



WISCONSIN LEGISLATIVE COUNCIL RULES CLEARINGHOUSE

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CLEARINGHOUSE RULE 08-074

Comments

[NOTE: All citations to “Manual” in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council Staff, dated January 2005.]

1. Statutory Authority

a. The department is required in s. 227.14 (2) (a) 1., Stats., to explain its authority to promulgate the rule. 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).]

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).]

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.

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.

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.”

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.]

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.

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.”

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.

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.

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.

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.]

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.]

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.

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?

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