

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 November 29, 2023.

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) relating to fish refuge establishment.

FH-09-22 (E)

Analysis Prepared by the Department of Natural Resources

- 1. Statute Interpreted:** The department has interpreted s. 23.09 (2) (c), 29.014, 29.041, and 29.053 (2), Stats., as authorizing the department to establish fish refuges on inland, outlying and boundary waters.
- 2. Statutory Authority:** Sections 23.09 (2) (c), 29.014, 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, 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: None apply.

5. Plain Language Analysis:

This rule will create a fish refuge encompassing the Kletzsch Park Dam fish passage on the Milwaukee River. 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.

SECTION 1 establishes a year-round fish refuge surrounding and including the Kletzsch Park Dam fish passage on the Milwaukee River.

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

No federal regulations apply. States possess inherent authority to manage the fishery and wildlife resources 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 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.

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. These rules 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.

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: Cheryl Masterson, 414-550-1831, Cheryl.Masterson@wisconsin.gov, or Aaron Schiller, 414-852-5488, Aaron.Schiller@wisconsin.gov

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

Comments may be submitted to the department contact person listed above or to 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.wisconsin.gov/calendar>. Comments may also be submitted through the Wisconsin Administrative Rules Website at https://docs.legis.wisconsin.gov/code/emergency_rules/active.

RULE TEXT

SECTION 1. NR 26.01 (41) is created to read:

COUNTY	WATERS	REFUGE BOUNDARIES	START DATE	END DATE
(41) Milwaukee	(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°55'12"W	Continuous	Continuous

SECTION 2. STATEMENT OF EMERGENCY. Through the creation of a fish refuge, this emergency rule will protect the public welfare by protecting fish populations in an area encompassing a fish passage where fish are highly concentrated and vulnerable to angler harvest. While fish passages promote fish movement within their spawning range in order to maintain healthy fish populations, they also can cause fish to congregate in a very small area where anglers could more easily target them. The refuge created through this rule may also protect public safety through the prohibition of fishing access around a dam where dam mechanics, water depths and velocities, and other factors present a hazard to the public.

SECTION 3. EFFECTIVE DATE. This rule takes effect upon publication in the official state newspaper, as provided in s. 227.24(1)(c), Stats.

SECTION 4. BOARD ADOPTION. This rule was approved and adopted by the State of Wisconsin Natural Resources Board on September 27, 2023.

Dated at Madison, Wisconsin _____.

STATE OF WISCONSIN

DEPARTMENT OF NATURAL RESOURCES

BY _____

Steven Little, Deputy Secretary