

The statement of scope for this rule, SS 057-22 was approved by the Governor on June 30, 2022, published in Register No. 799A2 on July 11, 2022, and approved by the Natural Resources Board on September 28, 2022. This rule was approved by the Governor on March 7, 2024.

## ORDER OF THE STATE OF WISCONSIN NATURAL RESOURCES BOARD CREATING RULES

The Wisconsin Natural Resources Board proposes an order to **create** NR 26.01 (41), (45), (69) (e) to (g), and 26.03 relating to fish refuge establishment.

### FH-10-22

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

**1. Statute Interpreted:** Sections 23.09 (2) (c), 29.014 (1), 29.041, and 29.053 (2), Stats., are interpreted as authorizing the department to create fish refuges in waters of the state in which fishing is not allowed.

**2. Statutory Authority:** Sections 23.09 (2) (c), 29.014 (1), 29.041, and 29.053 (2), Stats., authorize this rule.

**3. Explanation of Agency Authority:** Section 23.09 (2) (c), Stats., provides that the department may designate fish refuges to secure the perpetuation and adequate supply of any species of fish and provide safe retreats in which fish may breed and replenish adjacent fishing waters.

Section 29.014 (1), Stats., “rule-making for this chapter,” grants the department the authority to establish and maintain open and closed seasons, bag limits, size limits and other conditions that will conserve fish populations and provide good fishing opportunities for the citizens of the state.

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

Section 29.053 (2), Stats., provides that the department may establish conditions governing the taking of fish for the state as a whole, for counties or parts of counties, or for waterbodies or parts of waterbodies.

#### **4. Related Statutes or Rules:**

A companion emergency rule with board order number FH-09-22 (E) and legislative reference bureau number EMR 2318 established a fish refuge at Kletzsch Park. That rule was adopted by the board at its September 27, 2023 meeting. The emergency rule expires in May, 2024

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

Fish refuges provide protection for fish in areas where they are concentrated and vulnerable to fishing, including areas where fish congregate to spawn. Fish refuges are closed to fishing during the time that the refuge is in effect each year. This rule will create fish refuges around fish passages and spawning areas that are expected to lead to increased concentrations of fish, resulting in increased vulnerability of these fish to angler harvest. The objective of these refuges is to protect fish populations from overharvest when fish are concentrated in the area of the refuge, as well as to minimize fishing-related disturbances to spawning fish in these areas. The refuges may also protect public safety in areas where fishing near dams or related structures would present safety hazards. Fish refuges help ensure an adequate population of fish and provide a place for fish to reproduce and replenish the population in adjacent fishable waters.

SECTION 1 establishes a year-round fish refuge surrounding and including the Kletzsch Park Dam fish passage on the Milwaukee River to protect migratory fish using the fish passage. Fish passages promote the natural movement of fish, and are important for allowing species such as lake sturgeon, walleye, smallmouth bass, northern pike, and other game fish to reach their spawning habitat. This new fish passage will be completed in late November 2023, and will allow fish to move upstream around the existing dam to their spawning habitats, which will benefit populations of lake sturgeon, northern pike, smallmouth bass, suckers, and redhorse. However, this project is expected to lead to increased concentrations of fish around the fish passage, resulting in increased vulnerability of these fish to angler harvest before they can reach their spawning habitats. This fish refuge will prohibit fishing in the immediate vicinity of the Kletzsch fish passage and in the fish passage itself.

This section also creates fish refuges in spawning marshes connected to the Wolf River to protect walleye from fishing-related disturbance and fishing pressure as they move into their spawning habitat to reproduce. Because walleye only congregate for spawning during the spring, these fish refuges would just be in place during the spawning window each year, with fishing allowed in these areas at other times of the year.

SECTION 2 establishes a mechanism for implementing temporary fish refuges on a short-term basis when circumstances arise that necessitate protection of fish as soon as practicable. This process would be similar to the process for closing the fishing season under unusual circumstances (s. NR 20.33, Wis. Admin. Code) or establishing wildlife refuges on private lands (s. 29.621, Stats.), and would involve a public notice posted in the newspaper, a public meeting upon public request, and a pathway for the public to provide input on the proposed fish refuge. The temporary fish refuges would only be in effect for a limited time (up to three years), and a permanent rule process would be necessary to implement the refuges permanently.

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

No federal regulations apply. States retain management authority over the fish and wildlife resources within state boundaries provided that state regulations do not conflict with regulations established in the Federal Register. None of these rule changes violate or conflict with the provisions established in the Federal Code of Regulations.

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

The department was not directed to hold a preliminary public hearing and comment period on the scope statement for this rule.

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

Fisheries management rules are generally similar in the states surrounding Wisconsin. Specific regulations may differ for species among the surrounding states, but the general principles are similar. Michigan and Minnesota also utilize fish refuges or fish sanctuaries to protect fish in sensitive areas.

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

The Milwaukee River supports an abundant smallmouth and northern pike fishery and contains high numbers of suckers and redhorse in the system as well. Numbers of catfish and walleye are low but

present. The Milwaukee River has been implementing a sturgeon rehabilitation program since 2003 and adults are beginning to return to the river in the spring. The river drains into Lake Michigan in the Milwaukee Harbor and experiences runs of stocked trout and salmon in spring and fall. Salmonids can pass over Kletzsch Park Dam with relative ease. Native species such as lake sturgeon, redhorse, suckers, smallmouth bass and northern pike are unable to surpass the dam unless extremely high flows are encountered.

A fish passage was recently constructed in 2023 as a collaborative effort between partners. Fish passage and access to spawning habitat is well documented as essential for the natural reproduction of lake sturgeon, northern pike, smallmouth bass, walleye, and many other species. It is also well documented that fish congregate in fishways and are easily accessible to anglers if they are not protected. This fish refuge will protect fish in the area encompassing the fish passage where they are more vulnerable to angler harvest, and will help achieve the goals of establishing a self-sustaining population of lake sturgeon and providing a recreational fishery for smallmouth bass and northern pike. The refuge may also protect public safety in areas where fishing near dams or related structures would present safety hazards.

The marshes adjacent to the Wolf River are very important walleye spawning habitat. Walleye migrate into these marshes to spawn in the spring before returning to the river and connected waters. The young walleye that hatch in the marshes are a main source of walleye for the popular Winnebago System walleye fishery. The department and partners also manipulate the habitat in the marshes to facilitate walleye movement between the marshes and the river. Some of these marshes are navigable throughout the year, while others flood seasonally and become navigable. Anglers fishing in the marshes during the walleye spawning period from March to early May can disturb adult walleye that are trying to spawn and can stir up the water and vegetation, reducing the survival of eggs and young walleye. In the past, the department has posted the marshes occurring on state lands as “no entry” during walleye spawning, and has arranged for agreements with area landowners to lease the marshes for the purpose of protecting spawning walleye as no entry areas. However, the “no entry” designation also prevents the public from accessing these marshes for other purposes that do not involve fishing. Therefore, designation of the walleye spawning marshes as fish refuges is the most appropriate method for protecting these sensitive areas from activities that are most likely to disturb the fish. This rule designates the marshes occurring on state lands as fish refuges.

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

This rule is not expected to have a direct economic impact, as it will only restrict fishing from a small area encompassing the fish passage. This rule may have an indirect, positive economic impact since the fish refuge will ensure the perpetuation of game fish species by allowing the fish to safely move across barriers and reach their spawning waters. The mechanism for creating temporary fish refuges is also not expected to have an economic impact, as the end result of fish refuge establishment would not have an economic impact.

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

No impacts to small businesses are expected as a result of this rule.

**12. Agency Contact Person:** Scott Loomans, P.O. Box 7921, Madison, WI 53707, scott.loomans@wisconsin.gov, 608-225-9440

**13. Place where comments are to be submitted and deadline for submission:** A public comment

period on the draft rule occurred from January 8 to February 5, 2024, with a public hearing on February 5, 2024.

**RULE TEXT**

**SECTION 1. NR 26.01 (41), (45), and (69) (e) to (g) are created to read:**

**NR 26.01**

COUNTY	WATERS	REFUGE BOUNDARIES	START DATE	END DATE
<b>(41) Milwaukee</b>	(a) Milwaukee river	From 30 feet upstream of the upstream end of the Kletzsch Park dam fish passage to 30 feet downstream of the fish passage with the boundary extending westward to the Milwaukee river island at 43°7'59.736"N, 87°55'41.29837"W	Continuous	Continuous
<b>(45) Outagamie</b>	(a) Spoehrs marsh	Flooded woodland and marsh areas located adjacent to the Wolf River within the W ½ of section 4, E ½ of section 5, NE ¼ of the NE ¼ of section 8, and NW ¼ of the NW ¼ of section 9 T23N, R16E	March 15	Friday preceding first Saturday in May
	(b) Lockers marsh	Flooded woodland and marsh areas located adjacent to the Wolf River within the SW ¼ of section 16 and NW ¼ of section 21 T23N, R16E	March 15	Friday preceding first Saturday in May

	(c) Kalwitz marsh	Flooded woodland and marsh areas located adjacent to the Wolf River within the S ½ of section 7 and the N ½ of NE ¼ of section 18 T22N, R15E	March 15	Friday preceding first Saturday in May
<b>(69) Waupaca</b>	(e) Jenny bayou	Flooded woodland and marsh areas located adjacent to the Wolf River within the NE ¼ of section 12 T21N, R13E, the NW ¼ of section 7, and the SW ¼ of section 6 T21N, R14E	March 15	Friday preceding first Saturday in May
	(f) Miller bayou	Flooded woodland and marsh areas located adjacent to the Wolf River within the E ½ of the NE ¼ of section 24 and the SE ¼ of the SE ¼ of section 13 T21N, R13E	March 15	Friday preceding first Saturday in May
	(g) Muckwa marsh	Flooded woodland and marsh areas located adjacent to the Wolf River within the N ½ of section 15 and the S ½ of section 10 T22N, R14E	March 15	Friday preceding first Saturday in May

**SECTION 2. NR 26.03 is created to read:**

**NR 26.03 Establishment of temporary fish refuges.**

(1) CRITERIA. Pursuant to sub. (2), the department may establish a temporary fish refuge on a water or part of a water when it finds through scientific investigation, fish population monitoring, or

documentation of fish movement that fish have become concentrated and vulnerable to harvest and are in need of immediate protection due to at least one of the following:

(a) A fish passage, fishway, or similar structure has been installed to allow fish to move past a barrier to access additional areas of their natural range, and continued fishing may result in a depletion of the game fish supply due to the new movement patterns of fish in or around the structure.

(b) The department has authorized a habitat or waterway project that may temporarily impact the distribution of fish in the waterbody into a smaller area.

(c) New information or a change in conditions affecting one or more fish populations in the waterbody warrants the establishment of a temporary fish refuge to address an imminent conservation need.

(2) PROCEDURES. Upon making a determination under sub. (1) that a temporary fish refuge is warranted, the department shall do all of the following:

(a) Prepare and distribute a notice of its intent to establish a temporary fish refuge under this section. The notice shall be published as a class 1 notice under Ch. 985, Stats., in a general circulation newspaper in the vicinity of the water and, if the proposal has statewide significance, in the official state newspaper. A copy of the notice shall be sent to individuals and organizations which the department believes may be interested in the matter. The notice shall include a description of the water or part of the water that will be included in the temporary fish refuge, the effective date of the refuge, the proposed annual date range for the refuge, the location where the public may send comments on the proposal or request a public informational meeting, and the deadline for submitting comments or requesting a public meeting.

(b) If requested by the public in writing within 10 days of publication of the notice under par. (a), hold one or more public information meetings in the vicinity of the proposed temporary fish refuge, at which the department shall describe the factual basis for the temporary fish refuge and shall take public comments.

(c) If, based on the factual basis for the temporary fish refuge and public comments received, the department decides to proceed with establishment of the temporary fish refuge, the department shall issue an order establishing the fish refuge.

(d) Within 30 days of the order establishing the temporary fish refuge under par. (c), the department shall post notice of the fish refuge at public access sites in the vicinity of the fish refuge that shall contain the boundary descriptions of the fish refuge and the annual date range during which the fish refuge shall be in effect.

(3) **EFFECTIVE PERIOD.** A temporary fish refuge established under this section shall remain in effect until three years following the effective date of the refuge, until the end of the project, or until the department has determined that fish no longer congregate either seasonally or continuously in the area of the fish refuge, whichever occurs first. Upon discontinuing a fish refuge, the department shall publish notice of discontinuation of the fish refuge in the state newspaper and shall remove the notices posted in the vicinity of the fish refuge.

**SECTION 3. 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 4. BOARD ADOPTION.** This rule was approved and adopted by the State of Wisconsin Natural Resources Board on February 28, 2024.