

**TESTIMONY OF THE DEPARTMENT OF NATURAL RESOURCES
IN SUPPORT OF CLEARINGHOUSE RULE 08-074,
RELATING TO THE IDENTIFICATION, CLASSIFICATION
AND CONTROL OF INVASIVE SPECIES**

By Peter D. Flaherty

Good morning Chairman Holperin and committee members. My name is Peter Flaherty, and I am an attorney with the Department of Natural Resources. I am pleased to appear on behalf of the Department in support of its proposed invasive species rules, CR 08-074

Invasive species increasingly threaten Wisconsin's traditions, environment and economy. As you may know, s. 23.22, Wis. Stats., directs the Department to establish a state-wide program to control invasive species. The statute defines "invasive species" to mean non-native species whose introduction causes or is likely to cause economic or environmental harm or harm to human health, and it directs the Department to promulgate rules to identify, classify and control invasive species for purposes of that program. CR 08-074, which is before you today, creates those rules and establishes a science-based classification system designed to address those invasive species considered most threatening to our environment and economy. These rules are needed to provide consistency in authorities between species groups; establish priorities for management and prevention; and provide guidance to the public and local units of government.

The Department and the Wisconsin Council on Invasive Species -- a formal advisory body created by the Legislature and appointed by the Governor -- have been working over the last 4 years to develop rules to classify and regulate invasive species. Department staff, with input from the Council and others, developed the lists of species to be assessed. Species Assessment Groups (SAGs) comprised of experts in their respective fields and stakeholder groups, were developed to assess the species and to make recommendations to the Council using the criteria for species selection.

In 2007, the Department prepared a draft rule and held informal listening sessions in Milwaukee, Madison, La Crosse, Spooner, Rhinelander and Green Bay. Several hundred comments were received and considered 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 around the state. One hundred twenty nine persons attended and over 1,350 written comments were received. Finally, many meetings were held with organizations, companies and individuals who submitted significant comments. Further revisions were then made to the proposed rule, and it was unanimously approved by the Natural Resources Board and endorsed by the Council.

The proposed rule creates ch. NR 40, Wis. Adm. Code, which establishes criteria for classifying invasive species and lists specific invasive species into 2 categories (prohibited and restricted) according to those criteria. The lists include terrestrial and aquatic plants and animals, along with some pathogens. The "prohibited" list species generally aren't established here yet, while the "restricted list" species are present and have a track record of causing harm here.

The rule bans transportation, possession, transfer and introduction of invasive species that are listed as "prohibited", with certain exceptions. "Restricted" invasive species are also subject to limits on transportation, transfer and introduction, but not possession, 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 an 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 with stakeholder groups would be one of several possible means of taking "reasonable precautions".

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 found on. The rule authorizes the Department to enter property for the purpose of inspection, sampling and control of "prohibited" invasive species, but Department staff must have permission before entering any property unless entry is otherwise authorized by law. The Department will seek to work cooperatively with land owners and managers to determine the best means of control and to approve management plans. ~~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.

If a landowner is responsible for an infestation of a "prohibited" species, the rule allows the Department to order the landowner to implement approved control measures. If 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 reasonable and necessary expenses it incurs. 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 part of ch. NR 40. These measures are not species-specific, but instead regulate certain common activities that serve as pathways for the spread of invasive species. 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 s. NR 19.05 and the "illegal to launch" prohibitions in s. 30.715, Wis. Stats. Preventive measures include requirements to:

- drain water from and remove attached aquatic plants and aquatic animals from vehicles, boats, trailers, equipment and gear of any type immediately upon their removal from the water,
- drain water from and remove 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.
- 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,

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, and for other specific situations.

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



AXLEY BRYNELSON
GOVERNMENT RELATIONS, LLC



JERRY DESCHANE
608.283.6799
jdeschane@axley.com

May 28, 2009

Chairman Jim Holperin, and
Members of the Senate Committee on Transportation,
Tourism, Forestry and Natural Resources
State Capitol
Madison, WI 53703

RE: Concerns of the Aquaculture Industry Regarding CR 08-074
Relative to Invasive Species

Dear Chairman Holperin and Members:

I apologize for being unable to attend in person this morning on behalf of the Wisconsin Aquaculture Association. I hope that you will accept our concerns in writing and consider those concerns as you review the proposed rule. We are attaching detailed written testimony that was presented to the DNR during the development of this rule. The concerns raised in that testimony have not been addressed by the Department.

The aquaculture industry depends upon a healthy environment. The industry supports and actively participates in efforts to maintain, protect, and restore Wisconsin's water resources. Our members have worked with the Department for several years on the development of this rule, and generally support DNR efforts to prevent the spread of invasive species.

However, this rule will have a significant negative impact on aquaculture. The Department's decision to list and prohibit the importation of the fish species, "Gambusia holbrooki" and "Gambusia affinis," commonly known as Eastern and Western Mosquitofish, will inhibit the importation of bait fish and forage fish from other states. Without these imports, Wisconsin's sport fishing industry will be seriously harmed. Wisconsin hatcheries and wild harvesting cannot supply enough live minnows to meet sport fishing demands.

Mosquitofish are common in Southern states and have been used in Wisconsin for decades for mosquito control. There is no need to list the mosquitofish as an invasive specie, because it cannot survive Wisconsin winters. It has never been and will never become, a threat to Wisconsin's environment.

The practical problem is that mosquitofish fry are commonly found among bait fish, including fathead minnows. Fathead minnows are one of the most sought-after baits in Wisconsin. Mosquitofish and fatheads are difficult, if not impossible to distinguish without close

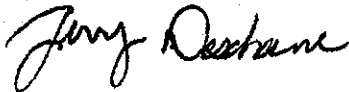
May 28, 2009
Page 2

individual examination. There is no "sorting" process that is practical. The rule needs to be modified to either de-list the mosquitofish, or clarify that nonviable species such as the mosquitofish are not prohibited for importation.

Thank you for considering our concerns.

Sincerely,

AXLEY BRYNELSON
GOVERNMENT RELATIONS, LLC



Jerry Deschane
Senior Government Relations Advisor
JD/tmd

Attachment



Wisconsin Aquaculture Association

P.O. Box 1408
Bayfield, WI 54814

Jeff Taylor, President
Star Prairie Trout Farm
8421 Lake Jane Tr
Lake Elmo, MN 55042
651-699-6050
jtaylor@dungarvin.com

Terry Hogan
Hayward Balt & Tackle, Inc
15737 Davis Ave
Hayward, WI 54843
715-634-2921
baltshop@cheqnet.net

Cindy Johnson
Creel Editor
Secretary/Treasurer
P.O. Box 1408
Bayfield, WI 54814
715-373-2990
Cindy@wisconsinaquaculture.com

Peter Fritsch
Rushing Waters Fisheries Inc
P.O. Box H
N301 Hwy H
Palmyra, WI 53156-0917
262-495-2089
Petef@rushingwaters.net

Ms. Kelly Kearns
WDNR
Bureau of Endangered Resources
PO Box 7921
Madison, WI 53707

Re: NR-40 Comments

8/26/2008

The Wisconsin Aquaculture Association (WAA), which is 100% industry led and producer centered, representing 70% of the commercial fish farms in the state, strongly objects to the proposed NR-40 rule change. Although we recognize the importance of diligence and difficulties in preventing the spread of injurious species, NR-40 as proposed fails to recognize naturalized species, the economic impact of the rule and implicates species as invasive without justification. WAA has promoted best management practices (BMP's) and its member farms are good stewards of the watersheds, using resources but not abusing them. WAA has a long history of working with the Wisconsin Department of Natural Resources through the Wisconsin Aquaculture Industry Advisory Council (WAIAC), numerous committees, a Working Group set up by DNR and, most recently, with the Species Assessment Group (SAG) regarding NR-40. WAA members worked with SAG and made suggestions that the industry would support in this very complicated issue of preventing known injurious wildlife from invading the natural resources in Wisconsin. However, these suggestions were not incorporated into the proposed rule change. WAA promotes, educates its members on, and advocates for economic viability and environmental sustainability of aquaculture in Wisconsin. WAA has supported member training on the recognition and control of aquatic invasive species through Sea Grant and Extension AIS-HACCP programs. However, private Wisconsin aquaculture is not and has never been a pathway for injurious aquatic species; on this the record is very clear.

WAA wants the following comments to be entered into the record regarding NR-40:

1. Statute 23.225, which was changed in March 2008, now defines invasive species in the following way – “invasive fish species” means a species of fish that is not native to the waters of this state and that causes, or is likely to cause, harm to the economy, to the environment, or to human health. In NR 40.02 Definitions (23) “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. By defining all nonnative fish species as invasive, the agency has not only unilaterally expanded its statutory authorization but also changed the legislative intent, by defining invasive species as causing or likely to cause harm to the state’s economy or environment or to human health.
2. The Department did not follow Statute 227.114 Rule making: considerations for small business. In the analysis of the proposed rule change, section (10) *Effects on small business, including how the rule will be enforced*, there is no mention of aquaculture or that there would be economic and enforcement hardships placed on Wisconsin fish farms if the proposed changes take effect. There was no economic analysis done as to the consequences to fish farmers by declaring

all non-native (to Wisconsin) fish species as invasive species. This will certainly limit the industry's choice of viable, species to raise, thereby constraining economic growth, and without consideration or justification as to whether a species is injurious or not. WAA requests that the Department comply with Statute 227.114 and have an economic analysis conducted as to the resulting loss of revenue by placing all non-native fish on the invasive species list, thus restricting commerce.

3. NR 40.02 Definitions (16) "Fish species in the aquaculture trade". We believe that if the phrase "and non-viable fish species" is added at the end of the definition that this would allow future expansion of the industry and still remain within the authorization of the statute.
4. NR 40.03 Classifications – appears to have ignored state law in regards to the fish species they have defined as invasive. The state law prohibits possession, release, control, store, etc. of invasive species while the Department's rule grants permission.
5. The Department of Natural Resources did not conduct an economic analysis of the consequences to fish farmers for placing the Eastern Mosquitofish (*Gambusia holbrooki*) and Western Mosquitofish (*Gambusia affinis*) on the prohibited species list. These species are native to many southern states and therefore, are incidentally found in interstate commerce shipments from these states, and to date have not been proven to be established or cause injurious harm in Wisconsin. In George C. Becker's *Fish of Wisconsin* there is no mention of Mosquitofish causing harm or being established in Wisconsin (<http://digital.library.wisc.edu/1711.dl/EcoNatRes.FishesWI>) even though Mosquitofish have been used in the Midwest as a biological control for mosquitoes for decades and have been incidentals in shipments. Clearly, the propagules pressure, which is the composite measure of the number of individuals released into an ecosystem to which they are not native, has been below the threshold for establishment of these species (with decades of releases) and therefore Mosquitofish should not be on the prohibited list. This restriction will cause unnecessary burden on the ability of many fish farmers to conduct their business, or put them out of business because of the fear of enforcement reprisals. (Possession could lead to violations of the Federal Lacey Act) It should also be noted that in March 2008 the Wisconsin Legislature in 23.225 changed the definition of invasive fish species – "means a species of fish that is not native to the waters of this state and that causes, or is likely to cause, harm to the economy, to the environment, or to human health", and, then, in (3) (e) exempted state or municipal fish hatcheries from this rule. The DNR hatcheries, which also import forage fish from the same states that the private farms do, are then exempt from the standard they are enforcing on the industry. WAA would like an exemption to the rule in regards to Mosquitofish – listing them as restricted but giving the aquaculture industry an exemption as incidentals.
6. NR 40.04 Prohibited category. WAA believes that grass carp (*Ctenopharyngodon idella*) in the natural state of diploid with the ability to reproduce should remain on the prohibited list. But, grass carp (*Ctenopharyngodon idella triploid*), which are verified sterile through the USFWS Grass Carp Triploid Program, and tagged and individually marked, be listed as restricted and given an exemption for importation. The DNR should work with WAA to develop a program which would allow the importation of USFWS certified triploid grass carp onto fish farms in Wisconsin, modeled after several other states that allow triploid grass carp importation. The DNR could require special permits for possession. The USFWS Grass Carp Program is found at <http://www.fws.gov/warmsprings/FishHealth/frgrain2.html>. There is good science and supportive literature documentation for the use of triploid grass carp for the non-toxic, biological control of weeds, and these triploid grass carp are not able to reproduce. (See "A Risk Analysis Pertaining to the Use of Triploid Grass Carp for the Biological Control of Aquatic Plants; Cassani, Hardin, Mudrak, and Zajicek, January 2008, Florida Department of Environmental Protection)
7. NR-40 concerning fish species as proposed, goes beyond the scope and authorization of the statute. Instead of proclaiming all nonnative fish species as invasive, the Department should incorporate Risk Analysis Techniques to determine which species truly are injurious and are likely to cause harm.
 - a. Risk Assessment - Rigorous method to arrive at answers to factual questions.
 - b. Risk Mitigation – Identifying and prioritizing strategies to prevent or mitigate defined risks.
 - c. Operational Plan – Implementing risk management and monitoring system to revise and update risk management.

WAA will support environmentally sound, scientifically based, and economically balanced rules that incorporate a stakeholder partnership which recognizes the needs of the industry, and shows consideration of small business along with regards to environmental concerns. NR-40, as proposed, has not reached that level of cooperation or balance.

Sincerely,
Jeff Taylor

Jeff Taylor
President, WAA

Cc: Senator Mark Miller (Chair) Sen.miller@legis.wisconsin.gov
Senator Robert Jauch (Vice Chair) Sen.jauch@legis.wisconsin.gov
Senator Robert Wirch Sen.wirch@legis.wisconsin.gov
Senator Neal Kedzie Sen.kedzie@legis.wisconsin.gov
Senator Dale Schultz Sen.schultz@legis.wisconsin.gov
Representative Scott Gunderson (Chair) Rep.gunderson@legis.wisconsin.gov
Representative Jim Ott (Vice Chair) Rep.OttJ@legis.wisconsin.gov
Senator Dan Kapanke Sen.kapanke@legis.wisconsin.gov
Representative Gary Sherman Rep.sherman@legis.wisconsin.gov
Carol Dunn, Wisconsin Dept. of Commerce carol.dunn@wisconsin.gov