based on consideration of the criteria of s. NR 40.03 (2), the species meets the definition of prohibited invasive species for inclusion under s. NR 40.04 (2).

(c) An emergency exists, making it necessary for the preservation of public peace, health, safety or welfare, or the environment, to require the immediate identification and classification of the species as a prohibited invasive species under this chapter prior to the time it would take effect if the department complied with the procedures for permanent rulemaking under ch. 227, Stats.

(2) Department action under sub. (1) shall become effective upon issuance of an emergency order by the secretary and publication of a notice of the emergency order in the official state newspaper.

(3) The department shall provide the notice of the emergency order to the Wisconsin Council on Invasive Species and shall promptly notify the public of its determination by issuing a press release, by

posting the notice of the emergency order on the department's internet site, and by such other means as the department determines are reasonably likely to inform the public.

(4) During the time that an emergency order issued under sub. (2) is in effect, the actions prohibited by s. NR 40.04 (3) (a) and the exemptions of s. NR 40.04 (3) (b) through (h) apply to the additional species. In addition, the control requirements of s. NR 40.04 (4) apply to the additional species.

(5) The identification and classification under sub. (1) of an additional species as an invasive species in the prohibited category terminates when the emergency order issued under sub. (2) is withdrawn by the department or when a permanent rule takes effect adding the species to this chapter, whichever occurs first.

NR 40.05 Restricted category. (1) RESTRICTED INVASIVE SPECIES. Restricted species are listed or identified in this section by common and scientific names and by specific categories of species.

(2) IDENTIFICATION OF RESTRICTED SPECIES. (a) Algae and cyanobacteria. The following algae and cyanobacteria invasive species are restricted: None.

(b) Plants. The following plant invasive species are restricted:

1. *Ailanthus altissima* (Tree of heaven)
2. *Alliaria petiolata* (Garlic mustard)
3. *Anthriscus sylvestris* (Wild chervil) in Barron, Columbia, Dane, Milwaukee, Polk and Walworth counties
4. *Bunias orientalis* (Hill mustard) in Green and Lafayette counties
5. *Butomus umbellatus* (Flowering rush)
6. *Campanula rapunculoides* (Creeping bellflower)
7. *Carduus acanthoides* (Plumeless thistle)
8. *Carduus nutans* (Musk thistle or nodding thistle)
9. *Celastrus orbiculatus* (Oriental bittersweet)
10. *Centaurea biebersteinii*, *Centaurea maculosa* or *Centaurea stoebe* (Spotted knapweed)
11. *Chelidonium majus* (Celandine) south of state highway 64
12. *Cirsium arvense* (Canada thistle)
13. *Cirsium palustre* (European marsh thistle) east of state highway 13 and north of state highway 29, including Door county

14. *Conium maculatum* (Poison hemlock) in Iowa and Grant counties
 15. *Cynoglossum officinale* (Hound's tongue)
 16. *Dipsacus laciniatus* (Cut-leaved teasel)
 17. *Dipsacus sylvestris* or *Dipsacus fullonum* (Common teasel)
 18. *Elaeagnus angustifolia* (Russian olive)
 19. *Elaeagnus umbellata* (Autumn olive)
 20. *Epilobium hirsutum* (Hairy willow herb) in Kenosha county
 21. *Epipactis helleborine* (Helleborine orchid)
 22. *Euphorbia cyparissias* (Cypress spurge)
 23. *Euphorbia esula* (Leafy spurge)
 24. *Galeopsis tetrahit* (Hemp nettle)
 25. *Glyceria maxima* (Tall or reed mannagrass) east of a line formed by state highway 22 from Oconto to Arlington, then state highway 51 from Arlington to the Illinois state line.
 26. *Hesperis matronalis* (Dame's rocket)
 27. *Humulus japonicus* (Japanese hops) in Grant county and Crawford counties
 28. *Leymus arenarius* or *Elymus arenarius* (Lyme grass or sand ryegrass) in Door, Kewaunee, Manitowoc, Sheboygan and Racine counties.
 29. *Lonicera maackii* (Amur honeysuckle) south of state highway 21 from La Crosse to Wautoma and state highway 22 from Wautoma to Oconto
 30. *Lonicera morrowii* (Morrow's honeysuckle)
 31. *Lonicera tatarica* (Tartarian honeysuckle)
 32. *Lonicera x bella* (Bell's or showy bush honeysuckle)
 33. *Lythrum salicaria* (Purple loosestrife)
- Note:** Purple loosestrife is also designated as an invasive aquatic plant statewide under s. NR 109.07 (2).
34. *Myriophyllum spicatum* (Eurasian watermilfoil)
- Note:** Eurasian watermilfoil is also designated as an invasive aquatic plant statewide under s. NR 109.07 (2).
35. *Pastinaca sativa* (Wild parsnip), except for the garden vegetable form
 36. *Phragmites australis* (Phragmites or Common reed) nonnative ecotype
 37. *Polygonum cuspidatum* (Japanese knotweed)
 38. *Potamogeton crispus* (Curly-leaf pondweed)

Note: Curly-leaf pondweed is also designated as an invasive aquatic plant statewide under s. NR 109.07 (2).

39. *Rhamnus cathartica* (Common buckthorn)
40. *Rhamnus frangula* or *Frangula alnus* (Glossy buckthorn) including the Columnaris (tall hedge) cultivar but excluding the cultivars *Asplenifolia* and *Fineline* (Ron Williams)
41. *Rosa multiflora* (Multiflora rose)
42. *Tanacetum vulgare* (Tansy), except the cultivars “Aureum” and “Compactum”
43. *Torilis japonica* (Japanese hedge parsley) south of the line formed by state highway 21 from La Crosse to Coloma, north on state highway 51 to Heafford Junction, east on state highway 8 to the Michigan state line
44. *Typha angustifolia* (Narrow-leaf cattail)
45. *Typha x glauca* (Hybrid cattail)
46. *Vincetoxicum nigrum* or *Cynanchum louiseae* (Black or Louise’s swallow-wort) south and west of a line formed by interstate highways 90 from La Crosse to Madison and 94 from Madison to Milwaukee

(c) Fish and crayfish. The following fish invasive species and crayfish invasive species are restricted:

1. Established nonnative fish species and established nonnative crayfish species
2. Nonnative viable fish species in the aquarium trade
3. Nonnative fish species in the aquaculture industry
4. Nonviable fish species

(d) Aquatic invertebrates except crayfish. The following aquatic invertebrate invasive species are restricted:

1. *Cipangopaludina chinensis* (Chinese mystery snail)
2. *Dreissena polymorpha* (Zebra mussel)

(e) Terrestrial invertebrates and plant disease-causing microorganisms. The following terrestrial invertebrate invasive species and plant disease-causing microorganism invasive species are restricted:

1. *Lymantria dispar* (European Gypsy moth) European race in all counties except those included in a DATCP quarantine under s. 94.01, Stats., or a United States Department of Agriculture Animal and Plant Health Inspection Service quarantine declaration under 7 USC § 7714 or 7715.

Note: This terrestrial invertebrate is also regulated by DATCP under ch. ATCP 21 and ch. 94, Stats.

Note: Gypsy moth quarantined areas may be viewed at: <http://www.gypsymoth.wisconsin.gov/>.

(f) Terrestrial and aquatic vertebrates except fish. The following terrestrial vertebrate invasive species are restricted:

1. *Trachemys scripta elegans* (Red-eared slider) with a carapace (top shell) length less than 4 inches.

(3) ACTIONS RESTRICTED BY THIS CLASSIFICATION; EXEMPTIONS. (a) Except as otherwise provided in pars. (b) to (o), no person may do any of the following:

1. Transport, possess, transfer or introduce a restricted invasive fish or crayfish species identified or listed under sub. (2).

2. Transport, transfer or introduce any other restricted invasive species identified or listed under sub. (2).

(b) Paragraph (a) does not apply to a person who transports, possesses, transfers or introduces a restricted invasive species identified or listed under sub. (2) if the department determines that the transportation, possession, transfer or introduction was incidental or unknowing, and was not due to the person's failure to take reasonable precautions.

Note: Paragraph (b) does not apply to preventive measures set out in s. NR 40.07.

(c) If authorized by a permit issued by the department under this chapter, a person may transport, possess, transfer or introduce a restricted invasive species for research, public display, or for other purposes specified by the department in the permit.

(d) A legally obtained nonnative wild animal that is a pet may be possessed, transported or transferred without a permit issued by the department under this chapter.

(e) Paragraph (a) does not apply to a person who transports, possesses, transfers or introduces a terrestrial invertebrate or plant disease-causing microorganism that is regulated under a quarantine imposed by DATCP under s. 94.01, Stats., or a United States Department of Agriculture Animal and Plant Health Inspection Service quarantine area declared under 7 USC § 7714 or 7715 if the person is in compliance with a DATCP-USDA APHIS compliance agreement applicable to the terrestrial invertebrate or plant disease-causing microorganism.

(f) A person may transport or give away a restricted invasive species for the purpose of identification, education, control or disposal without a permit issued by the department under this chapter, if no viable individual specimens or propagules are allowed to escape or be introduced. This paragraph does not apply to aquatic plants, algae and cyanobacteria, terrestrial and aquatic vertebrates or fish species.

(g) For aquatic plants, algae and cyanobacteria, a person may transport or give away a restricted invasive species for the purpose of identification, control or disposal without a permit issued by the department under this chapter if the restricted invasive species is listed on the department's website as present in the waterbody from which the aquatic plant, algae or cyanobacteria came or, if the restricted invasive species is not listed, the person reports the restricted invasive species to the department within 30 days.

Note: Reports required by par. (e) shall be sent to:

Aquatic Invasive Plant Coordinator – WT/3

Wisconsin Department of Natural Resources

PO Box 7921

Madison , WI 53707-7921

Note: New populations of restricted aquatic plant species may be reported to the appropriate department regional lake coordinator. For a list of known waterbodies with restricted aquatic plant, algae and cyanobacteria species, see <http://dnr.wi.gov/invasives/aquatic>. To contact the appropriate lake coordinator see <http://dnr.wi.gov/org/water/fhp/lakes/aquaplan.htm>.

(h) Restricted plant species parts that are incapable of reproducing or propagating may be transported, transferred or introduced without a permit issued by the department under this chapter.

(i) Multiflora rose, when used as root stock for ornamental roses, may be transported, transferred or introduced without a permit issued by the department under this chapter.

(j) Koi carp and goldfish may be transported, possessed or transferred without a permit issued by the department under this chapter but koi carp may not be used as bait or introduced to any water of the state except waters of the state that are artificial, entirely confined and retained upon the property of a person, do not drain to other waters of the state, are not subject to intermittent or periodic flooding, and are not connected to any other water of the state.

Note: Section NR 20.08 (1) prohibits the use of goldfish as bait and the possession of goldfish in any form or manner on any water of the state.

(k) If held in a safe facility, rusty crayfish, nonviable fish species and nonnative viable fish species in the aquarium trade may be transported, possessed or transferred without a permit issued by the department under this chapter. In addition, rusty crayfish may be transported, possessed or transferred without a permit when being used as bait on the Mississippi river as authorized under s. NR 19.27 (4) (a) 1. a.

(L) Nonnative fish species in the aquaculture industry may be transported, possessed in a safe facility, possessed in a registered fish farm, or transferred without a permit issued by the department under this chapter.

Note: A department permit is required under this chapter and s. 29.735, Stats., to import nonnative fish for the purpose of introduction into any waters of the state, and under s. 29.736, Stats., to stock or introduce any fish, and DATCP regulates fish farms under ch. ATCP 10.

(m) Paragraph (a) does not apply to a person who has a permit issued by DATCP under s. ATCP 21.04 for importation, movement, distribution or release of a pest or biological control agent that is a restricted invasive species identified or listed under sub. (2).

(n) Paragraph (a) does not apply to phragmites associated with a reed bed treatment unit used in a wastewater treatment facility authorized by a WPDES permit under ch. 283, Stats.

(o) Paragraph (a) does not apply to any of the following:

1. A person who holds a scientific collector permit for the invasive species under s. 29.614.
2. A person who, while lawfully fishing, inadvertently catches a fish invasive species.

Note: Section NR 20.20 (73) (c) 1. sets a bag limit of 0 for nonindigenous detrimental fish, but allows one such fish to be taken by hook and line if it is killed immediately and delivered immediately to a department service center or regional office. All nonindigenous fish species are declared under s. NR 20.38 (6) to be detrimental fish if the fish were imported without a permit in violation of s. 29.735, Stats., or are found in any water where their presence is not specifically permitted by the department.

(4) CONTROL REQUIREMENTS. Any person who grows a restricted plant at a nursery shall make a good faith effort to destroy it upon closure of the nursery.

Note: Any person who owns, controls or manages land where a restricted plant species is present in the pioneering stage, in an area otherwise not infested with that species or where there is a high priority resource threatened by a restricted plant species is encouraged to control the restricted plant or contain it to the already infested sites, to reduce its population, and to foster an increase in desired species.

NR 40.06 Invasive species permits. A person may transport, possess, transfer or introduce a prohibited invasive species listed in s. NR 40.04 (2), or a restricted invasive species listed in s. NR 40.05 (2), if the person has been issued a permit by the department under this section for the activity.

(1) WRITTEN APPLICATION REQUIRED. (a) Applications for permits under this chapter shall be submitted in writing to the department on forms available from the department. The application shall include the name and quantity or number of invasive species specimens for which a permit is sought,

whether the permit is sought for the transportation, possession, transfer or introduction of the invasive species, a description of other relevant permits, approvals or licenses of the applicant and the applicant's purpose or reasons for seeking a permit. The department may request additional information in order to determine whether the criteria of sub. (2) are met. This may include but is not limited to: where the invasive species is located or will be kept, how they will be kept from spreading into the wild, how they will be disseminated, and how they will be destroyed once the applicant is done using them.

Note: Applications for permits for fish and aquatic invertebrates may be sent to:

Attn: FH/4
Wisconsin Department of Natural Resources
PO Box 7921
Madison, WI 53707-7921

Applications for permits for plants may be sent to:

Attn: FR/4
Wisconsin Department of Natural Resources
PO Box 7921
Madison, WI 53707-7921

Applications for permits for other vertebrates may be sent to:

Attn: Wildlife Regulation Policy Specialist, WM/6
Wisconsin Department of Natural Resources
PO Box 7921
Madison, WI 53707-7921

Applications for permits for terrestrial invertebrates and plant disease-causing microorganisms may be sent to:

Forest Health Protection Program Coordinator
Wisconsin Department of Natural Resources
3911 Fish Hatchery Rd.
Fitchburg, WI 53711

(b) The department shall act on complete permit applications within 45 days following receipt of the application.

(2) APPROVAL CRITERIA. The department shall review permit applications to determine whether all of the following criteria are met:

(a) The applicant is knowledgeable in the proper management or humane care of the invasive species.

(b) The applicant has an adequate site or facility for containment of the invasive species.

(c) The applicant has demonstrated to the department's satisfaction that permitted activities will not cause significant ecologic or economic harm or harm to human health,

(d) The applicant has complied with the conditions of any previous department permits issued under this chapter.

(3) ISSUANCE AND CONDITIONS.

(a) If it determines that there is significant public interest, the department may hold a public informational hearing on a permit application before acting on the application.

(b) An applicant meeting the criteria described in sub. (2) may be issued a permit subject to conditions the department considers reasonable.

(4) RECORDS AND REPORTING. Each permittee shall keep a current, correct and complete record of all permit activities as required by the department, on forms available from the department. Permit records may be inspected and copied by the department at any time. Copies of records shall be provided to the department upon request.

(5) PERMIT TRANSFER; ALTERATION. Unless expressly provided by the terms of the permit or by subsequent written approval of the department, permits issued under this chapter are not transferable. No person may alter or deface a permit issued under this chapter.

(6) VIOLATIONS. No person may violate any term of any permit issued under this chapter.

(7) OTHER PERMITS OR APPROVALS. A person who holds a permit or approval issued by the department under another chapter or a statute other than s. 23.22, Stats., is not be required to hold a permit under this chapter to transport, possess, transfer or introduce a prohibited invasive species listed in s. NR 40.04 (2), or a restricted invasive species listed in s. NR 40.05 (2), if the department determines that all of the following apply:

(a) The permit or approval expressly authorizes the transportation, possession, transfer or introduction of the prohibited invasive species listed in s. NR 40.04 (2), or the restricted invasive species listed in s. NR 40.05 (2).

(b) The permit or approval includes legally enforceable requirements that are at least equivalent to those that would be contained in a permit issued by the department under this chapter.

(c) The person is not in violation of the permit or approval.

NR 40.07 Preventive measures. (1) NOTIFICATION REQUIRED. Any person who possesses a restricted invasive fish species in a safe facility shall notify the department within 24 hours of any escape of a specimen or viable part of a specimen, or of any failure of the integrity of the safe facility that could allow the escape of any specimen or viable part of a specimen. The notice shall be made in writing by mail or by e-mail and shall include the specific location of the known, suspected, or anticipated escape and the fish species involved.

Note: The notice shall be mailed to the Director, Bureau of Fisheries Management, Wisconsin Department of Natural Resources, PO Box 7921, Madison, Wisconsin 53707-7921 and e-mailed to NRFishHabitatProtection@wisconsin.gov.

(2) IMMEDIATE REMOVAL OF AQUATIC PLANTS AND AQUATIC ANIMALS AND DRAINAGE OF WATER. (a) Except as provided in pars. (b) to (g),

1. Any person who removes a vehicle, boat, boat trailer, boating or fishing equipment, or other equipment or gear of any type from any inland or outlying water or from its bank or shore shall remove all attached aquatic plants and aquatic animals immediately after removing the vehicle, boat, boat trailer, boating or fishing equipment or other equipment or gear from the water, bank or shore and before leaving any boat launch area or associated parking area.

2. Any person who removes a vehicle or equipment other than boating or fishing equipment, or gear of any type from any inland or outlying water or from its bank or shore shall drain all water from the vehicle, equipment or gear, including water in any motor, tank or other container, immediately after removing the vehicle, equipment or gear from the water, bank or shore and before leaving any boat launch area or associated parking area.

Note: Section NR 19.055 (1) requires any person who removes a boat, boat trailer, boating equipment or fishing equipment from any inland or outlying water or its bank or shore to immediately drain all water from the boat, boat trailer, boating equipment or fishing equipment, including water in any bilge, ballast tank, bait bucket, live well or other container immediately after removing the boat, boat trailer, boating equipment or fishing equipment from the water, bank or shore, with certain exceptions.

Note: Chapters NR 320, 323, 328, 329, 341, 343 and 345, relating to general navigable waters permit criteria, set out equipment decontamination requirements to stop the spread of invasive species from one waterway to another and require removal of all plants, animals, mud, debris, etc., before and after use.

Note: See ss. 30.18 (2) and 31.02 (1), Stats., regarding the diversion or withdrawal of water from lakes and streams. Withdrawals are regulated through individual permits that may consider the associated risk of spreading invasive species.

(b) The department may exempt any vehicle, equipment or gear in writing from par. (a) 1. or 2. if it determines that it will not allow invasive species to be transported to other waters.

(c) Paragraph (a) does not apply to decontaminated equipment, tanks or containers when used for the operation or maintenance of dry fire hydrants that are subject to ch. NR 329.

Note: See s. NR 329.04 (1) (c) 5. and (2) (c) 4. c. regarding the maintenance and operation of dry fire hydrants.

(d) Paragraph (a) 1. does not apply to an aquatic animal whose possession is authorized by department rule.

Note: An example of an aquatic animal whose possession is authorized by department rule is a dead game fish taken in compliance with ch. NR 20.

(e) Paragraph (a) 2. does not apply to water in closed engine cooling systems or to tanks or containers of potable drinking water or other beverages meant for human consumption.

(f) Paragraph (a) 2. does not apply to water in a container that holds live bait minnows obtained from a Wisconsin bait dealer, if the container holds no other fish, contains 2 gallons or less of water, and is used to transport only live minnows that have not been exposed to water or fish from that inland or outlying water or will be used for bait only on the same inland or outlying water, its bank or shore.

Note: The transport of live fish and fish eggs away from any inland or outlying water or its bank or shore is prohibited by s. NR 19.05 (3), with certain exceptions.

(g) Paragraph (a) does not apply to vehicles, equipment, or gear while engaged in fire suppression.

(3) TRANSPORT OF VEHICLES AND EQUIPMENT INTO WISCONSIN; REMOVAL PRIOR TO ENTRY OF AQUATIC PLANTS AND AQUATIC ANIMALS AND DRAINAGE OF WATER. (a) Except as provided in pars. (b) to (d), no person may do any of the following:

1. Transport over land from another state any vehicle, boat, boat trailer, boating or fishing equipment, or other equipment or gear of any type for use on any water of the state or its bank or shore unless the person first removes all attached aquatic plants and aquatic animals from the vehicle, boat, boat trailer, boating or fishing equipment, or other equipment or gear of any type before entering the state.

2. Transport over land from another state any vehicle, equipment other than boating or fishing equipment, or gear of any type for use on any water of the state or its bank or shore unless the person first drains all water from the vehicle, equipment or gear, including water in any motor, tank, or other container before entering the state.

Note: Section NR 19.055 (2) prohibits any person from transporting over land from another state any boat, boat trailer, boating equipment or fishing equipment for use on any water of the state or its bank or shore unless the person drains all water from the boat, boat trailer, boating equipment or fishing equipment, including water in any bilge, ballast tank, bait bucket, live well or other container before entering the state, with certain exceptions.

(b) The department may exempt any vehicle, boat, boat trailer, equipment or gear in writing from par. (a) 1. or 2. if it determines that it will not allow invasive species to be transported to waters of the state.

(c) Paragraph (a) 1. does not apply to dead game fish lawfully taken in another state, as provided by s. 29.047, Stats.

(d) Paragraph (a) 2. does not apply to water in closed engine cooling systems or to tanks or containers of potable drinking water or other beverages meant for human consumption.

(4) **ILLEGAL TO LAUNCH, TAKE OFF OR TRANSPORT.** (a) Except as provided in par. (b) to (d), no person may launch or place a vehicle, boat, boat trailer, equipment or gear of any type or land a sea plane in any water of the state, or take off a seaplane or transport on a public highway a vehicle, boat, boat trailer, equipment or gear of any type if the seaplane, vehicle, boat, boat trailer, equipment or gear has an aquatic plant or aquatic animal attached.

(b) Paragraph (a) does not apply to the placement or use of a boat or boating equipment or the placement of a boat trailer in a navigable water with an aquatic plant attached or in the St. Croix river with a zebra mussel attached.

Note: Placement and use of boats, boat trailers and boating equipment exempted under paragraph (b) is prohibited by s. 30.715, Stats.

(c) A person may transport a vehicle, boat, boat trailer, equipment or gear with aquatic plants or aquatic animals attached on a public highway if any of the following apply:

1. If authorized by a written exemption or permit issued by the department under this chapter.
2. For disposal, as part of a harvest or control activity conducted under an aquatic plant management permit issued under ch. NR 109.
3. When transporting commercial or municipal aquatic plant harvesting equipment to a suitable location, away from any water body, for purposes of cleaning the equipment of any remaining aquatic plants or aquatic animals.
4. In a covered truck bed, covered trailer or covered container, for personal or commercial use as compost or mulch.

5. For purposes of constructing or transporting a shooting or observation blind, if the aquatic plants are emergent, cut above the waterline, and contain no propagules such as seed heads, roots or rhizomes and no aquatic invasive species.

6. If the aquatic plant is native duckweed or wild rice.

7. If possession of the aquatic animal is authorized by department rule.

Note: Section NR 109.08 (4) prohibits any person from placing equipment used in aquatic plant management in a navigable water if the person has reason to believe that the equipment has any aquatic plants or zebra mussels attached, except equipment used in aquatic plant management when re-launched on the same body of water without having visited different waters, provided the re-launching will not introduce or encourage the spread of existing aquatic species within that body of water.

(d) Paragraph (a) does not apply to aircraft, vehicles, equipment, or gear while engaged in fire suppression.

(5) QUARANTINED MATERIALS. (a) No person may transport an identified carrier of an invasive species from a department infestation control zone designated under s. 26.30 (7), Stats., a DATCP quarantine area imposed under s. 94.01, Stats., or a United States Department of Agriculture Animal and Plant Health Inspection Service quarantine area declared under 7 USC § 7714 or 7715, for the specific identified invasive species.

Note: Identified carriers of invasive terrestrial invertebrates and plant-disease causing microorganisms most commonly include but are not limited to trees that support life stages of the prohibited species. Trees include all parts of a tree including limbs, branches, roots and foliage. Raw forest products such as unprocessed logs, slabs with bark, cut firewood and chips may be considered as carriers.

(b) Paragraph (a) does not apply to a person who transports an identified carrier of an invasive species from a department infestation control zone designated under s. 26.30 (7), Stats., a DATCP quarantine area imposed under s. 94.01, Stats., or a United States Department of Agriculture Animal and Plant Health Inspection Service quarantine area declared under 7 USC § 7714 or 7715, if the person is in compliance with a DATCP-USDA APHIS compliance agreement applicable to the terrestrial invertebrate or plant disease-causing microorganism.

(6) USE OF PROHIBITED FISH OR CRAYFISH AS BAIT. Unless authorized by a permit issued by the department under this chapter, no person may use a prohibited fish invasive species or prohibited crayfish invasive species as bait.

Note: Prohibited fish invasive species and crayfish invasive species are identified in s. NR 40.04 (2) (c).

(7) INTRODUCTION PROHIBITED. Unless authorized by a written exemption issued by the department under this chapter, no person may introduce a nonnative aquatic plant, algae or cyanobacteria species in any water of the state, except waters of the state that are artificial, entirely confined and retained upon the property of a person, do not drain to other waters of the state, are not subject to intermittent or periodic flooding, and are not connected to any other water of the state. This subsection does not apply to the incidental introduction of a nonnative aquatic plant, algae or cyanobacteria species by a person operating an aircraft, vehicle, equipment or gear while engaged in fire suppression.

NR 40.08 Enforcement. Under s. 23.22 (9), Stats., if the department finds that any person is violating this chapter or a permit issued under this chapter, the department may do one or more of the following:

- (1) Issue a citation pursuant to ss. 23.50 to 23.99, Stats.
- (2) Refer the matter to the department of justice for enforcement.
- (3) Revoke any permit issued under this chapter, after notice and opportunity for hearing.

SECTION 2. EFFECTIVE DATE. The rules 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 3. BOARD ADOPTION. The foregoing rules were approved and adopted by the State of Wisconsin Natural Resources Board on _____.

Dated at Madison, Wisconsin _____.

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

By _____
Mathew J. Frank, Secretary

(SEAL)