

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 December 21, 2023.

ORDER OF THE STATE OF WISCONSIN NATURAL RESOURCES BOARD
AMENDING RULES

The Wisconsin Natural Resources Board proposes an order to **amend** NR 20.20 (73) (n) 5., 25.06 (1) (a) 1. (intro.), 2. (intro.), a., and b., and 25.09 (1) (b) 1. relating to Lake Superior cisco and lake trout regulations and affecting small business.

FH-11-23 (E)

Analysis Prepared by the Department of Natural Resources

1. Statute Interpreted: The department has interpreted ss. 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 ss. 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 to manage the Lake Superior fishery for sustainable harvest.

4. Related Statutes or Rules: None apply.

5. Plain Language Analysis:

SECTION 1 adjusts the recreational lake trout harvest closure trigger for Lake Superior to reflect the increased lake trout quota. 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 adjusts the lake trout state and Tribal quota allotments for the WI-2 (east of Bark Point)

waters of Lake Superior. The overall lake trout harvest quota for state (commercial and recreational) and Tribal fishers will increase through this rule.

SECTION 3 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.

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 and cisco are updated every three years (for lake trout) and every two years (for cisco) 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 also developed a whitefish model to better assess and predict the impacts of harvest on the whitefish

population.

The cisco quota update methodology is still under development, so this emergency rule will focus on lake trout.

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 \$1.50 per pound for lake trout, the total gain to commercial fishers as a result of the quota increase would be about \$7,020, 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 are likely to 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 and cisco, harvest quotas are ideally reviewed every 2-3 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 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 will increase in this rule, allowing for additional lake trout commercial harvest and more opportunities for recreational fishers to harvest lake trout with a lower risk of an early season closure. This will benefit local businesses.

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

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.wi.gov/calendar/hearings/>. 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 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 9,500 <u>11,250</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.	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) 1. (intro.) and 2. (intro.), a., and b. are amended to read:

NR 25.06 (1) (a) 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:

2. 'WI-2.' The total allowable commercial and tribal home use harvest in the waters of WI-2 may not exceed ~~47,330~~52,000 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-2 may not exceed ~~6,330~~7,500 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 ~~41,000~~44,500 lake trout.

SECTION 3. 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 pot or crib, excluding shoaling twine, is 4 ¼ inch stretch measure or greater.

SECTION 4. 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. 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 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 lake trout, a commercial and recreational fish species. In addition, establishing minimum mesh size requirements for trap nets is necessary to prevent catch and mortality of sublegal whitefish caught in lake trout and whitefish fishing operations. In order to use the most current biological information and align with the start of the fishing season, an emergency rule process needs to be implemented.

SECTION 5. EFFECTIVE DATE. This rule takes effect upon publication in the official state newspaper, as provided in s. 227.24(1)(c), Stats.

SECTION 6. BOARD ADOPTION. This rule was approved and adopted by the State of Wisconsin Natural Resources Board on December 13, 2023.