

**ORDER OF THE STATE OF WISCONSIN NATURAL RESOURCES BOARD
AMENDING RULES**

The Wisconsin Natural Resources Board proposes an order to amend s. NR 24.06(1)(a) and (b), relating to open seasons for commercial clamming on the Wisconsin-Iowa boundary waters and the Mississippi River portion of the Wisconsin-Minnesota boundary waters

FH-23-05

Analysis Prepared by the Department of Natural Resources

- 1. Statutes interpreted:** In promulgating this rule, ss. 29.041, 29.014(1) and 29.537(8)(a), Stats., have been interpreted as authorizing the department to close the seasons for commercial clamming on the Wisconsin waters of the Mississippi River.
- 2. Statutory authority:** Sections 29.014(1), 29.041, 29.537(8)(a) and 227.11 (2)(a), Stats.
- 3. Explanation of agency authority to promulgate the proposed rules under the statutory authority:** Section 29.014(1), Stats., requires the department to establish rules that set conditions governing the taking of fish and game that will conserve the fish and game supply and ensure the citizens of this state continued opportunities for good fishing, hunting and trapping. Section 29.041, Stats., authorizes the department to regulate hunting and fishing on and in all interstate boundary waters, which includes the Mississippi River. Section 29.537(8)(a), Stats., states that the department may promulgate rules governing clamming and the clamming practices of commercial clam shellers, clam helpers, clam buyers and assistant clam buyers and other related matters, including but not limited to open and closed seasons. Section 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.
- 4. Related rule or statute:** Section 29.537, Stats., “Clams, clamming and commercial clamming.”
- 5. Plain language analysis of the proposed rule:** The order closes the commercial clamming seasons on the Wisconsin-Iowa boundary waters and the Mississippi River portion of the Wisconsin-Minnesota boundary waters (i.e., the Wisconsin waters of the Mississippi River).
- 6. Summary of and preliminary comparison with any existing or proposed federal regulation:** The department knows of no current or proposed federal regulations on this matter.
- 7. Comparison of similar rules in adjacent states (Minnesota, Iowa, Illinois and Michigan):** The only adjacent states that have Mississippi River boundary waters with Wisconsin are Iowa and Minnesota. During 2004, Minnesota closed its commercial mussel harvest season. It is expected that Iowa will also close its commercial mussel harvest season, especially if Wisconsin’s is closed. Illinois has an open commercial clam shelling season on the Mississippi River, excluding washboard clams, but no commercial harvest has taken place in Illinois waters of the Mississippi River in past 5 years.

8. 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: Surveys of mussel populations in the Mississippi River conducted by the department, U.S. Fish and Wildlife Service, and U.S. Army Corps of Engineers have quantified a substantial decline in adult density and near-absence of recruitment. Since 1998, the decline has become precipitous and has been attributed primarily to the negative effects of colonization by the non-indigenous zebra mussel. These recent stock reductions exacerbate declines documented between 1980-1998 which were attributed to commercial over-harvest and periodic mussel kills.

9. Any 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: This Order will preclude all commercial mussel harvest in Wisconsin waters of the Mississippi River. Because commercial clamming licenses under s. 29.537, Stats., may only be issued to individuals, closure of the commercial clamming season will directly affect small businesses. While more than 100 commercial clamming licenses were sold in 1997, demand and mussel stocks have precipitously declined since then. In 2001-2003, only one person purchased a commercial clamming license. No commercial buyers' licenses have been requested since 2000. By closing the season, this Order will prevent licensed commercial clamming businesses from reopening even if demand for shell increases, unless an open season is established by future rulemaking.

10. Effects on small business, including how the rule will be enforced. The commercial clamming business has a volatile economic history with wildly fluctuating markets and prices. Although commercial clamming has nearly stopped since 1997, markets could change quickly and demand for Wisconsin mussels may dramatically increase. Because of significant declines in commercial harvest activity in Wisconsin there should be virtually no impact to affected commercial clam shellers. Since 1998, there has been almost no commercial clam shelling activity in Wisconsin and virtually no commercial clam buyer activity. The proposed rules, like the current rules, will be enforced by department Conservation Wardens using the citation system and the specific commercial clamming enforcement provisions in s. 29.971(1m), Stats., which provides as follows:

29.971 (1m) (a) For the violation of s. 29.537, by a forfeiture of not more than \$1,000, except as provided under pars. (b) and (c).

(b) For possessing clams in violation of s. 29.537, if the value of the clams under par. (d) exceeds \$300 but does not exceed \$1,000, by a fine of not more than \$5,000 or imprisonment for not more than 30 days or both.

(c) A person possessing clams in violation of s. 29.537 is guilty of a Class I felony if the value of the clams under par. (d) exceeds \$1,000.

(d) Clams shall be valued for the purpose of pars. (b) and (c) according to the current average wholesale value. In this paragraph, "average wholesale value" means the average price received by commercial clam shellers during the 30-day period prior to the date of violation.

(e) For any person holding any approval issued under this chapter, upon the person's 2nd conviction within a 3-year period for violations of this chapter relating to clamming or commercial clamming, by the revocation of all of the person's approvals. In addition, no commercial clamming license or permit may be issued to the person for at least one year after the date of conviction.

11. Agency Contact Person: Ron Benjamin, Wisconsin Dept. of Natural Resources, 3550 Mormon Coulee Road, La Crosse WI 54601 (608) 785-9012, ron.benjamin@dnr.state.wi.us

SECTION 1. NR 24.09 (1) (a) and (b) are amended to read:

NR 24.09 (1) Except as provided in subs. (2) and (3), no person may engage in commercial clam shelling except between sunrise and sunset during the open season in waters which are open to commercial clam shelling, for clams of a species which is open to commercial clam shelling and which are of the minimum size or larger, as shown in the following table:

Waters Open to Commercial Clam Shelling			
Shelling	Open Season	Open Species	
	Minimum Size		
(a) Wisconsin-Iowa boundary waters	April 1—August 31 <u>No open season</u>	mapleleaf (<i>Quadrula quadrula</i>)	2 ¾"
		pigtoe (<i>Fusconaia flava</i>)	2 ¾"
		pimpleback (<i>Quadrula pustulosa</i>)	2 ¾"
		threeridge (<i>Amblema plicata</i>)	3"
(b) Wisconsin-Minnesota boundary waters except Lake St. Croix, the St. Croix river, and the St. Louis river	April 1—August 31 <u>No open season</u>	mapleleaf (<i>Quadrula quadrula</i>)	2 ¾"
		pigtoe (<i>Fusconaia flava</i>)	2 ¾"
		pimpleback (<i>Quadrula pustulosa</i>)	2 ¾"
		threeridge (<i>Amblema plicata</i>)	3"

SECTION 2. EFFECTIVE DATE. This rule 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 rule was approved and adopted by the State of Wisconsin Natural Resources Board on October 26, 2005.

Dated at Madison, Wisconsin _____.

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

By _____

Scott Hassett, Secretary

(SEAL)