

BEFORE THE
DEPARTMENT OF NATURAL RESOURCES

NOTICE OF PUBLIC HEARINGS
IS-34-06

NOTICE IS HEREBY GIVEN THAT pursuant to ss. 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., interpreting s. 23.22(2)(a), Stats., the Department of Natural Resources will hold public hearings on the creation of ch. NR 40, Wis. Adm. Code, relating to the identification, classification and control of invasive species. 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.

Rule analysis

The proposed rules establish criteria for classifying invasive species, and then list or identify specific invasive species into 2 specific categories (prohibited and restricted) according to those criteria (giving consideration to recommendations from the Wisconsin Council on Invasive Species). 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 (except for fish and crayfish), with certain exceptions. The rules also allow transportation, possession, transfer or introduction for research, education, identification, control or disposal, or for other specified purposes when authorized by a department permit.

Transportation, possession, transfer and introduction without a permit are not prohibited 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 ban transportation 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.

The rules authorize the department to enter property for the purpose of inspection, sampling and control of prohibited invasive species and allow the department to order persons who own, control or manage property where prohibited invasive species are present to implement approved control measures. 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.

General preventative measures are also required by the rules, without being specific as to species. These rules limit certain common activities that may 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. These include conditional requirements to drain all water from boats, boat trailers, equipment and containers upon their removal from the water; a ban on the transport of live fish and fish eggs away from the water; and restrictions on the transport on public highways of boats, trailers and equipment with aquatic plants or animals attached.

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

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

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

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

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.

Iowa has a noxious weed law similar to Wisconsin, but includes many more plant species (25+). The Iowa Noxious Weeds and Iowa Weed Law is rather involved, including roads and railroad regulations, removal and cost issues.

Illinois has a noxious weed law similar to Wisconsin's noxious weed law. 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."

Michigan has a noxious weed law similar to Wisconsin, but lists many more species. They also have a law titled *Transgenic and Nonnative Organisms* which lists prohibited and restricted aquatic plants, fish and insects. It seems similar to the proposed rule, again, minus the terrestrial plants.

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

The department and the Wisconsin Council on Invasive Species (Council) have been working over the last 2 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. Summaries were written of the available literature 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 have been 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

Analysis and supporting documentation that the agency used in support of the agency's determination of the rule's 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 Committee identified economics as a criterion for species classifications. Therefore, the literature reviews conducted for each species include socio-economic effects. The category 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 plant; increased cost to sectors caused by the plant; 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. Department staff has been consulting with industry groups to assess potential impacts of the proposed rules on businesses and ways to minimize any adverse impacts. Permits and exemptions will be allowed for the 2 regulated categories of invasive species (prohibited and restricted).

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 won't bother them if the plant is 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 that 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 limitations to minimize spread of the seeds.

Summary of the State and Local fiscal estimate required under s. 227.14 (4), Stats.:

Local: No Local Government costs.

State: Increased costs. May not be possible to absorb within agency's budget. Estimated net annualized fiscal impact: \$160,000.

NOTICE IS HEREBY FURTHER GIVEN that pursuant to s. 227.114, Stats., the proposed rule may have an impact on small businesses. The initial regulatory flexibility analysis is as follows:

a. Types of small businesses affected: Nursery growers, nursery dealers, garden centers, seed dealers, floriculture growers and retailers will no longer be allowed to grow or sell listed species, unless there is an exception or the business has a permit from the Department. Landscape architects, landscapers and others will no longer be allowed to purchase and plant listed species. 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 consultants, vegetation managers and landscape contractors may benefit from this rule. Businesses that transport, possess and transfer raw wood products such as pulp and paper mills, sawmills and firewood dealers may be affected by 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.

b. Description of reporting and bookkeeping procedures required: Permit holders must keep a current, correct and complete record of all permit activities. Permit records may be inspected and copies by the Department at any time. Copies of records must be provided to the Department upon request. Persons who wish to transport, possess or give away a prohibited invasive species for the purpose of identification, control or disposal without a permit must report the location of origin of prohibited invasive species to the Department. Reports must be submitted within 30 days of the person taking possession and must 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.

c. Description of professional skills required: Professional skills required to comply with the rule include the ability to identify and distinguish listed invasive species from other species.

The Department's Small Business Regulatory Coordinator may be contacted at SmallBusiness@dnr.state.wi.us or by calling (608) 266-1959.

NOTICE IS HEREBY FURTHER GIVEN that the Department has made a preliminary determination that this action does not involve significant adverse environmental effects and does not need an environmental analysis under ch. NR 150, Wis. Adm. Code. However, based on the comments received, the Department may prepare an environmental analysis before proceeding with the proposal. This environmental review document would summarize the Department's consideration of the impacts of the proposal and reasonable alternatives.

NOTICE IS HEREBY FURTHER GIVEN that the hearings will be held on:

<u>August 14, 2008</u> Thursday	Gathering Waters/Glacier's Edge conference room, DNR South Central Region Headquarters, 3911 Fish Hatchery Road, Fitchburg at 10:00 a.m.
<u>August 14, 2008</u> Thursday	Room 141, DNR Southeast Region Headquarters, 2300 N. Dr. Martin Luther King Jr. Drive, Milwaukee at 3:00 p.m.
<u>August 15, 2008</u> Friday	Lake Michigan room, DNR Northeast Region Headquarters, 2984 Shawano Ave., Green Bay at 1:00 p.m.
<u>August 19, 2008</u> Tuesday	Room B19 & B20, State Office Building, 3550 Mormon Coulee Road, La Crosse at 1:00 p.m.
<u>August 20, 2008</u> Wednesday	Large conference room, DNR Northern Region Headquarters, 810 W. Maple Street, Spooner at 2:30 p.m.
<u>August 26, 2008</u> Tuesday	Council Chambers, Wausau City Hall, 407 Grant Street, Wausau at 1:00 p.m.

NOTICE IS HEREBY FURTHER GIVEN that pursuant to the Americans with Disabilities Act, reasonable accommodations, including the provision of informational material in an alternative format, will be provided for qualified individuals with disabilities upon request. Please call Ms. Kelly Kearns at (608) 267-5066 with specific information on your request at least 10 days before the date of the scheduled hearing.

The proposed rule and fiscal estimate may be reviewed and comments electronically submitted at the following Internet site: <http://adminrules.wisconsin.gov>. Written comments on the proposed rule may be submitted via U.S. mail to Ms. Kelly Kearns, Bureau of Endangered Resources, P.O. Box 7921, Madison, WI 53707 or by email to DNRNR40Comments@wisconsin.gov. Written comments may be submitted until September 5, 2008. Written comments, whether submitted electronically or by U.S. mail, will have the same weight and effect as oral statements presented at the public hearings. A personal copy of the proposed rule and fiscal estimate may be obtained from Ms. Kearns.

Dated at Madison, Wisconsin

July 15, 2008

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

By

Matthew J. Frank

Matthew J. Frank, Secretary