

**ORDER OF THE STATE OF WISCONSIN NATURAL RESOURCES BOARD
REPEALING, AMENDING, REPEALING AND RECREATING AND CREATING RULES**

The Wisconsin Natural Resources Board proposes an order to repeal NR 20.20(73)(e)2.c.; to amend NR 20.10(1r) and (8), and 20.20(73)(e)2.b.; to repeal and recreate NR 20.33(5); and to create NR 20.03(42m) and 20.105 relating to Lake Winnebago sturgeon spearing.

FH-22-05

Analysis Prepared by the Department of Natural Resources

1. Statutes interpreted: In promulgating this rule, ss. 29.014(1), 29.237, and 29.192 Stats., have been interpreted as authorizing the department to modify and create rules relating to Lake Winnebago sturgeon spearing.

2. Statutory authority: Sections 29.014(1) and 227.11 (2)(a), Stats.

3. Explanation of agency authority to promulgate the proposed rules under the statutory authority: Section 29.014(1), Stats., requires the department to establish rules that set conditions governing the taking of fish and game that will conserve the fish and game supply and ensure the citizens of this state continued opportunities for good fishing, hunting and trapping. Section 29.192 (3), Stats. states that the department may limit the maximum harvest of sturgeon in any area and that the department may impose any limitation under this subsection by establishing a limit on the number of persons fishing for sturgeon by spearing. Section 29.192 (4) Stats. establishes procedures for awarding preference points for a random permit drawing. Section 227.11(2)(a), Stats., expressly confers rulemaking authority on the department to promulgate rules interpreting any statute enforced or administered by it, if the agency considers it necessary to effectuate the purpose of the statute.

4. Related rule or statute: Section 29.237, Stats., “Sturgeon spearing license.”

5. Plain language analysis of the proposed rule: The order creates a random permit drawing for the sturgeon spear fishery on the upriver lakes to be held annually beginning in 2007. The “upriver lakes” are lakes Poygan, Winneconne, and Butte des Morts. Beginning in 2006, the season closure trigger will increase from 80% to 90% of any one of the three established harvest caps (juvenile females, adult females, and males). Beginning in 2006, the spearing season will be closed at the end of a spearing day should any one of the three harvest caps (juvenile females, adult females, and males) be reached or exceeded that day. Season closure triggers are the maximum numbers of harvested fish of a certain age or gender deemed as acceptable harvest.

6. Summary of and preliminary comparison with any existing or proposed federal regulation: Provided state rules and statutes do not relieve individuals from the restrictions, requirements and conditions of Federal statutes and regulations. Regulation of fishing for native species has been delegated to state fish and wildlife agencies. No federal regulations regarding sturgeon spearing have been in effect.

7. Comparison of similar rules in adjacent states (Minnesota, Iowa, Illinois and Michigan): The lake sturgeon spearing fishery in the Winnebago system waters of Wisconsin is unique to the world. The state of Michigan has a limited spearing season for lake sturgeon on a single lake, Black Lake. In 2004 the sturgeon spearing harvest quota for Black Lake was 5 sturgeon. Tags for spearing are given out via a lottery drawing system (i.e. limited access fishery). There are no open seasons for lake sturgeon on inland waters of Minnesota. Lake sturgeon are on the state of Illinois endangered species list. It is illegal to possess lake sturgeon in the state of Iowa.

8. Summary of the factual data and analytical methodologies that the agency used in support of the proposed rule and how any related findings support the regulatory approach chosen for the proposed rule: Since the early 1990’s numerous changes have been made to regulations controlling the harvest of sturgeon during the annual February spearing season on the Lake Winnebago pool. These changes were made to better control the harvest, specifically to reduce the overharvest of adult females and rebuild that portion of the stock while at the same time attempting to maintain a traditional open fishery. Between 1992 and 2003 steady progress had been made in accomplishing these fishery goals. Annual exploitation of adult females was reduced from nearly 20% down to the acceptable 5%, and 10 to 16 day open spear fishing seasons were experienced in 2002 and 2003. Progress

towards rebuilding the adult female population was also evidenced by steadily increasing numbers of larger and older females up to 188 lbs showing up in the fishery and up to 220 lbs in the spawning stock.

After experiencing the two long seasons on 2002 and 2003, the 2004 sturgeon spearing season lasted just two days (12 hours of spearing) producing a relatively large harvest of 1854 sturgeon. The pre-set harvest cap of 425 adult females was overshot by 61% - 683 adult females were registered during the two day fishery. Harvest and population data indicated that the harvest from the 2004 season did not immediately negatively affect the Winnebago System sturgeon population, although continuation of this harvest pattern would ultimately be detrimental and would reverse the progress made since 1992 in rebuilding the stock. Following the 2004 season, the Department conducted a series of public meetings where concerns were raised by the public about the threat of overharvest to the long-term health of the sturgeon population and spear fishery. While there was insufficient time to fully address concerns for the long term with new rules prior to the 2005 season, an emergency rule was passed by the Natural Resources Board for the 2005 spearing season only that gave the Department the authority to close spearing on the same day that any of the three harvest caps was reached or exceeded.

The 2005 sturgeon spearing season on Lake Winnebago and the Upriver lakes was much different than almost anyone connected with the fishery, spearers and Department staff alike, thought it would be. The season lasted 12 days (12 on Lake Winnebago and 1 day on the Upriver lakes) and produced a total harvest of 1238 sturgeon (255 juvenile females, 423 adult females, and 560 males). Opening day shanty counts of 2604 on Winnebago and 2055 on the Upriver lakes were very similar to counts in 2000, the last season with spearing in both areas (2736 and 2079 respectively). Since the "half day" spearing format went into effect in 2002, three out of four seasons have been relatively long and one very short - 10, 16, 2 and 12 days in 2002, 2003, 2004 and 2005 respectively.

Prior to the beginning of the 2005 season, it was widely anticipated that it would be very short, perhaps two or three days at most, due to the expected impact of the upriver lakes fishery (as yet still an open fishery with no limitation on tags), and the expectation that Lake Winnebago would again produce a high harvest in the south end of the lake (similar to the 2004 season when 89% of the harvest was taken from the southern 14% of the lake).

Warm weather, rain and runoff one week prior to the beginning of the spearing season on February 12, 2005 produced cloudy water in both the Upriver lakes and Lake Winnebago that did not show up in most areas until spearers went into their shanties on opening morning. As a result, the upriver lakes harvest, which by rule was limited to one day for the 2005 season, produced only 344 fish on opening day compared to 2155 fish during the last season (of two days) held there in 2000. On Lake Winnebago, spearers, in addition to some cloudy water, also were finding the fish to be highly scattered throughout the lake with no large concentration on the south end as was seen in 2004. The fish were scattered due to the relatively poor hatch of gizzard shad in 2004, which by their absence, eliminated the high concentration of fish in the south end of the lake. Coupled with this was the fact that the Upriver lakes harvest drew 4,169 tags off of Lake Winnebago as spearers were not allowed to fish both lake areas this year – they were allowed to purchase either an upriver lakes tag or a Lake Winnebago tag, not both. Therefore, the relatively low harvest on the upriver lakes, significantly fewer tags on Lake Winnebago, the fact that few spearers had planned on the season lasting longer than opening weekend and as such did not schedule vacation past that weekend, and the impact of the low abundance of gizzard shad on the distribution of sturgeon in Lake Winnebago all combined to produce a modest daily harvest rate and a long 12 day season.

However, considerable risk remains under the current management system. This Order comprises the following three proposals, developed with regional and work unit staff and the Winnebago Citizens Sturgeon Advisory Committee (SAC) after a series of public meetings between March 2004 and March 2005, designed to protect an open-access sturgeon spear fishery on Lake Winnebago and the continued viability of the sturgeon population in the Lake Winnebago System.

1. ***Upriver lakes Permit Drawing.*** Create a sturgeon spear fishery on the upriver lakes to be held annually beginning in 2007. Access will be limited by random permit drawings. This component is designed to redistribute sturgeon-spearing effort and produce an annual, limited harvest fishery on the upriver lakes.

2. ***"Fast Start" Season 100% Closure Trigger.*** Beginning in 2006, allow the spearing season to be closed before the opening hours of the next spearing day should any one of the three harvest caps (juvenile females, adult females, males) be reached or exceeded. This proposal provides emergency protection for sturgeon in seasons

where spearing conditions are ideal and harvest caps are reached quickly. It is designed to prevent harvest in excess of biologically acceptable caps.

3. **“Slow Finish” Season 90% Closure Trigger.** Beginning in 2006, increase the season closure trigger from 80% to 90%. This proposal is designed to extend the spearing season when conditions are unfavorable and the risk of excessive harvest is low. In seasons when ice and water clarity conditions are not perfect, and/or when fish concentrations do not facilitate high harvest rates (such as in three of the last four seasons) the potential for spearkers to harvest 20% of the harvest cap on the last day of the season is extremely low. Under current rule the season is closed 24 hours after the end of the spearing day when 80% of any one of the three harvest caps is reached or exceeded. Our experience has shown that the 80% trigger could be increased to 90% without increasing the risk of overharvest to the sturgeon stock.

9. Any analysis and supporting documentation that the agency used in support of the agency’s determination of the rule’s effect on small businesses under s. 227.114, Stats., or that was used when the agency prepared an economic impact report: Small businesses will be impacted by this Order.

10. Effects on small business, including how the rule will be enforced. Small businesses around the Winnebago system waters most likely benefit economically from the sturgeon spearing season. This Order is not anticipated to cause any dramatic changes in small business and economic impact, although it does provide potential for extended seasons in “slow finish” spearing seasons. However, preservation of the lake sturgeon population and open-access sturgeon spearing season will ensure the long term economic benefits of the season. The establishment of an annual Upriver lakes fishery could serve to more widely distribute the economic benefits of the season.

11. Agency Contact Person: Ron Bruch, Wisconsin Dept. of Natural Resources, 625 E County Road Y, Suite 700, Oshkosh WI 54901 (920) 424-3059, ronald.bruch@dnr.state.wi.us

SECTION 1. NR 20.03(42m) is created to read:

NR 20.03 (42m) “Upriver lakes” means Lakes Butte des Morts, Winneconne and Poygan.

SECTION 2. NR 20.10 (1r) is amended to read:

NR 20.10(1r) Take, capture, kill or attempt to take, capture or kill sturgeon on ~~Lakes Poygan, Winneconne and Butte des Morts~~ the upriver lakes unless the person possesses a current non-validated sturgeon spearing license and carcass tag for ~~Lakes Poygan, Winneconne and Buttes des Morts~~ the upriver lakes issued by the department.

SECTION 3. NR 20.10 (8) is amended to read:

NR 20.10(8) Possess a sturgeon speared from the upriver lakes under s. NR 20.20 (73) (e) 2. b. outside the following area unless the sturgeon has been registered pursuant to [http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=53315553&infobase=code.nfo&jump=NR%2020.10%2810%29&softpage=Document - JUMPDEST_NR_20.10\(10\)](http://folio.legis.state.wi.us/cgi-bin/om_isapi.dll?clientID=53315553&infobase=code.nfo&jump=NR%2020.10%2810%29&softpage=Document - JUMPDEST_NR_20.10(10)) sub. (10): from the intersection of highways ~~440 45~~ and 21 in Oshkosh west on highway 21 to highway 116; north on highway 116 to county highway B; west on county highway B to county highway D; west on county highway D to highway 49; north on highway 49 to county highway H; east on county highway H to highway 10; east on highway 10 to highway 110; south on highway 110 to county highway M; south on county highway M to highway 116; east on highway 116 to highway 110; south on highway 110 to highway ~~24 45~~; south on highway 45 to highway 21.

SECTION 4. NR 20.105(1) to (5) are created to read:

NR 20.105(1) UPRIVER LAKES LICENSE APPLICATION PROCEDURES. Persons applying to spear sturgeon on the upriver lakes shall apply for an upriver lakes sturgeon spearing license as follows:

(a) *Application deadlines.* All upriver lakes sturgeon spearing license applications shall be received by the date established by the department to be considered for selection. The annual application deadline date may be no earlier than July 1.

Note: The department conducts extensive publicity on the application deadlines beginning several months prior to any deadline. Application deadline dates are published in news releases, license outlet handouts, and pertinent regulation pamphlets. Applications may be obtained from any department license vendor. Applications and information may be obtained from the Bureau of Customer Service and Licensing address is 101 South Webster, Box 7924, Madison, WI 53707.

(b) *Group applications.* If a maximum of 4 persons wish to spear sturgeon on the upriver lakes together, each shall first apply for an individual upriver lakes sturgeon spearing license and then complete a group application form. The group application shall be treated as one application for purposes of random selection under the cumulative preference system and consideration for a license. The group's preference standing shall be that of the member with the lowest number of preference points. If the group is selected to receive upriver lakes sturgeon spearing licenses, all members of the group will lose all accumulated preference points.

(c) *Prohibition of purchase of Lake Winnebago spearing license.* No person who applies for an upriver lakes sturgeon spearing license may purchase a Lake Winnebago sturgeon spearing license in the same year, except unsuccessful applicants for an upriver lakes license may purchase a Lake Winnebago sturgeon spearing license after October 1.

(d) *Applications for upriver lakes.* No person may apply for an upriver lakes sturgeon spearing license unless they will become 14 years of age before or on the last day of the upcoming sturgeon spearing season.

(2) LICENSEE SELECTION PROCEDURES. (a) If the number of applications for licenses for the upriver lakes sturgeon spearing season exceeds the available quota of licenses, successful applicants shall be randomly selected in accordance with the preference system established under s. 29.192 (4), Stats. No person may purchase an upriver lakes sturgeon spearing license unless they are a successful applicant who has received authorization to purchase from the department.

Note: Section 29.192, Stats., Regulation of takings of certain wild animals. (4) If the department decides to limit the number of hunters or trappers taking Canada geese, sharp-tailed grouse, fishers, otters, bobcats or sturgeon by issuing permits and if the number of persons seeking the permits exceeds the number of available permits, the department shall issue the permits according to a cumulative preference system established by the department. The department shall give a preference point to each applicant for each previous season for which the applicant applied but was not issued a permit. The system shall establish preference categories for these applicants, with higher priority given to those categories with more points than those with fewer points. Applicants who fail to apply at least once during any 3 consecutive years shall lose all previously accumulated preference points. If the number of applicants within a preference category or a subcategory exceeds the number of permits available in the category or subcategory, the department shall select at random within the category or subcategory the applicants to be issued the permits.

(b) Upon selection, all successful applicants lose all accumulated preference points regardless of the length of the sturgeon spearing season or whether or not the successful applicant purchases a license. Unsuccessful applicants who subsequently purchase a Lake Winnebago sturgeon spearing license shall retain all accumulated preference points.

(3) NOTIFICATION AND CARCASS TAG ISSUANCE. (a) The department shall issue a notice of approval to those qualified applicants selected to receive an upriver lakes sturgeon spearing license. A person who receives a notice of approval and who pays the fee in the manner required by the department shall be issued an upriver lakes spearing license.

(b) Each successful applicant for an upriver lakes sturgeon spearing license shall be issued a carcass tag by the department upon issuance of the license.

(c) If the number of applications for licenses for an upriver lakes sturgeon spearing season is less than the available quota of licenses, the department may make available the remaining upriver lakes sturgeon spearing licenses to any person who has not purchased either a Lake Winnebago or upriver lakes sturgeon spearing license on

a first-come, first-served basis. The issuance of a tag under this paragraph will result in loss of preference points accumulated under the cumulative preference system.

Note: No person may purchase more than one sturgeon spearing license for the same spearing season according to s. 29.024 (2)(c), Stats.

(4) LICENSE AND CARCASS TAG RESTRICTIONS. (a) Licenses and carcass tags issued under subs. (1) to (3) are only valid for the upriver lakes sturgeon spearing season.

(b) Licenses or carcass tags issued under this section may not be transferred to or used by any person other than the licensee.

(5) REGISTRATION. A person who possesses a sturgeon speared from the upriver lakes shall register it at a department registration station pursuant to s. NR 20.10 (10).

SECTION 5. NR 20.20 (73)(e)2.b. is amended to read:

Lake sturgeon	2. Lake Winnebago system waters	a. Hook and line.	No open season	--	--
		b. Spearing on Lakes Poygan, Winneconne and Butte des Morts.	Second Saturday in February 2005 and every fifth year thereafter. Each season to be one day long. <u>in February and continuing for 16 consecutive days unless closed pursuant to s. NR 20.33(5)</u>	1 per season, regardless of the water in which speared <u>as specified by carcass tag.</u>	36

SECTION 6. NR 20.20(73)(e)2.c is repealed.

SECTION 7. NR 20.33(5) is repealed and recreated to read:

NR 20.33(5) HARVEST QUOTAS AND SPECIAL EARLY CLOSURE OF THE STURGEON SPEARING SEASON.

(a) *Harvest quota.* The total allowable annual harvest for the Lake Winnebago system shall be based on an average annual harvest or exploitation rate of 5% of the estimated Lake Winnebago system population of adult female sturgeon, 5% of the estimated population of juvenile female sturgeon and 5% of the estimated population of male sturgeon.

1. Lake Winnebago shall be allocated 90% of the Lake Winnebago system harvest cap for adult female sturgeon, 80% of the Lake Winnebago system harvest cap for juvenile female sturgeon, and 80% of the Lake Winnebago system harvest cap for male sturgeon. For the February 2006 sturgeon spearing season, Lake Winnebago shall be allocated 100% of the harvest cap for all cohorts as there is no season on the upriver lakes that year.

2. The upriver lakes shall be allocated 10% of the Lake Winnebago system harvest cap for adult female sturgeon, 20% of the Lake Winnebago system harvest cap for juvenile female sturgeon, and 20% of the Lake Winnebago system harvest cap for male sturgeon.

3. The number of upriver lakes sturgeon spearing licenses or carcass tags issued annually for each upriver lakes sturgeon spearing season shall be determined by the department. The department shall base its determination for each upriver lakes sturgeon spearing season upon:

- a. The total allowable annual harvest allocated to the upriver lakes in subd. 2.
- b. The abundance of lake sturgeon in the Lake Winnebago system.
- c. Trends in upriver lakes sturgeon spearer success rates.
- d. Spearer distribution and density.

(b) *Conditions for season closure.* The department shall close the season for spearing sturgeon on Lake Winnebago if the actual harvest on Lake Winnebago meets or exceeds 90% of the total allowable annual harvest of adult female sturgeon, juvenile female sturgeon or male sturgeon from Lake Winnebago, as determined by the department. The department shall close the season for spearing sturgeon on the upriver lakes if the actual harvest on the upriver lakes meets or exceeds 90% of the total allowable annual harvest of adult female sturgeon, juvenile female sturgeon or male sturgeon from the upriver lakes, as determined by the department. The department shall close the season for spearing sturgeon on the Lake Winnebago system if the actual harvest on the Lake Winnebago system meets or exceeds 90% of the total allowable annual harvest of adult female sturgeon, juvenile female sturgeon or male sturgeon from the Lake Winnebago system, as determined by the department.

(c) *Announcement and notice of season closure.* The season closure for the lake Winnebago sturgeon spearing season or the upriver lakes sturgeon spearing season or both shall be announced by a department press release to local media and to the official state newspaper on the day that actual harvest meets or exceeds 90% of the total allowable annual harvest of juvenile female sturgeon, adult female sturgeon or male sturgeon for that season, based upon the registration of harvested sturgeon pursuant to s. NR 20.10(10). The department shall post notice of the closure in the vicinity of Lake Winnebago or the upriver lakes or both and provide other notice deemed reasonable by the department.

(d) *Effective date of season closure.* The season closure shall take effect at 12:30 p.m. on the day following issuance of the department press release announcing the season closure in par. (c) when the actual harvest meets or exceeds 90% but is less than 100% of the total allowable annual harvest of juvenile female sturgeon, adult female sturgeon or male sturgeon for that season, based upon the registration of harvested sturgeon pursuant to s. NR 20.10 (10). The season closure shall take effect at 6:30 a.m. on the day following issuance of the department press release announcing the season closure in par. (c) when the actual harvest meets or exceeds 100% of the total allowable annual harvest of juvenile female sturgeon, adult female sturgeon or male sturgeon for that season, based upon the registration of harvested sturgeon pursuant to s. NR 20.10 (10).

SECTION 8. EFFECTIVE DATE. This rule shall take effect March 1, 2006, except for Section 7, which shall take 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 9. BOARD ADOPTION. The foregoing rule was approved and adopted by the State of Wisconsin Natural Resources Board on September 28, 2005.

Dated at Madison, Wisconsin _____.

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

By _____
Scott Hassett, Secretary

(SEAL)