

The scope statement for this rule, SS 047-18 was approved by the Governor on May 2, 2018, published in Wisconsin Administrative Register 749A1 on May 7, 2018 and approved by the Natural Resources Board on May 23, 2018. The final rule was approved by the Governor on August 29, 2019.

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

The Wisconsin Natural Resources Board proposes an order to renumber NR 1.02 (4) and to create NR 1.02 (4) (b), (c) and (d) and 1.985 relating to aquaculture and fish farms.

FH-08-18

Analysis Prepared by the Department of Natural Resources

1. Statutes Interpreted:

Section 23.09(2)(o), Stats. has been interpreted as authorizing the department to accept gifts of live fish or fish eggs for conservation purposes within the state.

Sections 29.014 (1), 29.041 and 29.053 (2), Stats. have been interpreted as allowing the department to conserve the fish supply on waters of the state while continuing to provide good opportunities for fishing.

Section 29.707, Stats. has been interpreted as requiring the department to define the role of genetics in the department's fish stocking strategy and to standardize fish donation procedures. This section has also been interpreted as authorizing the department to review rules regarding viral hemorrhagic septicemia and the classification of non-native forage fish.

2. Statutory Authority: Sections 23.09(2)(o), 29.014 (1), 29.041, 29.053 (2), and 29.707, 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:

The department is required to promulgate these rules under provisions of 2017 Act 21. In s. 29.707, Stats., the department is directed to establish rules related to the role of genetics in fish stocking policies and to standardize procedures for the donation of fish.

Under s. 23.09(2)(o), Stats., the department is authorized to receive material or monetary gifts for conservation purposes. This grants the department the authority to accept donations of live fish or fish eggs.

Under s. 29.014 (1), Stats. 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.

Provisions of s. 29.053 (2), Stats. 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 waters or parts of waters. It also allows the department to establish a fishing season on specified waters in certain urban areas to allow fishing only by persons who are under 16 years old or who are disabled, as specified in s. 29.193 (3) (a), (b), or (c), Stats.

In s. 29.707, Stats. the department is directed to create rules that define the extent to which genetics is involved in the department's stocking strategies, and rules that standardize the department's fish donation procedures. This section also requires the department to review its rules relating to viral hemorrhagic septicemia, assess the efficiency of the fish hatchery classification system, and assess the viability and use of bait fish and forage fish, including the classification of established non-native species. The department may promulgate new rules as necessary as a result of these reviews.

4. Related Statutes or Rules:

Section 29.705, Stats. specifies that the department may only supply fish or fish eggs to private entities that have entered into an agreement with the department, and that these fish must be stocked into publicly accessible waters of the state according to the agreement. This section further states that fish farms entering into such agreements must be registered with the Department of Agriculture, Trade and Consumer Protection.

5. Plain Language Analysis:

The department is required to promulgate these rules under provisions of 2017 Act 21. Act 21 revises the laws relating to aquaculture and fish farms in a variety of ways. It provides a pathway for private fish farms to enter into agreements with the DNR in order to stock fish into waters of the state. The Act also specifically requires the department to promulgate rules on the role of genetics in departmental fish stocking and standardization of fish donation procedures. The Act also provides that the department must review existing rules relating to viral hemorrhagic septicemia, a fatal fish disease affecting several Wisconsin waters, and promulgate new rules to update VHS policies as needed. Additionally, the Act directs the department to evaluate the use of bait and forage fish, particularly non-native species classified under ch. NR 40, Wis. Admin. Code, and allows the department to reclassify such species as necessary. Under the new laws, the department must continue to consult with interested parties including fishing groups and the aquaculture industry when creating these rules.

The department has undertaken a thorough review of rules pertaining to viral hemorrhagic septicemia and the use of non-native bait and forage fish. To supplement the department's rule-making efforts, several documents are in the final stages of development, including best management practices for transportation of baitfish and a fish donation policy document. The department has also initiated meetings with stakeholder input to review the status of non-native mosquitofish, which could be inadvertently transported among baitfish, and to potentially reclassify mosquitofish in ch. NR 40 as needed. Additionally, the department continues to work with the Department of Agriculture, Trade and Consumer Protection on their rules relating to health certificate requirements for transfer of fish between Type 3 registered fish farms and to waters without confirmed presence of viral hemorrhagic septicemia.

SECTIONS 1 and 2 define the role and extent that genetics is involved in the department's fish stocking strategies. The department utilizes this general approach for stocking of both native species and non-native species in the aquaculture industry, such as salmon, rainbow trout and brown trout. The department's current strategy for stocking fish considers genetic factors of both fish being stocked and of fish already present in a waterbody. This section also establishes that the department may establish collaborative relationships with other public and private entities for the purposes of aquaculture and stocking fish into Wisconsin waters.

SECTION 3 establishes the department's policy on accepting donations of live fish or fish eggs. These rules will establish a timelier process for accepting donations of surplus fish or eggs from private aquaculturists.

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

No federal regulations apply to activities that occur entirely within the state. 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.

For activities involving movement of fish or eggs between the states, a violation of state law constitutes a violation of federal law under the Lacey Act. Violations would be enforceable by agents of the United States Fish & Wildlife Service.

7. Comparison with Similar Rules in Adjacent States:

Minnesota statutes allow the Department of Natural Resources to sell or barter fish fry or eggs at the cost of production and allow the department to sell fish or fish eggs from the state hatchery at fair market value to private hatcheries. In Iowa, licensed aquaculturists may only obtain fish from public waters of the state as authorized by the director of the Department of Natural Resources. Rules in Michigan and Illinois do not currently provide for the state to supply fish to private aquaculturists.

Michigan statutes specify that genetically engineered fish may not be introduced, and the Michigan Department of Natural Resources internal policy on stocking describes the guidelines for maintaining genetic integrity in stocked waters. No other neighboring states have established rules or policy relating to the role of genetics in stocking.

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

The department's handbook chapter on fish stocking explains the importance of stocking strains of fish that are genetically adapted to the local area. Central to this stocking strategy is meeting the management goals for the diverse fisheries of the state. The department's stocking strategy ensures that a stock selected for transfer is compatible with the geographic area in which stocking occurs, and does not put unique genetic resources at risk. Because each native fish population's genetics is well suited to the environment, maintaining the genetics within these populations helps maintain population diversity across the state. Stocking with strains not suited to the local environment could reduce the genetic diversity of the local population and may contribute to outbreeding depression, in which introduced genetics result in offspring with inferior fitness.

To determine which strains are appropriate for stocking, the department creates species-specific management plans that include information on the genetic structure of populations across the landscape and spatially distinct genetic management units that encompass genetically similar populations. The department analyzes the genetic composition of wild fish populations by collecting tissue samples across a broad array of populations and comparing the polymorphic genetic markers to identify genetic differences. To arrive at a stocking plan, the department assesses genetic population structure and diversity and reproductive biology, determines broodstock collection protocols and sources that will preserve genetic diversity, and locations appropriate for stocking. Walleye, muskellunge, and lake sturgeon are examples of species for which genetics are significant considerations. A challenge of these policies is that private aquaculture may not have fish with genetics that the department has determined are

the most appropriate for a region. New policies will make it possible to work cooperatively with private aquaculture so that they have access to genetically appropriate fish as well as to establish predictable stocking policies.

The department's policy on receiving gifts, which would include donations of live fish or fish eggs, is described in manual codes 1401 and 1403.11 as well as a new manual code currently under development. Rules related to standardizing donations of fish will closely reflect the policy outlined in these manual codes. It is the policy of the Natural Resources Board to accept gifts and bequests for the promotion of activities beneficial to the preservation, wise use and scientific management of Wisconsin's natural resources. Significant donations are accepted at monthly meetings of the board; however, this process may not be responsive enough to utilize gifts of live fish or eggs for stocking into waters of the state. Private aquaculturists have offered surplus fish to the department in the past, but the department has been unable to take advantage of this opportunity because a clear and streamlined process for accepting such donations was not in place.

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

According to the report "A Consumer's Guide for Wisconsin Farm-raised Fish," jointly produced by the Wisconsin Aquaculture Association, University of Wisconsin-Extension, Wisconsin Department of Agriculture, Trade and Consumer Protection and the University of Wisconsin-Stevens Point Northern Aquaculture Demonstration Facility, aquaculture results in the sale of over \$14 million in fish and minnows and contributes \$21 million in economic activity to the state. Because these rules will provide additional flexibility to the aquaculture industry, these rules may benefit private aquaculturists, which could in turn increase the industry's contribution to the state's economy.

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

These rules may create additional opportunities for businesses in the aquaculture industry, which may generate beneficial economic impacts. For example, aquaculturists may gain access to unique wild genetics through cooperative agreements with the department, and public and private partnerships to produce fish may be created. The department has met with the representatives of the aquaculture industry and state-licensed commercial fishing representatives and has held public meetings to consider policies and regulations relating to these rules.

The rules will not have an economic impact on recreational angling, though recreational anglers may indirectly benefit from new partnerships for stocking fish into waters of the state.

The rule will not impose new compliance or reporting requirements or design or operational standards.

The department developed a preliminary economic impact analysis and held a comment period pursuant to Governor's Executive Order 50, Section IV, in winter 2018. Fiscal impacts on the department were also summarized in this analysis.

11. Agency Contact Person: 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.

The hearing date and comment submission deadline was March 18, 2019.

SECTION 1. NR 1.02 (4) (intro.) is renumbered NR 1.02 (4)(a).

SECTION 2. NR 1.02 (4) (b), (c) and (d) are created to read:

1.02 (4) (b) The department shall implement fish stocking strategies that recognize economic impact by species, provide opportunities to resident and non-resident anglers, and ensure that fish stocked are best suited to survive and thrive in the unique ecological conditions found throughout the state. These strategies shall be developed in coordination and consultation with private aquaculturists to ensure effective coordination and partnerships in protecting, sustaining and improving the genetic integrity of native, nonnative and self-sustained populations of fish of the species defined in s. NR 40.02 (30) within the state.

(c) Preserving the genetic integrity of fish stocks that are documented and proven to survive and thrive in Wisconsin waters is a central goal of fisheries management in Wisconsin. All fish stocking in Wisconsin inland waters shall be authorized under a permit issued by the department and shall be conducted to maintain the genetic boundaries of fish best adapted to those waters. Stocking shall be considered an important restoration tool used to reestablish naturally reproducing populations and may not be conducted to the potential detriment of natural reproduction.

(d) In order to effectively meet statewide stocking goals, the department shall, on an annual basis, make available fish or fish eggs to private entities so they have access to the same genetic fish strains the state maintains in their hatchery system. This will provide additional resources and opportunities to ensure that statewide stocking needs are met through coordination and partnerships between the department and private entities.

SECTION 3. NR 1.985 is created to read:

1.985 Donation of live fish or fish eggs from a private fish farm. The department may accept gifts of live fish or fish eggs from a private fish farm located within Wisconsin if all of the following apply:

- (1) The fish or fish eggs will be stocked into waters of the state accessible to the public for which stocking needs have not been met.
- (2) The fish or fish eggs of the species to be stocked are of a compatible genetic strain to any existing native population of that species in the waters to be stocked.
- (3) The fish or fish eggs are covered under a valid fish health certificate issued under s. ATCP 10.65.

SECTION 4. EFFECTIVE DATE. This rule takes 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 5. BOARD ADOPTION. This rule was approved and adopted by the State of Wisconsin Natural Resources Board on June 26, 2019.