

# Report From Agency

## REPORT TO LEGISLATURE

NR 25, Wis. Adm. Code

Board Order No. FH-02-18  
Clearinghouse Rule No. CR 19-103

### Basis and Purpose of the Proposed Rule

This rule updates commercial fishing regulations for Lake Superior, including harvest allocations, reporting requirements, restricted areas, equipment regulations, data sharing and other similar provisions. These updates aim to maintain healthy target and non-target fish populations while balancing the needs of resource users, including state and tribal commercial fishers, tribal home use fishers and state recreational anglers.

The 2018 – 2028 Lake Superior Fishing Agreement serves as the foundation for this rule. The Lake Superior Fishing Agreement reflects a commitment between the state and the Bad River and Red Cliff Bands of the Lake Superior Chippewa to cooperatively manage the shared Lake Superior fishery through agreed-upon harvest limits, allocations and other management tools. The agreement provides tribal, commercial and recreational harvest opportunities while protecting the Lake Superior fishery. According to the agreement, the goal of all parties is to maintain a healthy Lake Superior ecosystem that supports fish populations and fisheries and is managed through sound science. This is accomplished through regulations enacted by each party participating in the agreement.

### Summary of Public Comments

**The Lake Superior Fishing Agreement and rule do not adequately protect the fisheries or represent stakeholder interests, and stakeholders should have been involved in the discussions to maintain a level playing field.**

To involve the public and gain input from both recreational and commercial fishing interests, the department has convened several meetings over the past four years to identify the top issues for recreational anglers and charter businesses, including meetings to develop a Lake Superior Fisheries Management Plan. To gather feedback from commercial fishers, the department worked with the Lake Superior Commercial Fishing Board and area commercial fishing operations. The rule provides regulatory consistency for state and tribal commercial fishers, and allows for greater commercial fishing effort in WI-2, the management zone used most often for state commercial fishing. Additionally, based on information received at various meetings and through correspondence with stakeholders, the department was able to achieve the majority of issues that sport fishers raised as high priorities, including:

- Refuges: existing refuges will be maintained to protect spawning fish and commercial fishing allowances within the refuges have been reduced.
- Cisco and whitefish quotas: the tribes and the state will work together to evaluate and commit to the cisco quota, and will create a Statistical Catch At Age model to determine the health of populations and guide management of whitefish.
- Net-restricted areas: commercial fishing will continue to be restricted or prohibited in a sizeable majority of these areas.
- Enforcement: the department wardens will continue to work cooperatively with tribal wardens to ensure uniform and effective law enforcement efforts, including conducting joint patrols with state and tribal wardens.
- No commercial sale of additional species will occur.
- Net marking standards: new labeling and ice buoy standards for net marking are in effect to improve visibility and safe navigation.

- Standardizing fishing regulations: these rules improve consistency in regulations, including net size, placement and use, between state and tribal fishers.
- Gill net effects on game fish: the department will study gear restrictions and release data on bycatch to the public.
- Trap nets in the Van Tassells restricted area: the new rules do not allow additional nets to be placed in this area. However, under existing rules tribal fishers have been able to place a limited number of nets in this area.
- Unreported walleye harvest: while data indicate that walleye harvest is reported consistently, the department and tribes will pursue more thorough data sharing to ensure that harvest is correctly reported and data remain accurate.

**Surveys should be made available at sites on Lake Superior to capture stakeholder opinions, questions and comments.**

The department has distributed surveys to gather public feedback on Lake Superior management during development of the Lake Superior Management Plan, and stakeholders with questions or concerns about Lake Superior fisheries management can also contact the local fisheries biologists to provide input. The department has also committed to convening two public meetings per year to gather stakeholder input on the management and evaluation of the Lake Superior fishery.

**Nets should not be allowed within ½ to 1 mile of tributaries because of the potential for bycatch harvest.**

The department acknowledges this concern. The permanent rule will not impact the requirement that nets must be placed at least 1 mile from trout streams. In addition, tribes will now impose a minimum distance for nets of ½ miles from trout streams; previously, there was no minimum distance requirement for tribal nets.

**Expanded use of gill nets and restrictions on trap nets have hurt fishing. Gill net use should be greatly reduced or eliminated.**

This rule maintains prohibitions on gill net usage in areas where fish spawn as well as fish refuges. In addition, harvest of fish with gill nets is limited through quotas, effort restrictions, tag requirements and other regulations. The department recognizes that fish mortality with the use of gill nets is higher than other types of nets, and will continue monitoring fish populations through established processes.

**Net-free areas should not have been reduced; small boats are now experiencing lower levels of fish close to the shore and have observed higher levels of lake trout bycatch, and opening the South Channel to additional commercial netting creates additional user conflicts.**

The rule does not greatly expand areas open to commercial and tribal fishing. Over 310 square miles of Wisconsin waters of Lake Superior (roughly 20% of non-refuge waters) are restricted sport fishing areas with limited or no commercial fishing. About 500 square miles continue to be maintained as fish refuges closed to fishing. In exchange for maintaining other restricted sportfishing areas, a small area of approximately 2,100 acres (3.28 square miles, or 1% of the total area) in the South Channel (Sand Cut Restricted Area) that was previously closed to high efficiency gear used by commercial fishers will be open to Bad River fishers. Sport anglers note that the agreement and rule open part of a restricted area around Long Island to tribal commercial fishing. The area in question encompasses four square miles out of over 310 square miles of restricted areas that are open to recreational fishing with limited or no commercial fishing. Recreational anglers will still be able to fish more than 300 square miles of waters less than 240 feet deep open only to sport fishing, and the department has not observed additional user conflicts between commercial and recreational fishers in restricted areas. Since the emergency rule went into effect, the department has closely monitored the fishery in these areas to ensure that commercial nets are not harvesting fish at unsustainable levels.

The rule will implement a new lake trout harvest allocation in WI-2 that may actually increase opportunity for recreational anglers. Because the new overall harvest allocation in WI-2 is larger, there is a reduced chance of reaching the lake trout quota early, triggering an early season closure for all recreational lake trout fishers. The revised harvest allocation could result in additional opportunity for lake trout harvest by recreational anglers.

Additionally, 22.6 miles of the Bayfield Peninsula will now be closed to trap nets, which will reduce the amount of commercial gear in that area.

**An October fishery would be detrimental to spawning fish and should not be allowed.**

The department acknowledges this concern, and the proposed permanent rule does not include an experimental October whitefish season for state commercial fishers. While tribal members may participate in this season, it is experimental in nature; state and tribal biologists are working cooperatively to thoroughly assess any potential impacts. In 2019, only four tribal boats participated in the season. While data is still being analyzed, monitoring occurred on nine days of net lifting and included jointly monitoring 75,000 feet of gill net, and has indicated that harvest is well under the maximum amount of whitefish expected to be harvested during this season.

The lake trout quota helps ensure that overharvest does not occur. The whitefish population is showing signs of density-dependent slower growth, which indicate whitefish could benefit from additional harvest to reduce intraspecific competition for resources.

**A better mechanism for monitoring and responding to incidental catch of non-target fish needs to be in place. What happens if incidental catch is high? Are monitoring methods accurate and expedient enough to monitor incidental catch and quickly reduce it if needed?**

Department biologists and tribal biologists are working on improved population models and data sharing, in part to improve monitoring of incidental catch. Biologists monitor incidental catch with on-board commercial monitoring, which provides direct observations of the species and amounts of fish caught. Our goal is to monitor 7 percent of commercial fishing effort to ensure data accuracy. Furthermore, under existing rules (s. NR 25.09 (5)), if incidental catch exceeds 10% of the total legal harvest, the nets must be immediately removed from the area. The commercial fishing licensee may only resume using the nets if they are moved to a different area or water depth from where the excessive incidental catch occurred. If incidental catch levels become problematic, the department may review the commercial fishing rules and pursue a rule change.

**Data on incidental catch of non-target fish should be easily available to the public.**

The department is in the process of developing an annual monitoring report to convey this information.

The department gathers data on incidental catch of sport fish each year. Sport fish (Coho Salmon, Chinook Salmon, Brown Trout, Rainbow Trout, Splake, Brook Trout, Smallmouth Bass, Northern Pike) are occasionally caught in gill nets, but are not allowed to be sold and therefore are released by state-licensed commercial fishermen. In 2018, the sport fish bycatch made up 0.5% of the total fish captured in gillnets in 2018, based on monitoring data. Sport fish catch per unit effort averages 0.28 fish per 1,000 feet or roughly 1 fish per 4,000 feet of net.

**Additional steps need to be taken to assist sport fishers in navigating around nets, including better training and better net marking.**

This rule improves net marking, including for home use nets and when nets are used in the presence of ice. The department also includes language in the fishing regulations about navigating around and avoiding nets.

**The Economic Analysis did not fully cover the potential economic effects.**

The department completed an Economic Impact Analysis and solicited public comments from local businesses and organizations. Based on this analysis, the department believes that the rule as a whole will improve the Lake Superior fisheries in Wisconsin and therefore may benefit the local economy. A more equitable allocation of allowable harvest between management zones WI-1 and WI-2 will provide additional opportunities for harvest of lake trout by state commercial and recreational fishers. For example, the increase in WI-2 lake trout allotment during the 2019 emergency rule allowed for a greater recreational harvest than occurred during the 2017 season that was closed early because the sport fishing allotment was met. An analysis of spending patterns while other rule changes have been in place since 2014 suggest that impact to tourism in the Lake Superior area will be minimal to positive. For example, during the 2019 emergency rules, the charter industry

saw the highest number of angler trips reported over the last 10 years and saw catch rates higher than the last 10 years, indicating that the emergency rules have resulted in an overall increase in recreational opportunity, angler participation and spending. Additionally, recreational effort during the summer of 2019 also was higher than the last couple of years showing that sport fishing was not affected by the rule changes.

#### **Sport fish harvest for lake trout and whitefish decreased in 2019 as a result of the new rules.**

Lake Trout harvest in 2019 was lower than 2018 for both sport and commercial fishing; however, 2019 recreational total harvest and catch rate were similar to harvest and catch rate in 2017 and higher than harvest and catch rate in 2015 and 2016. Catch rate in 2018 was much higher than average and ice harvest was higher in 2018 because of good ice conditions which explains the higher total harvest in 2018 compared to 2019 and 2015-2017. Additionally, harvest of other species in 2019 increased, and angler effort was higher in 2019 for lake trout in the open water season than the last couple of years, indicating that fishers have not been deterred from participating in the fishery based on the regulation changes. Further, charter fisheries harvest was higher in 2019 than the 10-year average for all species, indicating that there was increased participation. Lake whitefish harvest during 2019 was 10 times higher during the open water season than average, likely as a result of increased angler success. Additionally, in 2019, the lake trout season remained open for the entire season for a total harvest greater than what has promoted early season closures in prior years, which maximized opportunity. The positive impacts of the emergency rules on recreational opportunity and harvest suggest that the permanent rules will also have a similar effect.

#### **A safe harvest level for whitefish needs to be determined.**

The tribes and the department are currently working to develop a whitefish model that will add to existing information used to determine and assess safe harvest levels. The current fishery is managed primarily through effort restrictions that have coincided with increased abundance of lake whitefish and a decrease in gillnet effort resulting in less sport-commercial conflicts. The department feels that current whitefish harvest levels are not detrimental to the short- or long-term sustainability of the whitefish fishery. Current data suggests that growth of whitefish has declined since effort limitation began and that lake whitefish density has increased. Together these indicate that lake whitefish density is too high. Allowing more harvest is anticipated to improve growth rates and ultimately increase the value of the commercial industry while providing recreational anglers the opportunity to harvest large whitefish.

#### **Tribal and commercial fishing activity will increase as a result of the new rules which will result in a decrease of sport fishing activity.**

Since the emergency rule went into effect, recreational fishing has generally increased. Creel surveys indicate that sport fishing effort in WI-2 was higher during 2019 than the preceding two years. Charter effort in 2019 was the highest it has been over the last 10 years. Additionally, while there was a small increase in the area that commercial fishing could occur, the continuation of effort limitation regulations did not allow for increased commercial fishing effort. The maximum number of trap nets that can be used under a single state or tribal license was not increased as a result of the emergency rule. The total allowable gillnet footage in WI-2 decreased with the changes in lake trout allocation; therefore, commercial activity in WI-2 decreased in 2019. This decrease in commercial activity is evident in the decrease in harvest of lake whitefish (approximately 170,000 pounds less than 10-year average) by state-licensed commercial fishers which corresponds to more than 400 less trap net lifts. Collectively, these data indicate that commercial fishing activity decreased as a result of the 2019 emergency rule while sport fishing activity increased.

*Comment not directly related to the rule:*

#### **Commenter recommends a Lake Superior walleye slot limit and reduction in the daily bag limit from 5 to 3.**

This suggestion has been shared with Lake Superior fisheries biologists.

Modifications Made

No modifications were made to the rule as a result of the public comments, as many of the comments related to provisions of the Lake Superior Fishing Agreement that are already in place. However, one modification was made upon request of the Natural Resources Board prior to the rule's adoption. This change inserts language into the rule reinforcing the department's commitment to using biological indicators and public health, safety and welfare considerations when the Lake Superior fishery is managed under cooperative agreements, and provides that the department will take action to protect the fishery if the sustainability of the fishery, or public health, safety or welfare, is at risk.

#### Appearances at the Public Hearing

Bruce Prentice  
Alfred House  
Savanna Campbell  
Sean Campbell  
Bill Smith  
Ian H.  
Charles Rasmussen  
Dale Johnston  
Ken Lundberg, Brule River Sportsman's Club  
Mary Lundberg  
Tony Janiseh  
Craig Hoopman  
Bill Bodin, Bodin's Inc.  
Chad Abel, Red Cliff  
Thomas F. Johnson, Douglas County WCC, Douglas County Fish and Game League  
Dale Hoopman  
Carl Thomas  
Darryl Fenner  
Mark Johnston  
Dean Bortz, Wisconsin Outdoor News  
Bob Nies  
Jeff Williams, North Wisconsin Rod and Gun Club  
Harold Schmiede  
Mary Jo Williams  
Terry Bevil  
Tom Pinkel  
Scott Bretting

#### Changes to Rule Analysis and Fiscal Estimate

Changes to the fiscal estimate and plain language analysis included a better summary of the potential impacts to recreational fishers. The plain language analysis of the rule was also updated to reflect the addition of language expressing the department's commitment to assessing the implementation of agreements and experimental regulations.

#### Response to Legislative Council Rules Clearinghouse Report

The Legislative Council Rules Clearinghouse submitted comments on statutory authority, form, style and placement in administrative code, and clarity, grammar, punctuation and use of plain language.

Changes to the proposed rule were made to address all recommendations by the Legislative Council Rules Clearinghouse.

#### Final Regulatory Flexibility Analysis

The items proposed in this rule may result in implementation or compliance costs relating to net marking and reporting. Certain new requirements apply to the placement and marking of nets in waters of Lake Superior that aim to standardize regulations between the state and the tribes, which may require some adjustments in

gear use by state commercial fishers. A minor update to electronic fish harvest reporting system rules also removes the requirement for commercial fishers to print and sign any biweekly reports that the system generates for that commercial operation. An estimate of the cost for each business is not known at this time, but the impact is expected to be minimal, if any.

When assessing the effects of the rule on state commercial fishers, the changes to harvest allocations and seasons are likely to result in minimal economic impacts. The average dockside value for all species harvested by state commercial fishers from 2015 - 2017 is approximately \$1.08 million. Total allowable catch for lake trout by state commercial fishers will increase by 440 fish in WI-2 and decrease by 430 fish in WI-1, resulting in a similar annual total dockside value for future catches as under previous rules. Due to the minimal changes in total allowable catch for lean lake trout and no changes for cisco (lake herring) or whitefish, the annual dockside value for commercially harvested fish in Lake Superior is not expected to deviate significantly from the current value as a result of these rules.

The effect of this rule on tourism in the Lake Superior area is also likely to be minimal, since past spending patterns remained unaffected during other regulation changes. Direct visitor spending in Bayfield County increased from \$46.5 million in 2016 to \$47.7 million in 2017, despite early closure of the recreational lake trout fishery and removal of a summer restricted area that was previously open only to recreational fishing. Direct visitor spending in Ashland County similarly increased from \$34.9 million in 2016 to \$35.1 million in 2017, and Iron County direct visitor spending increased from \$19.6 million in 2016 to \$20.5 million in 2017.

The rule does not allow for the potential to establish a reduced fine for small businesses, nor does it establish "alternative enforcement mechanisms" for "minor violations" of administrative rules made by small businesses. Public utility rate payers and local governmental units will not be affected by the rule.

#### Response to Small Business Regulatory Review Board Report

The Small Business Regulatory Review Board did not prepare a report on this rule proposal.