

The statement of scope for this rule, SS 124-20 was approved by the Governor on August 21, 2020, published in Register No. 776B on August 31, 2020, and approved by the Natural Resources Board on October 28, 2020. This rule was approved by the Governor on December 18, 2020.

ORDER OF THE STATE OF WISCONSIN NATURAL RESOURCES BOARD
REPEALING AND AMENDING RULES

The Wisconsin Natural Resources Board proposes an order to **repeal** NR 25.06 (1) (c) (note) and 25.07 (1) (b) (note) and to **amend** NR 20.20 (73) (n) 5., 25.06 (1) (a), 25.06 (1) (c), and 25.07 (1) (b) (title) relating to fish harvest in Lake Superior and affecting small business.

FH-12-20 (E)

Analysis Prepared by the Department of Natural Resources

1. Statutes Interpreted: Sections 29.014 (1), 29.041 and 29.053 (2), Stats., have been interpreted as authorizing the department to conserve the fish supply on waters of the state while continuing to provide good opportunities for fishing. Section 29.519 (1m) (b), Stats. is interpreted as allowing the department to regulate commercial fish harvest.

2. Statutory Authority: Sections 29.014 (1), 29.041, and 29.519 (1m) (b), Stats., authorize the promulgation of this rule. All rules promulgated under this authority are subject to review under ch. 227, 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.

Provisions of s. 29.053 (2), Stats., “Specific open and closed seasons,” provide 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.

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. It also specifies that the limitations on harvests must be based on the available harvestable population of fish and in the wise use and conservation of the fish, so as 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 to manage the Lake Superior fishery for sustainable harvest.

4. Related Statutes or Rules: The department will also promulgate a companion permanent rule, FH-10-20.

5. Plain Language Analysis: This rule addresses cisco and lake trout quotas and harvest limits for Lake Superior sport and commercial fisheries. Adjustments to these quotas and limits are necessary to maintain sustainable harvest levels for a healthy Lake Superior ecosystem and the diverse fisheries and

stakeholders it supports.

SECTION 1 revises the harvest trigger for lake trout taken by recreational anglers in waters of Lake Superior east of Bark Point (WI-2). If lake trout harvest meets this threshold, the fishing season will close to prevent overharvest of lake trout.

SECTION 2 updates the lake trout quota in WI-2, as well as the accompanying harvest allocations, for state and tribal commercial fishers and tribal home use fishers. There is no change to the quota in WI-1.

SECTION 3 updates the state and tribal cisco quota as well as the total allowable harvest for state commercial fishers, total allowable harvest for state commercial fishers fishing between Oct. 1 and Dec. 31 using gill nets between 2 3/8 and 3 inch stretch measure, and total allowable harvest for department assessment, angling, and incidental harvest.

SECTION 4 establishes the total allowable cisco harvest for tribal commercial and home use fishers.

SECTIONS 5 to 7 remove the January 1, 2021 sunset for the cisco quota.

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. 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.

8. 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 and cisco are 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. 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. Department and tribal biologists are currently developing a whitefish model as well to better assess and predict the impacts of harvest on the whitefish population.

The department and tribes utilize hydroacoustics surveys to determine the density of cisco in the water column, and then extrapolate to the total biomass of cisco in Wisconsin waters of Lake Superior. The hydroacoustics data are validated with department and tribal agency netting surveys to verify that the numbers and species caught correlate with the results from the hydroacoustics surveys. While the cisco quota is reviewed on a three-year schedule, the department and tribes collect and review data continually, so changes based on the most current data can be considered if the sustainability of the cisco fishery is in question. Cisco are a key species in the Lake Superior ecosystem, and are harvested in Wisconsin waters for commercial, recreational and subsistence purposes by state licensees and members of the Red Cliff and Bad River Bands of Lake Superior Chippewa Indians. Cisco are also an important food chain link, connecting the lower trophic level of zooplankton with the higher trophic level occupied by predatory fish such as lake trout, and are an important component of the prey base for lake trout. Whitefish and other fish also consume cisco eggs as part of their regular diet.

Cisco populations in Lake Superior have been declining and have lacked strong year classes to help rebuild the population. Since 2016, cisco harvest regulations have included a harvest limit of 7.5 percent of the total cisco biomass estimate in round weight pounds of cisco, not to exceed 1,497,900 round weight pounds in a calendar year, as well as specific date restrictions for certain types of commercial fishing gear for state users. The department and tribes have met to review cisco population data and model projections regularly over the past several years, and the department and Lake Superior Commercial Fishing Board have met five times since 2018 to discuss population trends. The Lake Superior Fisheries Management Plan also includes information on cisco and stakeholder input. Through this rule, the harvest limit will be updated to reflect the most current standard for the limit on the proportion of cisco that may be harvested each year, which will ensure that the realized level of harvest remains sustainable. This includes incorporating the tribal share into the quota so that the total quota is 15 percent of the average of the most recent three years of hydroacoustic-modeled spawning cisco biomass, and including a safety buffer within the total quota to prevent overharvest. The recreational fishing season for cisco is open year-round in Lake Superior with a 10-fish daily bag limit per person and no size limit, and recreational cisco harvest is minimal. However, populations are still declining and the harvest limit needs to be reduced further in attempts to create a sustainable cisco population. The Lake Superior Chippewa tribes will join the cisco quota under the 2018-2028 Lake Superior Fishing Agreement, allowing the cisco fishery to be managed under a single, unified state-tribal quota.

9. Analysis and Supporting Documents Used to Determine the Effect on Small Business or in Preparation of an Economic Impact Report: The rules could have an impact on the harvest of Lake Superior fish species, including cisco, lake whitefish, and lake trout, by commercial fishers and recreational fishers. The rules imposing harvest restrictions are necessary in order to ensure a sustainable fishery over the long-term that provides an economic and natural resource benefit for all user groups. The permanent rule may have a moderate economic impact (defined as \$50,000 to \$20 million in total) but an exact amount of impact is unknown at this time. When a permanent rule is pursued, the department will conduct an economic impact analysis to gather comments from any individuals, businesses, local governments, or other entities that expect to be affected economically by the rule change.

Average state-licensed commercial fishers' annual catch between 2016 and 2019 was 688,710 round weight pounds of cisco and 28,137 dressed pounds of lake trout. In 2019, the cisco price per pound was

\$0.40-0.75, but has been as high as \$1.20 per pound since 2012. While the price per pound has varied over time, estimated total value of the commercial cisco roe fishery is between \$200,000 and \$500,000 per year. Lake trout price per pound has been approximately \$1.00 per pound and has not fluctuated as much due to the lack of international forces present with the cisco roe fishery. The methods in the rules for determining harvest restrictions are expected to allow the commercial fishing community to harvest at or near the current total average annual catch amount. However, because the individual quota allotment for cisco will decrease, some individual fishers that harvested their full allotment in the past few years may see a decrease in harvest and corresponding economic impacts under the reduced quota. In 2019, only three commercial fishing licensees harvested more cisco than the amount of cisco that would be allotted to those fishers under the proposed lower quota. Some fishers may see an economic benefit if they are able to sell part of their quota allotment to other fishers. Therefore, determining an exact impact for all commercial fishing licensees is difficult. Outside of the rules, market demand and fuel and other variable expenditures would have a greater economic impact.

10. Effect on Small Business (initial regulatory flexibility analysis): This rule may have a moderate (from \$50,000 to \$5 million in total) economic impact on commercial fishing businesses. The methods in the rules for determining harvest restrictions are expected to allow the commercial fishing community to harvest at or near the current total average annual catch amount. However, because the individual quota allotment for cisco will decrease, some individual fishers that harvested their full allotment in the past few years may see a decrease in harvest and corresponding economic impacts under the reduced quota. Outside of the rules, market demand and fuel and other variable expenditures would have a greater economic impact on commercial fishing profits. This rule does not impose any compliance or reporting requirements, nor would any design or operational standards be contained in the rule. 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.

11. Agency Contact Person: Brad Ray, Lake Superior fisheries team supervisor, 141 S. Third St., Bayfield, WI 54814, 715-779-4036, Bradley.Ray@wisconsin.gov

12. 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:

Meredith Penthorn, FH/4

Department of Natural Resources

P.O. Box 7921

101 S. Webster St.

Madison, WI 53707

608-316-0080

Meredith.Penthorn@wisconsin.gov

Written comments may also be submitted here: DNRAAdministrativeRulesComments@Wisconsin.gov

Hearing dates and the comment submission deadline are to be determined.

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)
(73) SPECIES OR WATERS NOT LISTED IN SUBS. (1) TO (72)					
(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 11,755 lake trout in 2018 or 12,800 in any other year <u>9,500</u> , 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.	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

SECTION 2. NR 25.06 (1) (a) 2. is amended to read:

Wisconsin	Allowable annual harvest
Statistical	
District	

WI-2

2. The total allowable commercial and tribal home use harvest in the waters of WI-2 may not exceed ~~56,000~~47,330 lake trout.
 - a. That number of lake trout to be harvested by non-tribal licensed commercial fishers from the waters of WI-2 may not exceed ~~8,500~~6,330 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-2 may not exceed ~~47,500~~41,000 lake trout.
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SECTION 3. NR 25.06 (1) (c) (intro.), 1., 2. and 3. are amended to read:

25.06 (1) (c) *Cisco* ~~until January 1, 2021~~. The total allowable annual harvest of cisco by state and tribal fishers during the open season in Wisconsin waters of Lake Superior may not exceed ~~7.5 percent of the total of the most recent hydroacoustics cisco biomass estimate~~ 1,794,000 round weight pounds, which is based on 15 percent of the average of the 3 most recent years of hydroacoustic-modeled spawning cisco biomass expressed in round weight pounds of cisco, as determined by the department and tribes and:

1. The total allowable state harvest in the waters of Lake Superior may not exceed ~~1,497,900~~897,000 round weight pounds in a calendar year.
2. From October 1 through December 31 of each year, 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 ~~1,317,900~~850,000 round weight pounds.
3. Excluding harvest under subd. 2, from January 1 through December 31 of each year, the total harvest of cisco by state fishers and the department shall not exceed ~~180,000~~47,000 round weight pounds. The department shall subdivide the allocation of ~~180,000~~47,000 round weight pounds among commercial incidental catch, angling, and department assessment activities.

SECTION 4. NR 25.06 (1) (c) 4. is created to read:

25.06 (1) (c) 4. The total allowable harvest by the Red Cliff and Bad River bands of the Lake Superior Chippewa, including both commercial and tribal home use fishers in the waters of Lake Superior, may not exceed 897,000 round weight pounds in a calendar year.

SECTION 5. NR 25.06 (1) (c) (note) is repealed.

SECTION 6. NR 25.07 (1) (b) (title) is amended to read:

25.07 (1) (b) *Cisco* ~~until January 1, 2021.~~

SECTION 7. NR 25.07 (1) (b) (note) is repealed.

SECTION 8. STATEMENT OF EMERGENCY. Lake Superior is the largest freshwater lake in the world and its sport and commercial fisheries are internationally significant. The welfare of state-licensed commercial fishers, tribal commercial fishers, recreational anglers, and associated businesses of Lake Superior depends upon abundant, sustainable fish populations. Additionally, appropriate quotas will allow commercial and recreational fishers to sustainably utilize the available fishery resources while managing harvest of species currently experiencing a population decline, such as cisco. Three years of data are required to identify trends in fish populations and harvest and formulate management decisions, and rule promulgation timelines do not allow for a permanent rule to be implemented after such decisions are made but in time for the regulations to be in place for the start of the commercial fishing season. To preserve the welfare of fish populations in Lake Superior and the fishers and businesses that rely on them, the department finds that an emergency rule is necessary to implement rule changes that apply to the harvest of commercial fish species. In order to use the most current biological information and align with the start of the commercial season, an emergency rule process needs to be implemented.

SECTION 9. EFFECTIVE DATE. This rule takes effect upon publication in the official state newspaper, as provided in s. 227.24(1)(c), Stats.

SECTION 10. BOARD ADOPTION. This rule was approved and adopted by the State of Wisconsin Natural Resources Board on Dec. 9, 2020.

Dated at Madison, Wisconsin _____.

STATE OF WISCONSIN

DEPARTMENT OF NATURAL RESOURCES

BY _____

For Preston D. Cole, Secretary