

**Report From Agency**

**STATE OF WISCONSIN  
DEPARTMENT OF TRANSPORTATION  
OFFICE OF THE SECRETARY**

**REPORT FROM AGENCY**

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The State of Wisconsin Department of Transportation Proposes an Order to Amend Permanent Rule s. Trans 201.23 (2), 202.01 (1) and (2), 202.02 (4) and (14), 202.05 (2), and 202.13 (3); to repeal and recreate Trans 202.05 (4), 202.08, 202.09, and 202.10 (1); and to create Trans 202.02 (10m), Relating to Wisconsin Scenic Byway Program.

**REPORT TO LEGISLATURE**

**CLEARINGHOUSE RULE 16-045**

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**I. THE PROPOSED RULE:**

The proposed rule revisions and the analysis are attached.

**II. REFERENCE TO APPLICABLE FORMS:**

No forms are newly required by these rule revisions.

**III. FISCAL ESTIMATE AND EIA:**

The Fiscal Estimate and EIA are attached.

**IV. DETAILED STATEMENT EXPLAINING THE BASIS AND PURPOSE OF THE PROPOSED RULE, INCLUDING HOW THE PROPOSED RULE ADVANCES RELEVANT STATUTORY GOALS OR PURPOSES:**

This rulemaking specifies which types of highways may be integrated into a scenic byway created under s. 84.106, Stats.

2011 Wisconsin Act 147 amended s. 84.106, Stats., so that any type of highway, except interstates, has the potential to be designated as a scenic byway. Prior to 2011 Wisconsin Act 147, only state and federal highways, other than interstates, could be incorporated into a scenic byway.

This rulemaking incorporates this statutory change into Wis. Admin. Code s. Trans 201.23 and ch. Trans 202 and excludes those parts of the transportation network not designed or intended for regular use by the motoring public.

The following types of highways will be eligible for inclusion as a scenic byway:

- State and federal highways (currently eligible);
- Connecting highways (currently eligible);
- County highways (new);
- Local streets (new).

The following types of facilities fall within the scope of the legal term “highway” but shall not be eligible for inclusion as a scenic byway:

- Interstate highways (already excluded by rule);
- Alleys (new);
- Bike paths, sidewalks and footpaths (new);
- ATV and snowmobile trails (new);
- Hiking trails (new);
- Railroad rights of way (new);
- Any other facility not intended for use by motor vehicles (new).

Because the Scenic Byways program will now include highways under county and local jurisdiction, to which the federal Highway Beautification Act and conforming state laws do not apply, state outdoor advertising regulations related to scenic highways found in s. Trans 201.23, Wis. Admin. Code, will make clear that these outdoor advertising regulations are not being extended to those local and county roads.

2011 Wisconsin Act 147 also created s. 84.106 (3), Stats., related to marking highways. Section 84.106 (3), Stats., specifies that the Wisconsin Department of Transportation (“Department”) is responsible for the installation and maintenance of scenic byways logo signs along sections of the scenic highway that are part of the state trunk highway system, and also

provides that the local government that has maintenance authority over a road or highway shall be responsible for the installation and maintenance of scenic byways logo signs on those roads.

Section 227.115(2), Stats., requires if a proposed rule directly or substantially affects the development, construction, cost, or availability of housing in this state, the Department of Administration (DOA) shall prepare a report, within 30 days after the rule is submitted to the department, on the proposed rule before it is submitted to the legislative council staff. On March 30, 2016, the Department submitted a request to DOA - Division of Energy, Housing and Community Resources seeking a determination, and if necessary a report, whether the proposed rule affects the development, construction, cost or availability of housing in this state. The Department did not receive any feedback or report from DOA - Division of Energy, Housing and Community Resources. The Department does not believe the proposed rule will affect housing development, cost, or availability in any respect.

**V. SUMMARY OF PUBLIC COMMENTS AND THE DEPARTMENT'S RESPONSES, AND EXPLANATION OF ANY RESULTING MODIFICATIONS TO THE PROPOSED RULES:**

The following is a summary of comments made at a Public Hearing conducted by the Department on September 28, 2016. Comments were made in support of the proposed regulation and for information related to the proposed promulgation of changes to ss. Trans 201.23 and Trans 202, Wis. Admin. Code, relating to Wisconsin Scenic Byway Program, as the rule text filed with the Rules Clearinghouse.

Bud Styer (Owner of Bud Styer & Associates and Camping For The Fun Of It), supported the rule as drafted; however, Mr. Styer had questions regarding township and county highway maintenance and preservation responsibilities. Mr. Styer also offered written testimony supporting the proposed rule, but suggested limiting maintenance, such as trees and vegetation cutting by

townships and counties. The Department does not limit local maintenance authority under this rulemaking. The scenic Byway program is a management strategy, but not a regulatory program. Communities that pass resolutions as part of the designation process are responsible for maintaining highways under their maintenance jurisdiction and determining what maintenance activities are consistent with the highway's scenic designation.

State law permits outdoor advertisers to apply for permits to remove trees from rights-of-way, including scenic byways. According to s. 84.305, Stats. WisDOT authority to deny permission to cut trees under that statute is very limited.

On many state highways where the State owns only easement, trees and shrubs are owned by adjoining landowners who may, with a WisDOT permit, remove their property from the highway.

The statement of scope for this rulemaking did not propose to impose maintenance regulation upon local governments. WisDOT has not sought to expand the statement of scope to include maintenance issues as would be required by s. 227.135(4), Stats. Accordingly, no change to the rule is being made in regard to byway maintenance responsibilities for scenic byways.

Representative Ken Skowronski, 82<sup>nd</sup> Assembly District, supported the rule as drafted and appeared for information.

Janet Swandby, (Executive Director & Lobbyist, Swandby Kilgore Associates, Inc.), testified on behalf of the Outdoor Advertising Association of Wisconsin at the public hearing. She suggested proposed amendments to s. Trans 202.02(4), Wis. Admin. Code, not be made in

the final rule. The Department agreed with this suggestion and has removed the proposed amendment from this rule.

## **VI. RESPONSE TO LEGISLATIVE COUNCIL STAFF COMMENTS:**

The Department received the Clearinghouse Report on August 24, 2016, which reported five distinct comments related to: form, style and placement in administrative code, along with clarity, grammar, punctuation and use of plain language. The Department made all recommended changes relating to form, style and placement in administrative code. The Department also made all recommended changes relating to clarity, grammar, punctuation and use of plain language. With respect to each individual comment:

2.a-b. The Legislative Council's recommendations are adopted.

2.c. The Legislative Council asks whether reference to interstate highways in s. Trans 201.23(2) is appropriate. The Department intends that interstate highways be specifically included in the rule to eliminate any possible ambiguity in the rule. This rule applies to interstate highways as well as primary highways. Interstate highways are subject to the stated restrictions, pursuant to the "Bonus Act," provisions of Public Law 85-381, 5<sup>th</sup> Congress, H.R. 9821, April 16, 1958, federal regulations found at 23 CFR 750, subpart A; the State-Federal 1961 Bonus Act Agreement; and Wis. Stat. §§ 84.30(2)(b), (3)(c), and (3)(h). One rule of statutory construction is that the mention of one item and not another may be interpreted as excluding the other from the scope of a regulation. *See LRB Drafting Manual* Sec. 2.01(i) (2015-16) for discussion of the rule of *expressio unius est exclusio alterius*. In this situation, both scenic byway and interstate signs are required to be regulated in the manner described in s. Trans 201.23. Accordingly, both types of highways need to be mentioned in the rule text.

2.d.-e. Legislative Council recommendations are adopted.

**VII. REPORT FROM THE SBRRB AND FINAL REGULATORY FLEXIBILITY ANALYSIS:**

The Department did not receive any statement, suggested changes, or other material from the Small Business Regulatory Review Board.