

The statement of scope for this rule, SS 124-20 was approved by the Governor on August 21, 2020, published in Register No. 776B on August 31, 2020, and approved by the Natural Resources Board on October 28, 2020. This rule was approved by the Governor on July 16, 2021.

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

The Wisconsin Natural Resources Board proposes an order to **repeal** NR 25.06 (1) (c) (note) and 25.07 (1) (b) (note), to **amend** NR 20.20 (73) (n) 5., 25.06 (1) (a), 25.06 (1) (c) (intro.), 1., 2., and 3., and 25.07 (1) (b) (title), and to **create** NR 25.06 (1) (c) 4. relating to fish harvest in Lake Superior and affecting small business.

FH-07-21 (E)

Analysis Prepared by the Department of Natural Resources

1. Statutes Interpreted: Sections 29.014 (1), 29.041, and 29.053 (2), Stats., have been interpreted as authorizing the department to conserve the fish supply on waters of the state while continuing to provide good opportunities for fishing. Section 29.519 (1m) (b), Stats., is interpreted as allowing the department to regulate commercial fish harvest.

2. Statutory Authority: Sections 29.014 (1), 29.041, 29.053 (2), and 29.519 (1m) (b), 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: 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.

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.

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. It also specifies that the limitations on harvests must be based on the available harvestable population of fish and in the wise use and conservation of the fish, so as 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: The department also promulgated a companion emergency rule, FH-12-20 (E) / EmR2048, and a permanent rule, FH-10-20 / CR 21-024.

5. Plain Language Analysis: This rule addresses cisco and lake trout quotas and harvest limits for Lake Superior sport and commercial fisheries. These changes were first implemented in the companion emergency rule, EmR2048, and are the subject of permanent rule FH-10-20 / CR 21-024. Adjustments to these quotas and limits are necessary to maintain sustainable harvest levels for a healthy Lake Superior ecosystem and the diverse fisheries and stakeholders it supports.

SECTION 1 revises the harvest trigger for lake trout taken by recreational anglers in waters of Lake Superior east of Bark Point (WI-2). If lake trout harvest meets this threshold, the fishing season will close to prevent overharvest of lake trout.

SECTION 2 updates the lake trout quota in WI-2, as well as the accompanying harvest allocations, for state and tribal commercial fishers and tribal home use fishers. There is no change to the quota in WI-1.

SECTION 3 updates the combined state and tribal cisco quota as well as the total allowable harvest for state fishers, total allowable harvest for state commercial fishers fishing between Oct. 1 and Dec. 31 using gill nets between 2 3/8 and 3-inch stretch measure, and total allowable harvest for department assessment purposes, angling, and incidental harvest.

SECTION 4 establishes the total allowable cisco harvest for tribal commercial and home use fishers.

SECTIONS 5 to 7 remove the January 1, 2021 sunset for the cisco quota.

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 received no comments at the preliminary public hearing, nor during the comment period for the statement of scope.

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 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 are currently developing a whitefish model as well to better assess and predict the impacts of harvest on the whitefish population.

The department and tribes utilize hydroacoustics surveys to determine the density of cisco in the water column, and then extrapolate to the total biomass of cisco in Wisconsin waters of Lake Superior. The hydroacoustics data are validated with department and tribal agency netting surveys to verify that the numbers and species caught correlate with the results from the hydroacoustics surveys. While the cisco quota is reviewed on a three-year schedule, the department and tribes collect and review data continually, so changes based on the most current data can be considered if the sustainability of the cisco fishery is in question. Cisco are a key species in the Lake Superior ecosystem, and are harvested in Wisconsin waters for commercial, recreational, and subsistence purposes by state licensees and members of the Red Cliff and Bad River Bands of Lake Superior Chippewa Indians. Cisco are also an important food chain link, connecting the lower trophic level of zooplankton with the higher trophic level occupied by predatory fish such as lake trout, and are an important component of the prey base for lake trout. Whitefish and other fish also consume cisco eggs as part of their regular diet.

Cisco populations in Lake Superior have been declining and have lacked strong year classes to help rebuild the population. Since 2016, cisco harvest regulations have included a harvest limit of 7.5 percent of the total cisco biomass estimate in round weight pounds of cisco, not to exceed 1,497,900 round weight pounds in a calendar year, as well as specific date restrictions for certain types of commercial fishing gear for state users. The department and tribes have met to review cisco population data and model projections regularly over the past several years, and the department and Lake Superior Commercial Fishing Board have met five times since 2018 to discuss population trends. The Lake Superior Fisheries Management Plan also includes information on cisco and stakeholder input. Through this rule, the harvest limit will be updated to reflect the most current standard for the limit on the proportion of cisco that may be harvested each year, which will ensure that the realized level of harvest remains sustainable. This includes incorporating the tribal share into the quota so that the total quota is 15 percent of the average of the most recent three years of hydroacoustic-modeled spawning cisco biomass, and including a safety buffer within the total quota to prevent overharvest. The recreational fishing season for cisco is open year-round in

Lake Superior with a 10-fish daily bag limit per person and no size limit, and recreational cisco harvest is minimal. However, populations are still declining and the harvest limit needs to be reduced further in attempts to create a sustainable cisco population. The Lake Superior Chippewa tribes will join the cisco quota under the 2018-2028 Lake Superior Fishing Agreement, allowing the cisco fishery to be managed under a single, unified state-tribal quota.

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

This emergency rule will not impose any additional impacts on small businesses beyond the impacts of EmR 2048 and CR 21-024. EmR 2048 and CR 21-024 combined were expected to have a moderate economic impact because they are very similar to rules which were in place from 2018 to 2020, but do include quota reductions that could impact total commercial harvest. Lake trout are managed by quota and state and tribal commercial fishers are allotted individual tags. Estimated dockside value of lake trout for the ten state licensed commercial fishermen during the 2019 season was \$28,651. Even under a decreased quota, dockside value 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. In 2018, a higher lake trout quota went into effect for commercial fishers; therefore, the average pounds of lake trout harvested by all commercial fishers in 2018-19 was 32,609 per year, compared to an average of 23,665 pounds per year in 2016-17. Assuming a value of \$1 per pound for lake trout, the total gain to commercial fishers under the higher quota years was \$8,944. A similar quota reduction, therefore, would result in a similar economic loss of less than \$10,000 across the 10 Lake Superior state commercial fishers. However, the reduction under this rule will not create quotas as low as the 2016-17 quotas, so the economic impact to profits will likely be less than under the 2016-17 quotas. It is also important to note that whitefish harvest is also limited by lake trout harvest. Commercial fishing allowable effort is established at a level that will prevent overharvest of lake trout during whitefish gill netting operations, so commercial fishers may see an economic impact from lower whitefish harvest. However, the average wholesale price of whitefish fluctuates from year to year, so lower harvest may not necessarily translate to lower profits. For example, in 2014 commercial fishers harvested a total of 380,968 (dressed weight) pound of whitefish with an estimated dockside value of \$792,413. In 2019, commercial fishers harvested a total of 393,269 (dressed weight) pounds of whitefish valued at \$385,403. The difference between the two years was due to the difference in average wholesale value. Though these rules do 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 decrease or maintain pattern for lake trout and whitefish harvest.

In 2019, the cisco price per pound was \$0.40-0.75, but has been as high as \$1.20 per pound since 2012. While the price per pound has varied over time, estimated total value of the commercial cisco roe fishery is between \$200,000 and \$500,000 per year. The methods in the rules for determining harvest restrictions are expected to allow the commercial fishing community to harvest at or near the current total average annual catch amount. A reduction in cisco quota may impact commercial fishers, but actual harvest levels over the past 10 years have generally been below the proposed quota, so the total value of the fishery may not change significantly. Due to annual variation in value of the cisco fishery, the total economic impact is indeterminate. However, because the individual quota allotment for cisco will decrease, some individual fishers that harvested their full allotment in the past few years may see a decrease in actual harvest and corresponding economic impacts under the reduced quota (likely less than \$40,000 for each

licensee). In 2019, three commercial fishing licensees harvested more cisco than the amount of cisco allowable harvest that would be allotted to those fishers under the proposed lower quota, so most licensees are not likely to experience reduced harvest due to this rule. Individual commercial fishers may need to reduce their harvest or acquire part of the individual quota allocated to another fisher as a result of the new quota. This would be viewed as a negative impact by commercial fishers that would experience decreased harvest or the need to purchase part of another fisher's quota, but could benefit the seller of the quota.

These rules may also have a minimal impact on sport fishing businesses and local businesses, in the event that the lake trout season closes early. 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. However, because the lake trout season is not guaranteed to close early under these rules, and because these rules make no changes to size or bag limits, sport fishers may not be affected. It is difficult to determine the economic impact that might result from changes in the angling activities, and related spending, from non-commercial fishing but it is expected to be minimal because lake trout are just one component of the fishery. Angling activity is determined by weather conditions year-round as well as by success on other targeted salmonid species such as brown trout, splake, or coho salmon. Angler hours in WI-2 have ranged from 195,000 to 235,000 from 2017 through 2019. Charter fishing licenses for Lake Superior have remained stable over the past years (2005-2019) ranging from 22 to 29. The number of licensed charter fishers in 2019 was 24 and had the highest harvest and effort since 2010. Lake trout size and bag limits will not change with these rules, though an adjustment to the harvest trigger for lake trout could potentially lead to an early season closure if the trigger is reached prior to the end of the recreational lake trout season. The last time that the lake trout season closed early was 2017, and the new quota would not have resulted in early closure in 2017. Economic impact on local businesses is expected to be similar to 2019.

Related to both commercial and angler use of lake trout and cisco, harvest quotas are ideally reviewed every 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 emergency rule will not impose any additional impacts on small businesses beyond the impacts of EmR 2048 and CR 21-024. EmR 2048 and CR 21-024 combined were expected to have a moderate (from \$50,000 to \$140,000 in total) total economic impact on commercial fishing businesses, and minimal (less than \$50,000) impact on sport fishing businesses, due to the following reasons. The reduction in lake trout and cisco quotas may impact the amount of lake trout and cisco harvest within the commercial fishing community, thereby potentially having an economic impact on individual commercial fishers but little impact on the commercial fishing community overall. The reduction in the lake trout harvest trigger to 9,500 lake trout may result in an early recreational lake trout season closure once that number has been harvested, which may affect sport fishing businesses that guide anglers in fishing for lake trout and businesses that support angler activities. However, lake trout are only one component of the Lake Superior fishery available to sport fishers, so sport fishing businesses may only experience a minimal impact from this suite of rules.

The rule does not impose any compliance or reporting requirements, nor would any design or operational standards be contained in the rule. 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:

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

Meredith Penthorn, FH/4
 Department of Natural Resources
 P.O. Box 7921
 101 S. Webster St.
 Madison, WI 53707
 608-316-0080
 Meredith.Penthorn@wisconsin.gov

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/chr/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	2 in total in waters east 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

a line running north-south from Bark Point (46° 53.21', -91° 11.16') measured by department creel surveys exceeds ~~11,755~~ lake trout in 2018 or 12,800 in any other year 9,500 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.

3 in total west of a line running north-south from Bark Point.

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) 2. is amended to read:

Wisconsin Statistical District	Allowable annual harvest
WI-2	<p>2. The total allowable commercial and tribal home use harvest in the waters of WI-2 may not exceed 56,000<u>47,330</u> lake trout.</p> <p>a. That number of lake trout to be harvested by non-tribal licensed commercial fishers from the waters of WI-2 may not exceed 8,500<u>6,330</u> lake trout.</p> <p>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 47,500<u>41,000</u> lake trout.</p>

SECTION 3. NR 25.06 (1) (c) (intro.), 1., 2., and 3. are amended to read:

25.06 (1) (c) *Cisco* ~~until January 1, 2021.~~ The total allowable annual harvest of cisco by state and tribal fishers during the open season in Wisconsin waters of Lake Superior may not exceed ~~7.5 percent of the total of the most recent hydroacoustics cisco biomass estimate~~ 1,794,000 round weight pounds, as determined by the department and tribes and:

1. The total allowable state harvest in the waters of Lake Superior may not exceed ~~1,497,900~~897,000 round weight pounds in a calendar year.
2. From October 1 through December 31 of each year, the total harvest of cisco by state licensed commercial fishers using gill nets with a mesh size of not less than 2 3/8 inch and not more than ~~3 inch~~3-inch stretch measure may not exceed ~~1,317,900~~850,000 round weight pounds.
3. Excluding harvest under subd. 2, from January 1 through December 31 of each year, the total harvest of cisco by state fishers and the department shall not exceed ~~180,000~~47,000 round weight pounds. The department shall subdivide the allocation of ~~180,000~~47,000 round weight pounds among commercial incidental catch, angling, and department assessment activities.

SECTION 4. NR 25.06 (1) (c) 4. is created to read:

25.06 (1) (c) 4. The total allowable harvest by the Red Cliff and Bad River bands, including both commercial and tribal home use fishers in the waters of Lake Superior, may not exceed 897,000 round weight pounds in a calendar year.

SECTION 5. NR 25.06 (1) (c) (note) is repealed.

SECTION 6. NR 25.07 (1) (b) (title) is amended to read:

25.07 (1) (b) *Cisco* ~~until January 1, 2021.~~

SECTION 7. NR 25.07 (1) (b) (note) is repealed.

SECTION 8. 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 while managing harvest of species currently experiencing a population decline, such as cisco. 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 fully implemented after such decisions are made and in time for the regulations to be in place for the in-progress fishing seasons. 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 commercial fish species. In order to use the most current biological information and ensure that fish harvest remains sustainable for the duration of the commercial and sport fishing seasons, an emergency rule process needs to be implemented.

SECTION 9. EFFECTIVE DATE. This rule takes effect upon publication in the official state newspaper, as provided in s. 227.24(1)(c), Stats.

SECTION 10. BOARD ADOPTION. This rule was approved and adopted by the State of Wisconsin Natural Resources Board on June 23, 2021.

Dated at Madison, Wisconsin _____.

STATE OF WISCONSIN

DEPARTMENT OF NATURAL RESOURCES

BY _____

Preston D. Cole, Secretary