

## Clearinghouse Rule 24-073

The statement of scope for this rule, SS 058-23 was approved by the Governor on August 17, 2023, published in Register No. 812A3 on August 21, 2023, and approved by the Natural Resources Board on September 27, 2023. This rule was approved by the Governor on insert date.

### ORDER OF THE STATE OF WISCONSIN NATURAL RESOURCES BOARD AMENDING, REPEALING AND RECREATING AND CREATING RULES

The Wisconsin Natural Resources Board proposes an order to **amend** NR 20.20 (73) (n) 5., 25.09 (1) (b) 1.; to **repeal and recreate** NR 25.06 (1) (a); to **amend** NR 25.06 (1) (c) 1. to 3.; and to **create** NR 25.09 (1) (bm) 3. relating to Lake Superior cisco and lake trout regulations and affecting small business.

### FH-12-23

#### Analysis Prepared by the Department of Natural Resources

**1. Statute Interpreted:** The department has interpreted s. 29.014 (1), 29.041, and 29.519 (1m) (b), Stats., as authorizing this rule.

**2. Statutory Authority:** The department is granted the authority for this rule under s. 29.014 (1), 29.041, and 29.519 (1m) (b), Stats.

**3. Explanation of Agency Authority:** Section 29.014(1), Stats., directs the department to establish and maintain any bag limits and conditions governing the taking of fish that will conserve the fish supply and ensure the citizens of this state continued opportunities for good fishing.

Section 29.041, Stats., provides that the department may regulate fishing on and in all interstate boundary waters and outlying waters.

Section 29.519 (1m) (b), Stats., grants discretion to the department to establish commercial fish species harvest limits after giving due consideration to the recommendations made by the commercial fishing boards. In order to establish harvest limits, s. 29.519 (1m) (b), Stats., grants the department the authority to promulgate rules establishing formulas for harvest allocations among licensees or for the allotment of individual licensee catch quotas. Additional authorities granted to the department through s. 29.519 (1m) (b), Stats., include the authority to designate the size, kind and amount of gear allowed for harvesting fish, the authority to restrict the number of licenses issued, and the authority to designate areas in outlying waters as restricted to commercial fishing operations. This section also specifies that the limitations on harvests, licenses, restricted areas, and gear must be based on the available harvestable population of fish and must uphold the wise use and conservation of the fish to prevent overexploitation.

In addition, the 1972 *Gurnoe* decision (*State v. Gurnoe*, 53 Wis. 2d 390 (1972)) established that the Lake Superior Chippewa tribes reserved the right to fish in Lake Superior as part of their treaties with the United States government. Thus, the State of Wisconsin works in coordination with these tribes regarding the allocation and management of the Lake Superior fishery resource to ensure sustainable harvest.

**4. Related Statutes or Rules:** The department has also promulgated companion emergency rule FH-11-23 (E) which establishes a numeric quota for lake trout only.

#### **5. Plain Language Analysis:**

This rule updates cisco allocation and lake trout quotas and associated regulations for Lake Superior. This rule also establishes that the lake trout quota will be established using specific quantitative data. Similar to the process used for bear, elk and lake whitefish in Lake Michigan, the department's recommendations would be presented to the Natural Resources Board for approval. This change will allow lake trout quota updates to be more responsive to changes in fish populations in Lake Superior. This rule also implements gear and permit changes in line with state-Tribal discussions that have occurred as part of the Lake Superior Fishing Agreement.

SECTION 1 adjusts the recreational lake trout harvest closure trigger for Lake Superior to 75% of the recreational lake trout quota rather than a hard number. When reached, this trigger would prompt the department to close the recreational lake trout fishing season to prevent exceeding the recreational lake trout quota.

SECTION 2 establishes the model parameters for determining the department's lake trout quota recommendations for the WI-2 (east of Bark Point) waters of Lake Superior for state fishers. The WI-1 waters will remain at a static lake trout quota. The overall lake trout harvest quota for state (commercial and recreational) and Tribal fishers will increase through this rule for the next three years, which is also reflected in the rule language. The rule would only regulate tribal harvest at times when there is no Lake Superior Fishing Agreement in effect.

SECTION 3 modifies the season dates for commercial fishers and codifies the subdivision of the allocations for cisco.

SECTION 4 establishes a minimum mesh size requirement of 4 ¼-inch stretch measure on the pot of the trap for trap nets used in Lake Superior. This will prevent the incidental catch and mortality of lake whitefish that are caught in lake trout and lake whitefish fishing operations.

SECTION 5 applies tagging requirements of mesh size, length and license to all nets used in Lake Superior, which will help the department better track commercial fishing nets.

## **6. Summary of, and Comparison with, Existing or Proposed Federal Statutes and Regulations:**

No federal statutes or regulations apply. States possess inherent authority to manage the fishery and wildlife resources located within their boundaries, except insofar as preempted by federal treaties and laws, including regulations established in the Federal Register.

## **7. If Held, Summary of Comments Received During Preliminary Comment Period and at Public Hearing on the Statement of Scope:**

The department held a preliminary public hearing and comment period on the statement of scope for FH-11-23 (E) and FH-12-23 on October 5, 2023. Three people attended the preliminary public hearing, and while none provided comments, two people asked questions relating to the Lake Superior fishery. The department did not receive any written comments.

## **8. Comparison with Similar Rules in Adjacent States:**

Along with Wisconsin, Michigan and Minnesota are the only adjacent states with a Lake Superior commercial fishery. In Michigan, whitefish is the focus of the commercial fishery. Minnesota regulates several commercial fisheries on Lake Superior. Both Minnesota and Michigan have established quotas,

gear requirements and other restrictions for commercial fishing in Lake Superior, working in cooperation with the Chippewa tribes in those states.

## **9. Summary of Factual Data and Analytical Methodologies Used and How Any Related Findings Support the Regulatory Approach Chosen:**

Lake Superior offers a diverse fishery in which lake trout, cisco, and lake whitefish are the three main commercial fish species. Recreational fishers and local charter and guide businesses also value these species as game fish, and frequently target lake trout and whitefish. Because commercial, recreational, and subsistence fishers all depend on a sustainable Lake Superior fishery, harvest regulations must be analyzed and balanced using updated biological data and public input from the different stakeholder groups.

Quotas and associated regulations for lake trout are typically updated every three years based on the most current biological data. Population monitoring is a key component of managing Lake Superior fisheries. A statistical catch-at-age-model has been developed to sustainably manage lake trout harvest in waters of WI-2 Lake Superior, while a static quota is used in WI-1. The lake trout statistical catch-at-age model incorporates data from independent fishery assessments, the sport fishery, the commercial fishery, and tribal fisheries to project population trends and predict the maximum sustainable harvest of lake trout. The model incorporates length, age, and mortality data to maintain a 42 percent mortality rate on lake trout. The allowable harvest of lake trout is used to restrict footage available for gill net effort, which also regulates whitefish harvest. (Department and tribal biologists also developed a whitefish model to better assess and predict the impacts of harvest on the whitefish population.) The footage is based on monitored catch-per-unit-effort of lake trout in three time periods. A rolling 3-year average is used for each period to determine the amount of footage that can be sustainably used while staying within the lake trout quota. The effort restriction also encourages the avoidance of lake trout, which are more vulnerable than whitefish, and rewards minimizing lake trout bycatch.

## **10. Analysis and Supporting Documents Used to Determine the Effect on Small Business or in Preparation of an Economic Impact Report:**

The main cost associated with this rule would relate to ensuring that trap nets meet the minimum mesh size requirement for preventing catch of sublegal lake whitefish. However, all commercial fishers already use trap nets with a mesh size in compliance with the proposed rules. Therefore, this rule would not require a major overhaul in gear use by state-licensed commercial fishers.

Because this rule would increase the lake trout quota, state commercial and recreational fishers would most likely benefit from implementation of this rule. Dockside value of harvested lake trout is dependent on a variety of factors including market value and fishing conditions, and fuel and other expenditures have a greater economic impact for commercial fishers than quota adjustments. Assuming a dockside value of \$1 per pound for lake trout, the total gain to commercial fishers due to the quota increase would be about \$4,670, which would increase when the fish are sold. It is also important to note that whitefish harvest is also limited by lake trout harvest, so an increase in the lake trout quota also allows for additional gill net effort to be used to fish for lake whitefish. Though this rule does not apply to tribal fishers, tribal commercial fishers are also included under the quota through the Lake Superior Fishing Agreement, so they would see a similar pattern for lake trout and whitefish harvest.

Sport fishing is an important contributor to local economic activity in the Lake Superior region through direct spending to hotels, restaurants, bars, and to fishing businesses such as outfitters, guide or charter services and bait and tackle stores. While the recreational lake trout harvest closure trigger may impact

sport fishing activities in some years when sport fishers reach the trigger early, this rule will increase the amount of lake trout that it would take to trigger a season closure, thereby reducing the risk of an early season closure compared to other years. Also, the season has only closed early once in the past three years under a lower quota.

Related to both commercial and angler use of lake trout, harvest quotas are ideally reviewed every 3 years, with data collection and review occurring each year. Because of the variability of harvest quotas, there is no true baseline against which to compare increases and decreases and related economic impacts. Because of this variability, it is also difficult to estimate specific long-term economic impacts except to surmise that continued availability of the resource has overall positive impacts.

#### **11. Effect on Small Business (initial regulatory flexibility analysis):**

This rule is likely to have a minimal (less than \$50,000) total economic impact, if any, on commercial fishing businesses and sport fishing businesses. Both the lake trout quota allocation for the commercial fishery and the lake trout harvest closure trigger for angling will increase over the next three years in this rule, allowing for additional lake trout commercial harvest and more opportunities for anglers to harvest lake trout with a lower risk of an early season closure. This will benefit local businesses.

In future cycles, the quotas may increase further or could decrease. Whether established by rule or through use of the mechanisms which are established by rule, harvest quotas have always fluctuated due to relative abundance of the species.

The rule will require that commercial fishers tag all gill nets with an information and identification tag on the net's buoy staff on the portion that is above the water. Currently, only gill nets greater than 4 7/16-inch stretch measure and set shallower than 330 feet require these tags. These tags are supplied by the department at no cost to the commercial fisher and require little effort or expense to attach.

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.

**12. Agency Contact Person:** Brad Ray, Lake Superior fisheries team supervisor, 141 S. Third St., Bayfield, WI 54814, 715-779-4036, [Bradley.Ray@wisconsin.gov](mailto:Bradley.Ray@wisconsin.gov)

#### **13. Place where comments are to be submitted and deadline for submission:**

Written comments may be submitted at the public hearings, by regular mail, or email to:

Kari Lee-Zimmermann

Department of Natural Resources

P.O. Box 7921, 101 S. Webster St.

Madison, WI 53707

(608) 316-0080

[Kari.LeeZimmermann@wisconsin.gov](mailto:Kari.LeeZimmermann@wisconsin.gov)

Comments may be submitted to the department contact person listed above or to [DNRAAdministrativeRulesComments@wisconsin.gov](mailto:DNRAAdministrativeRulesComments@wisconsin.gov) until the deadline given in the upcoming notice of

public hearing. The notice of public hearing and deadline for submitting comments will be published in the Wisconsin Administrative Register and on the department's website, at <https://dnr.wi.gov/calendar/hearings/>. Comments may also be submitted through the Wisconsin Administrative Rules Website at <https://docs.legis.wisconsin.gov/code/chr/active>.

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## RULE TEXT

### SECTION 1. NR 20.20 (73) (n) 5. is amended to read:

COUNTY AND SPECIES	WATERS	AUTHORIZED METHODS	OPEN SEASON (both dates inclusive)	DAILY BAG LIMIT	MINIMUM LENGTH OR OTHER SIZE RESTRICTIONS (INCHES)
<b>(73) SPECIES OR WATERS NOT LISTED IN SUBS. (1) TO (72)</b>					
(n) Trout and salmon	5. Lake Superior, lake trout only	a. Hook and line	December 1 to September 30 except that when recreational lake trout harvest during a season in waters east of a line running north-south from Bark Point (46° 53.21', -91° 11.16') measured by department creel surveys exceeds <del>9,500</del> <u>75% of the recreational harvest quota established by the department</u>	2 in total in waters east of a line running north-south from Bark Point.  3 in total west of a line running north-south from Bark Point.	In waters east of a line running north-south from Bark Point (46° 53.21', -91° 11.16') the minimum is 15 and only 1 fish longer than 25  For lake trout in waters west of a line running north-south from Bark Point the minimum is 15 and only 1 fish longer than 25

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			<p><u>for</u> lake trout, the season may be closed only in those waters east of Bark Point. A season closure shall become effective upon issuance of an order of the secretary and publication in the official state newspaper.</p>		
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**SECTION 2. NR 25.06 (1) (a) is repealed and recreated to read:**

**NR 25.06 (1) (a) *Lake trout.*** The total allowable annual harvest of lake trout by state and tribal commercial fishers and tribal home use fishers under par. (b) during the open season in WI-1 and WI-2 shall be determined by the department and approved by natural resources board. The department shall subdivide the total allowable catch for WI-1 and WI-2 among state anglers, state commercial fishers, tribal commercial fishers, tribal home use, and department assessment.

**Note:** Pursuant to a December 2018 agreement between the Bad River Band of Lake Superior Chippewa, the Red Cliff Band of Lake Superior Chippewa, and the Wisconsin Department of Natural Resources, the department's harvest quota recommendation is based on the advice of a biological committee with members from both bands and the department.

1. 'WI-1.' The total allowable commercial and tribal home use harvest in WI-1 may not exceed 6,000 lake trout and shall be allocated as follows:

a. That number of lake trout to be harvested by non-tribal licensed commercial fishers from the waters of WI-1 may not exceed 4,000 lake trout.

b. That number of lake trout to be harvested by the Red Cliff and Bad River bands, including both commercial and tribal home use fishers, from the waters of WI-1 may not exceed 2,000 lake trout.

2. 'WI-2.' The department shall utilize the WI-2 lake trout population model for calculating the department recommendation for the total allowable commercial and home use harvest of lake trout. The recommendation for the total allowable commercial harvest for WI-2 shall be calculated at least every three years using the output from the population model. The population model shall use the following quantitative data for lake trout: commercial and recreational harvest, commercial and recreational fishing effort, adult lake trout index in spring fishery-independent survey, juvenile lake trout index in summer fishery-independent survey, age compositions of lake trout in commercial, recreational, and fishery-independent surveys, length at age, weight at age, maturity schedule, and sea lamprey mortality estimates. An appropriate exploitation rate based on recent harvest trends shall be applied to the model estimates, and the department may also account for mortality and presence of hatchery-origin fish in the system to reach the total allowable catch recommendation.

a. For any given lake trout season after November 27, 2026, the total allowable commercial and tribal home use harvest in the waters of WI-2 will be determined under subd. 2.

b. For 2024 through the open season ending September 30, 2026, the number of lake trout harvested by non-tribal licensed commercial fishers from waters of WI-2 may not exceed 7,500 lake trout and the number of lake trout to be harvested by the Red Cliff and Bad River bands, including both commercial and tribal home use fishers, from the waters of WI-2 may not exceed 44,500 lake trout.

**Note:** If the Red Cliff and Bad River bands do not reach an agreement on the method of allocating the tribal quota between them, the department may divide the quota 50% for the Bad River band and 50% for the Red Cliff band, or by any other equitable method.

**SECTION 3. NR 25.06 (1) (c) 1. to 3. is amended to read:**

1. The total allowable state harvest of cisco in the waters of Lake Superior may not exceed 897,000 round weight pounds in a calendar year. A portion of the state allowable harvest shall be reserved for recreational harvest and assessment purposes.

2. ~~From October 1 through December 31 of each year, the~~ The total harvest of cisco by state licensed commercial fishers ~~using gill nets with a mesh size of not less than 2 3/8 inch and not more than 3 inch stretch measure~~ may not exceed ~~850,000~~ 890,000 round weight pounds.

3. ~~Excluding harvest under subd. 2, from January 1 through December 31 of each year, the~~ The total harvest of cisco by state recreational fishers and from the department assessment activities shall not exceed ~~47,000~~ 7,000 round weight pounds. ~~The department shall subdivide the allocation of 47,000 7,000 round weight pounds among commercial incidental catch, angling, and department assessment activities.~~

**SECTION 4. NR 25.09 (1) (b) 1. is amended to read:**

**NR 25.09 (1) (b) 1.** The licensee may use entrapping nets only when the pot or crib is set, placed, or operated in water not more than 90 feet (15 fathoms) deep, and only when the mesh size of the trap net pot or crib, excluding shoaling twine, is 4 1/4 inch stretch measure or greater.

**SECTION 5. NR 25.09 (1) (bm) 3. is created to read:**

**NR 25.09 (1) (bm) 3.** The licensee using gill nets shall tag the net with an informational tag, supplied by the department, on the buoy staff above the water line. Each tag shall state the length of the gang of nets, the mesh size of the gang of nets, the license number or fleet reporting number, and the licensee's initials.

**SECTION 6. EFFECTIVE DATE.** This rule takes 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 7. BOARD ADOPTION.** This rule was approved and adopted by the State of Wisconsin Natural Resources Board on [DATE].

Dated at Madison, Wisconsin \_\_\_\_\_.

STATE OF WISCONSIN

DEPARTMENT OF NATURAL RESOURCES

BY \_\_\_\_\_

Steven Little, Deputy Secretary