

Clearinghouse Rule 19-134

The statement of scope for this rule, SS 049-15 was approved by the Governor on May 19, 2015, published in Register No. 713B on May 27, 2015, and approved by the Natural Resources Board on August 12, 2015. This rule was approved by the Governor on .

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

The Wisconsin Natural Resources Board proposes an order to **renumber** NR 25.09 (5) (a) and (b); to **renumber and amend** NR 25.09 (5) (intro.); to **amend** NR 25.02 (66), 25.05 (4), 25.09 (2) (d) 2. b., and 25.09 (5) (a) and (b); and to **create** NR 25.09 (2) (d) 2. d. and e., 25.09 (2m), and 25.09 (5) (b) relating to commercial fisheries of lake whitefish in Lake Michigan and affecting small business.

FH-10-15

Analysis Prepared by the Department of Natural Resources

1. Statutes Interpreted: Sections 29.014 (1), 29.041, 29.053 (2) and 29.519, Stats., have been interpreted as allowing the department to regulate fishing activities in waters of the state.

2. Statutory Authority: Sections 29.014 (1), 29.041, 29.053 (2), and 29.519, Wis. 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: Under s. 29.014 (1), Stats., “Rule-making for this chapter,” the department is directed to establish and maintain conditions governing the taking of fish that will conserve the fish supply and ensure the citizens of this state continued opportunities for good fishing.

The department is authorized to regulate fishing on and in all interstate boundary waters and outlying waters by s. 29.041, Stats., “Department to regulate hunting and fishing in interstate 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.

Under s. 29.519, Stats., “Commercial fishing in outlying waters,” the department is granted discretion to establish commercial fish species harvest limits after giving due consideration to the recommendations made by the commercial fishing boards, and to promulgate rules relating to quota allocations. This section also specifies that the limitations on harvests must be based on the available harvestable population of fish and on the wise use and conservation of the fish, so as to prevent overexploitation. This section grants the department the authority to designate areas where commercial fishing is restricted, as well as to establish restrictions on the types and sizes of gear used in commercial fishing. Finally, this section authorizes the department to conduct inspections of buildings, boats, vehicles, storage and records associated with commercial fishing operations.

4. Related Statutes or Rules: No additional rules or statutes relate to commercial lake whitefish fisheries in Lake Michigan.

5. Plain Language Analysis:

This rule codifies gear requirements for trawls used to harvest lake whitefish commercially. Trawling for smelt is currently allowed in a portion of Management Zone 3 near Two Rivers (Figure 1). In 2015, the department authorized a cooperative study to evaluate the use of trawls for lake whitefish in the same part of Zone 3. This rule would allow commercial fishers to trawl for whitefish only in this area of Zone 3 as an alternative to using other types of gear. Under current rules, only trap nets can be used to harvest whitefish in this area. Trawling would continue to be allowed only during part of the Lake Michigan lake whitefish season. While trawling is a more efficient method of harvest than these other types of nets, the quota system and limited number of licenses currently in place for this zone will prevent overharvest of lake whitefish. Trawling may also help reduce user conflicts between commercial fishers and sport anglers. Trawls are dragged through the water to harvest fish over a period of an hour, while nets are deployed and left to catch fish for days before being lifted to retrieve the harvest. Fewer nets left in the water as obstacles would make it easier for sport anglers to navigate and troll for sportfish in Lake Michigan.

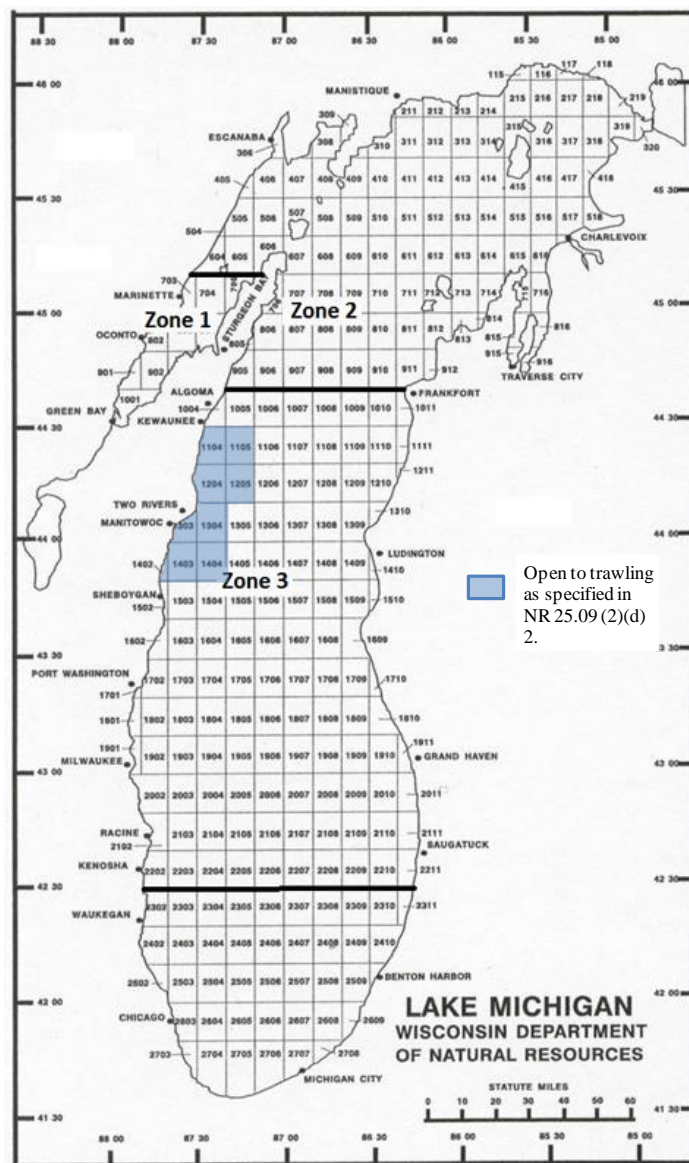


Figure 1: Area of Zone 3 where trawling is allowed

Although the original scope statement for this rule also allowed for the possibility of redistributing lake whitefish quotas, this is not included in the rule at this time, as public meetings and discussions are ongoing.

SECTION 1 amends the definition of “trawl” with more specific language that describes bottom trawling. Bottom trawling is the type of trawling used for commercial fishing in Wisconsin.

SECTION 2 is a housekeeping change that revises the closing date of commercial ice fishing. The date of March 15 was previously established when many more commercial fishers were operating in Lake Michigan, and thus the more restrictive closing date is now obsolete for the purpose of protecting the fisheries.

SECTION 3 establishes that whitefish may be harvested by trawling subject to the trawling requirements in NR 25.09 (2)(d) 2.

SECTION 4 describes gear use restrictions for harvesting lake whitefish by the method of trawling. These restrictions include season dates specific to trawling in Zone 3, where trawling has previously occurred, with these waters closed to trawling between September 1 and November 30. The rule also specifies standards for the dimensions of trawling gear and the maximum time allowed for each trawl drag. These restrictions will help protect lake whitefish and minimize bycatch. Finally, this section requires electronic reporting of whitefish harvested by trawling, as well as electronic reporting of incidental harvest through trawling.

SECTION 5 provides that licensees may elect to use on-vessel video surveillance for whitefish trawling as an alternative to monitoring by department employees. If the commercial fishing licensee does not use the video surveillance option, section 29.519 (6), Stats., authorizes the department to enter boats to conduct inspections of gear and records to monitor commercial fishing activity, fish storage and fish disposition, among other parameters. This section establishes the video system requirements that would apply to all vessels that choose to use this option. The department could request access to the video monitoring system and archival video footage at any time. Monitoring will be important for assessing compliance with the new rule and estimating bycatch trends.

SECTIONS 6 to 8 establish additional requirements for moving and operating whitefish trawls during the month of August if the level of bycatch of non-target fish, and whitefish returned to the water, meets or exceeds 10% of the harvest by weight, or if two or more lake sturgeon are harvested incidentally.

SECTION 8 also establishes the formula for calculating the percentage of bycatch out of the total whitefish harvest by weight. While bycatch rates are typically low through the method of trawling, these additional requirements will help prevent recurring harvest of non-target species.

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 Illinois are the only adjacent states with a Lake Michigan commercial fishery. In Michigan, lake whitefish is the focus of the commercial fishery. In addition to the

large commercial gill and trap net fishery, a small trawling fishery that focuses on smelt and lake whitefish has operated in Michigan waters of Green Bay since the 1960s. Illinois has a very limited commercial fishery on Lake Michigan. Both states have established quotas, gear requirements and other restrictions for commercial fishing in Lake Michigan.

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

Lake whitefish, *Coregonus clupeaformis*, is widely distributed in North American fresh waters from the Atlantic coast westward across Canada and the northern United States. Whitefish are a species of commercial importance in Lake Michigan, and recently have been gaining in popularity among sport anglers as well. Known Wisconsin lake whitefish “stocks” (localized groups or populations that spawn and live in certain areas) within Lake Michigan and Green Bay include a spawning stock in the North/Moonlight Bays area off of eastern Door County and a newly developing stock from west shore Green Bay tributaries. During much of the year, some Lake Michigan whitefish stocks are highly mobile and Wisconsin fishers may also harvest fish from some of the Michigan stocks of lake whitefish, most notably the Big Bay DeNoc stock. Although the lake-wide population began increasing in the mid-1990s, some Lake Michigan lake whitefish stocks have declined over the past few years. Recent surveys to assess spawning fish near eastern Door County have shown low abundance of younger lake whitefish entering the population, indicating potential problems with recruitment of lake whitefish from the North/Moonlight Bays spawning stock and a resulting population decline. Conversely, spawning stocks in Green Bay are thriving. Since 2015, commercial harvest of lake whitefish has increased slightly while catch-per-unit-effort has decreased.

The department, in cooperation with Sea Grant and a Lake Michigan commercial fisher, conducted a three-year study on trawling for lake whitefish. Trawling occurred in the area of Manitowoc and Two Rivers in Lake Michigan. The MOU was evaluated annually, and updates were made as needed to reflect information gathered during the previous year’s trawling efforts. These changes allowed the commercial fisher to increase efficiency and provided the department with a means to research potential options for a possible permanent rule. The department renewed the MOU for 2019 to continue the data collection process to inform the department on any future regulations.

The trawl report details the results of a portion of the trawl study conducted between February 2015 and May 2018. This trawl study provided depth and seasonal harvest summaries of lake whitefish through trawling in the Zone 3 Wisconsin fishery (Two Rivers area). The trawling methods employed resulted in a relatively low catch rate of bycatch (non-target species and sizes) of 2.4 percent of the total catch. However, in August, September and October the bycatch as a percentage of the overall harvested lake whitefish increased. Department staff on the Lake Michigan Fish Team reviewed the report and provided the recommendations in this rule proposal with the overall intent of minimizing bycatch. Recently, the department presented a review of the MOUs, including a timeline of changes that have occurred leading up to this rule, at a Lake Michigan Fisheries Forum meeting and at a meeting of the Lake Michigan Commercial Fishing Board. The department did not receive any negative feedback through that process.

The trawl study also revealed that fewer user conflicts occurred when trawling was employed as compared to trap nets because fewer trap nets were placed in the area concurrently. From 2015 to 2017, the commercial fishers set a reduced number of trap nets, and in 2018 no trap nets were set at all. In addition, whitefish trawling pursuant to the MOU occurred during times of the year when sportfishing was reduced or absent.

Stakeholders have been involved throughout the process following the approval of the initial scope

statement. Outreach encompassed: commercial fishers through LMCFB meetings; charter fishermen at the Lake Michigan Fisheries Forum meetings; and sport anglers through targeted public meetings on Lake Whitefish Management in Lake Michigan. In addition, the department developed an online public input form to provide additional opportunities for public comment, and a draft Stakeholder Engagement Strategy for lake whitefish further details outreach activity. The department also held public meetings in the vicinity of Lake Michigan in 2016 and 2017 to discuss options for lake whitefish commercial fishing regulations and quota changes. During those meetings, commercial fishers expressed strong concerns over revising quotas and zone boundaries without further data and discussions. Overall, commercial fishers have indicated the following concerns: 1) impacts of an ever-increasing lake whitefish sport fishery on commercial lake whitefish harvests, 2) a desire to allocate quota where the fish are currently expanding (Green Bay), and 3) a need for more research activities on lake whitefish stocks. On the other hand, sport anglers overall have indicated the following concerns: 1) a general opposition to commercial fishing and any selling of sportfish as bycatch, 2) increased bycatch of sportfish as effort expands in Green Bay for the harvest of lake whitefish, and 3) increased competition for space as more commercial nets are deployed in Green Bay. Since 2017, the department has continued to gather data to provide a basis for future quota discussions. However, because such discussions are still ongoing, quotas will be addressed through a separate rule-making process.

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

Because this rule will not impact the annual lake whitefish quota or zone boundaries in Lake Michigan, which restrict how many lake whitefish commercial fishers may harvest or where they may fish, the department expects minimal economic impacts to commercial and recreational fishers. The only costs would apply to commercial fishers that choose to trawl through purchase of trawling gear and installation of the video surveillance system. Commercial fishers that continue to use nets would not be affected. Docksides value of lake whitefish harvested from Lake Michigan is expected to remain the same or potentially increase from its current value of \$1.97 million. The fishery is controlled by a quota, such that any increased value to the local economy would be from fishers able to harvest fish more efficiently during certain fishing periods. The rule change could also lead to the harvest of quota currently not filled. This may occur because the department's commercial harvest records show there is quota available for purchase or transfer. Hook and line bag limits and season dates for recreational fishing will not change with the new rules.

The department will conduct an economic impact analysis comment period to gather comments from any individuals, businesses, local governments, or other entities that expect to be affected economically by the rule change.

10. Effect on Small Business (initial regulatory flexibility analysis):

Commercial fishers that choose to trawl instead of using other types of nets for harvesting whitefish will be required to use the electronic reporting system described in s. 25.13 (2), Wis. Admin. Code. In addition, the rule will set requirements for trawling gear for lake whitefish that differ slightly from gear requirements for other species. For commercial fishers that choose to use the video surveillance option, installation of the video system is estimated to cost \$7,000 per trawling vessel. Trawls are expected to cost up to \$10,000 per fishing vessel, if the commercial fisher does not already own appropriate trawling gear. However, since the use of trawling over other methods of harvesting lake whitefish is voluntary, only commercial fishers that choose to trawl may incur the costs associated with complying with the monitoring, reporting and gear requirements.

Sport anglers, fishing guides and related businesses may be indirectly affected due to changes in the type of gear used in the area of Lake Michigan near Two Rivers. Reduction in the use of trap nets due to increased trawling could reduce the incidence of boat entanglement with nets, and because trawling does not overlap as much with the sport fishing season as the use of trap nets, the incidence of sport and commercial fishers encountering one another may also diminish.

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 Eggold, Bradley.Eggold@wisconsin.gov, 414-303-0138; Meredith Penthorn, Meredith.Penthorn@wisconsin.gov, 608-316-0080

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

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

Meredith Penthorn
Department of Natural Resources
P.O. Box 7921, Madison, WI 53707
608-316-0080
Meredith.Penthorn@wisconsin.gov

Written comments may also be submitted to the Department at DNRAdministrativeRulesComments@wisconsin.gov.

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

SECTION 1. NR 25.02 (66) is amended to read:

NR 25.02 (66) “Trawl” means a large conical bag of netting to which are often attached wings of netting, which is towed in the water and weighted such that its sweep line maintains contact with the bottom throughout the drag, and captures fish by scooping rather than encircling them. The mouth of the bag is normally kept open laterally by 2 large boards, one on each side so rigged that they serve to spread the entire net, and these boards are secured to towing lines running to the vessel or vessels engaged in towing the net through the water.

SECTION 2. NR 25.05 (4) is amended to read:

NR 25.05 (4) ICE FISHING. Commercial fishing through the ice in Green Bay and Lake Michigan is prohibited after March ~~15~~30 during each license year.

SECTION 3. NR 25.09 (2)(d) 2. b. is amended to read:

NR 25.09 (2)(d) 2. b. Only for taking smelt as provided in s. NR 25.06 (2) (c) except chubs may be harvested during the trawling season for smelt, subject to s. NR 25.07 (2) (a), and whitefish may be harvested subject to the requirements in this subdivision and s. NR 25.09 (2m).

SECTION 4. NR 25.09 (2)(d) 2. d. and e. are created to read:

NR 25.09 (2)(d) 2. d. Until October 31, 2025, whitefish may be taken by trawling from December 1 to August 31 from one hour before sunrise to one hour before sunset. Trawls shall consist of a head rope height not less than 4.5 meters and not greater than 5.0 meters, wing mesh not less than 4.5 inches stretch measure, body mesh between the wing and bag not greater than 2 inches stretch measure and beginning with a fishing circle of not less than 250 meshes, and a bag mesh at the cod end not less than 4.5 inch stretch measure beginning with a fishing circle not less than 80 meshes. The net shall be composed of twine material capable of remaining open under tension. No trawl may be deployed for longer than one hour per drag, measured from the time the trawl door enters the water until the time the trawl door leaves the water upon retrieval.

e. Any person taking whitefish using a trawl under this subdivision shall submit commercial fishing reports on whitefish subject to the requirements in s. NR 25.13 (2), and on incidental harvest subject to the requirements in s. NR 25.13 (2) (g).

SECTION 5. NR 25.09 (2m) is created to read:

NR 25.09 (2m) VIDEO SURVEILLANCE OPTION. As an alternative to on-board inspection by department employees in accordance with s. 29.519 (6), Stats., a licensee taking whitefish using a trawl under s. NR 25.09 (2) (d) 2. may elect to capture a video record of the on-board activity on any vessel engaged in trawling for whitefish as provided in this subsection. The licensee shall provide written notification of the intent to use a video surveillance system not less than 30 days prior to trawling. The licensee shall comply with all the video surveillance system requirements in this subsection unless the licensee notifies the department of a system malfunction as described in subd. 3., or notifies the department in writing, in the manner prescribed by the department, of the intent to discontinue use of the system not less than 30 days before terminating video surveillance. The department may conduct inspections pursuant to s. 29.519 (6) during periods when the video surveillance system is not in use. The video record

shall be made by using a video surveillance system that complies with all of the following requirements:

(a)

1. The system shall consist of not fewer than two cameras, with one camera positioned to clearly capture the area of the vessel in which fish are emptied from the bag of the trawl net, and one camera positioned to clearly capture the area of the vessel where incidentally caught fish are measured before being returned to the water. Placement of the cameras is subject to all of the following:
 - a. The licensee shall place a measuring board near the bycatch chute, arranged so that each incidentally caught fish passes across the measuring board in view of the camera prior to the fish's return to the water.
 - b. Upon direction from the department, the licensee shall reposition one or all of the cameras if the activities identified in par. (a) are not visible or are unclear in any video record generated under this section after being viewed by the department under par. (c).
2. The video record generated by the cameras described in subd. 1. shall be recorded on a hard drive that has memory capacity of not less than 1 terabyte and is capable of retaining not less than 30 days of video records generated as required under par. (b).
3. The video recording system shall be equipped with an audible alarm warning that indicates system malfunction. If a system malfunction occurs, the licensee shall immediately cease trawling and shall contact the department within two hours of returning to the dock, and the department may conduct on-board inspections pursuant to s. 29.519 (6), Stats. while the system is inoperable. Upon restoration of system functionality, the licensee shall notify the department of the intent to resume using the system.

(b) The licensee shall activate the video recording system under par. (a) upon engine ignition each time a vessel is operated for the purpose of taking whitefish with a trawl and shall provide that the video recording system remains in operation until the vessel returns to its dock and the engine is turned off.

(c) The licensee shall maintain all video records captured under this subsection for 30 days following their recording. The licensee shall provide the video record to the department upon request.

SECTION 6. NR 25.09 (5) (intro.) is renumbered NR 25.09 (5) (a) and is amended to read:

NR 25.09 (5) (a) Except as provided in par. (b), whenever any gill net lift, encircling net lift or trawl drag catches illegal fish of any species in an amount equal to 10% or more by weight or numbers of the total legal catch, those nets the licensee shall be immediately removed from the water, and may not be reset, placed, replaced, place, replace, recast or operated during that same day unless:

SECTION 7. NR 25.09 (5) (a) and (b) are renumbered NR 25.09 (5) (a) 1. and 2.

SECTION 8. NR 25.09 (5) (b) is created to read:

NR 25.09 (5) (b) When trawling for whitefish from August 1 to 31 pursuant to s. NR 25.09 (2) (d) 2. d., all of the following requirements apply:

1. When a single trawl drag catches illegal fish of any species in an amount equal to 10% or more by weight or numbers of the total legal catch, the licensee shall immediately remove the trawl from the water, and may not reset, replace, recast, or operate any trawl during the same day unless the licensee moves and operates all parts of the trawl a distance of at least 3 miles from that site or to a water depth where no part of the trawl operates within 30 feet (5 fathoms) in depth of the water depth at which the catch of illegal fish was made.

2. Notwithstanding the requirement in subd. 1, when a single trawling vessel catches a daily average of at least 2 lake sturgeon, or a daily average of 10 to 49.9% by weight of incidental catch of illegal fish and any whitefish returned to the water, out of the dressed whitefish reported harvested by weight in a single week from Sunday to Saturday, the licensee may not reset, replace, recast, or operate any trawl during the following week unless the licensee moves and operates all parts of the trawl a distance of at least 6 miles from that site.
3. Notwithstanding the requirement in subds. 1 or 2., when a single trawling vessel catches 3 or more lake sturgeon or catches more than 50% by weight of incidental catch of illegal fish and any whitefish returned to the water out of the dressed whitefish reported harvested by weight in a single day, the licensee shall cease all trawling activities for the following 3 days.
4. The following formula shall be used to determine the percentage of incidental catch of illegal fish out of the reported whitefish harvest for the purposes of subds. 1. to 3.:
[(number of whitefish x 1.37) + (number of lake trout and other incidentally caught species x 5.86) / reported whitefish harvest in pounds] x 100.

Note: Weights are determined for incidental catch based on average fish weights.

SECTION 9. EFFECTIVE DATE. This rule takes effect on May 1, 2020.

SECTION 10. 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 _____

Preston D. Cole, Secretary

(SEAL)