

nr019_2_EmR0808.pdf **Natural Resources – Affects Chs. NR 19 and 20 – EmR0808**
ORDER OF THE STATE OF WISCONSIN NATURAL RESOURCES BOARD
AMENDING AND CREATING RULES

The Wisconsin Natural Resources Board proposes an emergency order to amend NR 20.05 (6) and (7) and 20.20 (73) (h) and create NR 19.05 (3) (e) and (f), 19.055 (5) and 20.14 (9) and (10), relating to control of fish diseases and invasive species.

FH-40-07A(E)

Analysis Prepared by the Department of Natural Resources

- 1. Statutes interpreted:** Sections 23.09 (2) (intro), 23.22 (2) (a), 29.014 (1), 29.039 (1), 29.041 and 227.11 (2) (a), Stats.
- 2. Statutory Authority:** Sections 23.09 (2) (intro), 23.091, 23.11 (1), 23.22 (2) (a) and (b) 6., 27.01 (2) (j), 29.014 (1), 29.041, 29.039 (1), 29.509 (4) and (5), 227.11 (2) (a), and 227.24 (1) (a), Stats.
- 3. Explanation of agency authority to promulgate the rules under the statutory authority:** Section 23.09 (2) (intro), Stats., grants the department general authority to adopt rules for the protection, development and use of forests, fish and game, lakes, streams, plant life, flowers and other outdoor resources in this state. Section 23.091, Stats., authorizes the department to acquire, develop, operate and maintain state recreation areas, to establish use zones within state recreation areas providing for the full range of recreational uses, including hunting and fishing, and to promulgate rules to control uses within zones and limit the number of persons using any zone.

Section 23.11 (1), Stats., gives the department the authority to have and take the general care, protection and supervision of all state parks, of all state fish hatcheries and lands used therewith, of all state forests, and of all lands owned by the state or in which it has any interests, along with such further powers as may be necessary or convenient to enable it to exercise the functions and perform the duties required of it by ch. 23, Stats., and by other provisions of law. Section 23.22 (2) (a) and (b) 6., Stats., confer on the department the authority to establish a statewide program to control invasive species in this state, including rules to classify invasive species for purposes of the program. Section 27.01 (2) (j), Stats., grants the department authority to promulgate rules necessary to govern the conduct of state park visitors, and for the protection of state park property, or the use of facilities, including the use of boats and other watercraft on lakes or rivers within the limits of a state park, and the use of roads, trails or bridle paths.

Sections 29.014 (1) and 29.041, Stats., grant rule making authority to the department to establish and maintain open and closed seasons for fish and any bag limits, size limits, rest days and conditions governing the taking of fish that will conserve the fish and game supply and ensure the citizens of this state continued opportunities for good fishing, and provide that the department may regulate fishing on and in all interstate boundary waters and outlying waters. Section 29.039 (1), Stats., authorizes the department to develop conservation programs to ensure the perpetuation of nongame species, require harvest information and establish limitations relating to taking, possession, transportation, processing and sale or offer for sale, of nongame species. Minnows are nongame fish species.

Section 29.509 (4) and (5), Stats., require bait dealers to keep records as required by the department and authorize the department to issue permits for the taking of bait from specified waters and to restrict the number of permits that may be issued for any designated body of water. Section 27.01 (2) (j), Stats., grants the department authority to promulgate rules necessary to govern the conduct of state park visitors, and for the protection of state park property, or the use of facilities, including the use of boats and other watercraft on lakes or rivers within the limits of a state park, and the use of roads, trails or bridle paths.

Finally, s. 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 statute or rule: None.

5. Plain language analysis of the proposed rule: This emergency rule amends the emergency measures put into effect November 2, 2007 by Order No. FH-40-07(E) for the control and prevention of Viral Hemorrhagic Septicemia (VHS) in fish in waters of the state.

SECTION 1 of the Order adds 2 new exemptions to s. NR 19.05 (3), which generally prohibits live fish or live fish eggs that were taken from or possessed on any inland or outlying water or its bank or shore from being transported away from that water, bank or shore. The new exceptions are for:

- live minnows possessed on a waterbody if they were obtained from a Wisconsin bait dealer and have not been exposed to water or fish from that waterbody, and
- live minnows possessed on a waterbody if they were obtained from a Wisconsin bait dealer and will be used for bait only on the same waterbody.

SECTION 2 of the Order creates a new exemption to s. NR 19.05 (3), which requires generally that any person who removes a boat, boat trailer, boating equipment or fishing equipment from any inland or outlying water or from its bank or shore must immediately drain all water from the boat, boat trailer, boating equipment or fishing equipment, including water in any bilge, ballast tank, bait bucket, live well or other container, unless it has been exempted in writing by the department after determining that it will not allow VHS virus to be transported to other waters. The immediate drainage requirement also applies to containers and fishing equipment used by bank or shore anglers. The new exemption applies to water in a container that holds live minnows obtained from a Wisconsin bait dealer, if the container holds no other fish, contains 2 gallons or less of water, and is used to transport only minnows that have not been exposed to water or to fish from that inland or outlying water, or that will be used for bait only on the same inland or outlying water, its bank or shore.

SECTION 3 of the Order clarifies that minnows possessed by an angler while on a water that has no open season for minnow harvesting are not illegal to possess if the minnows were purchased from a Wisconsin bait dealer. It also clarifies that minnows purchased from a Wisconsin bait dealer do not count toward an angler's daily bag limit.

SECTION 4 adds a provision to the current rule governing minnow collection, reiterating the requirement that prohibits a person from setting, using or operating any net, trap or similar device for the taking of minnows, or fishing for minnows except suckers for any purpose using any gear from any water listed in or identified by the Department under s. NR 20.14 (9) as a water where the VHS virus may be present. It also adds language reiterating that no person may transport any live suckers harvested from any waters listed in or identified by the Department under s. NR 20.14 (9) away from those waters.

SECTION 5 clarifies, in the open and closed season table in s. NR 20.20 (73), that there is a closed season on taking all species of minnows except suckers on any water listed in or identified by the department under s. NR 20.14 (9) as having the VHS virus present, and that suckers harvested from waters of the state may not be transported away from those waters alive.

6. Summary of and preliminary comparison with any existing or proposed federal regulation: In late 2006 the U.S. Department of Agriculture's Animal and Plant Health Inspection Service (USDA APHIS) issued an emergency order limiting the movement of live fish from Ontario or Quebec into the United States and limiting the interstate movement of live fish. That order does not apply to fish moved within the boundaries of individual states, and there are no known or proposed federal regulations that would do so.

7. Comparison of similar rules in adjacent states (Minnesota, Iowa, Illinois and Michigan): In late 2006 the U.S. Department of Agriculture's Animal and Plant Health Inspection Service (USDA APHIS) issued an emergency order limiting the movement of live fish from Ontario or Quebec into the United States and limiting the interstate movement of live fish among the eight Great Lakes states and from those states to other parts of the United States. That order does not apply to fish moved within the boundaries of individual states.

The Wisconsin Department of Agriculture, Trade, and Consumer Protection is a partner in this area. Under its regulations, no fish may be imported for stocking, use as bait, or fish farming without a permit from DATCP, and it has revised its Administrative Code to require testing for VHS virus in all fish proposed for importation from VHS-affected waters outside of Wisconsin. DATCP is also developing emergency rules to provide additional protections against the spread of the virus.

New regulations have been put into effect in New York, Pennsylvania, Ohio, and Michigan. Michigan is the only adjoining state that has enacted new regulations to address the VHS threat. Like ours, Michigan's regulations also limit the movement of live fish, fish eggs, and water from one water body to another. Michigan's approach to minimizing the risk of spread of the virus in bait fish differs from ours. 1) Their new regulations apply only to bait species on a "prohibited species" list. 2) They provide a system of certification so that anglers can obtain bait that has been certified as disease-free. 3) They classify their waters as affected ("positive management area"), at risk ("surveillance management area"), or disease-free ("VHS-free management area"). The allowed use of bait then depends on the species, the certification status, the source of the bait, and location of the lake or stream where the bait will be used.

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 rule: The World Health Organization for Animal Health (OIE) lists VHS as a "notifiable" disease, meaning that outbreaks must be reported immediately. On April 4, 2007 the Natural Resources Board adopted Order FH-22-07(E) to control the spread of the VHS virus in Wisconsin. Provisions of that rule were clarified and expanded in NRB Order FH-25-07(E), adopted on April 25, 2007. At the time those rules were adopted, VHS virus had caused fish kills in the lower Great Lakes, but had not been documented west of Lake Huron. Department biologists believed it was probably already in Lake Michigan, and possibly in Lake Superior and the Mississippi River.

On May 11, the University of Wisconsin Veterinary Diagnostic Lab informed the department that samples of freshwater drum taken from Little Lake Butte des Morts had tested positive for the VHS virus. For purposes of controlling the spread of the disease, it was then reasonable to regard Lake Winnebago and the majority of the Fox/Wolf River system as infected, and prudent to assume that the virus might appear in any inland water. Accordingly, Order FH-28-07(E) was adopted, expanding the geographic applicability of the emergency rules to include the Lake Winnebago and the Fox/Wolf River system.

The Aquatic Animal Health Code of the OIE provides specific guidance regarding the management of VHS. The rules proposed in this Order are consistent with that code. USDA APHIS has adopted emergency regulations to limit the transfer of VHS virus among states or into the United States from Ontario or Quebec. The rules proposed in this Order expand those protections by reducing the risk of spread of the virus from infected to uninfected waters.

9. Any analysis and supporting documentation that the agency used to determine in the rule's effect on small businesses under s. 227.114, Stats., or that was used when the agency prepared an economic impact report: The small business most affected by the rule are wild-bait harvesters and all other businesses that provide supplies and services to sport fishers. The harvesters will be negatively affected by limitations on where bait may be withdrawn from, while all other sport fishing-related businesses would be hurt by the effects of VHS if it is allowed to spread freely across the state. We have learned through the implementation of permitting requirements under the prior emergency rules that there are approximately 88 individuals who make a living harvesting wild bait. Most of those are very small operations. Sport fishing is a 2.9 billion dollar industry that supports more than 31,000 jobs in Wisconsin and generates over \$200,000,000 in state tax revenue.

10. Effect on small business, including how the rule will be enforced: The most significant economic impact of the rule will be on businesses involved in bait harvest, importation, culture, or sale. Businesses handling bait harvested in VHS-affected areas will be adversely affected, while those involved in culturing bait in fish farms may benefit. The rule will also make it harder for some crayfish trappers to obtain fish for use as bait in their traps, but allows other types of bait to be used in lieu of fish. Similarly, the rule will make it harder for some turtle trappers to obtain fish for use as bait, but current rules already allow the use of other types of bait. The rule will be enforced by department conservation wardens, county district attorneys, and county circuit courts through the use of citations and civil or criminal complaints under the provisions of ch. 29, Stats.

11. Agency contact person:

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SECTION 1. NR 19.05 (3) (e) and (f) are created to read:

NR 19.05 (3) (e) Live minnows that were obtained from a Wisconsin bait dealer and subsequently possessed by the person while on an inland or outlying water, its bank or shore, if the minnows have not been exposed to water or fish from that inland or outlying water.

(f) Live minnows that were obtained from a Wisconsin bait dealer and subsequently possessed by the person while on an inland or outlying water, its bank or shore, if the minnows will be used for bait only on the same inland or outlying water, its bank or shore.

SECTION 2. NR 19.055 (5) is created to read:

NR 19.055 (5) Subsection (1) does not apply to water in a container that holds live bait minnows obtained from a Wisconsin bait dealer, if the container holds no other fish, contains 2 gallons or less of water, and is used to transport only live minnows that have not been exposed to water or fish from that inland or outlying water describe or will be used for bait only on the same inland or outlying water, its bank or shore.

SECTION 3. NR 20.05 (6) and (7) are amended to read:

NR 20.05 (6) Fish for, possess or control fish in excess of the daily bag limit authorized in s. NR 20.20 for that water while on the waters, banks or shores of waters or while fishing except as authorized on specific waters by s. NR 20.35, 20.36 or 20.37 and minnows described in s. NR 19.05 (3) (e) or (f).

(7) ~~Possess~~ Except for minnows purchased from a Wisconsin bait dealer, possess or control fish unless they are included as part of the daily bag limit. Fish that are not released immediately shall be included as part of the daily bag limit.

SECTION 4. NR 20.14 (9) and (10) are created to read:

NR 20.14 (9) Notwithstanding any other provision in this chapter or chs. NR 21 to 23, use or operate any net, trap or similar device for the taking of minnows, or fish for minnows except suckers for any purpose using any gear in Lake Michigan, Green Bay, Lake Superior, the Mississippi River, Lake Winnebago, the Fox River from Lake Winnebago to Green Bay, or any bay, slough or backwater of these waters, or any water connected to these waters, upstream to the first dam or other obstruction impassible to fish, or in any other water where the department has determined that the Viral Hemorrhagic Septicemia virus is present based on test results or other empirical evidence. If the department determines that the Viral Hemorrhagic Septicemia virus is present in any additional water body, it shall promptly notify the public of its determination by issuing a press release, by publication in the official state newspaper, and by such other means as the department determines are reasonably likely to inform the public.

(10) Transport away from the water or its bank or shore any live sucker taken from Lake Michigan, Green Bay, Lake Superior, the Mississippi River, Lake Winnebago, the Fox River from Lake Winnebago to Green Bay, or any bay, slough or backwater of these waters, or any water connected to these waters, upstream to the first dam or other obstruction impassible to fish, or from any additional water where the department has determined under sub. (9) that the Viral Hemorrhagic Septicemia virus is present.

SECTION 5. NR 20.20 (73) (h) is amended to read:

(73) SPECIES OR WATERS NOT LISTED IN SUBS. (1) TO (72)

| COUNTY AND SPECIES | WATERS | AUTHORIZED METHODS | OPEN SEASON (both dates inclusive) | DAILY BAG LIMIT | MINIMUM LENGTH OR OTHER SIZE RESTRICTIONS (INCHES) |
|--------------------|--|--------------------|------------------------------------|-----------------|--|
| (h) Minnows | 1. Lake Superior, its bays and tributaries | a. None. | No open season | ----- | ----- |

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| | 2. Green Bay, Lake Michigan | a. Dip netting <u>and hook and line</u> for suckers only. <u>Unless authorized under s. NR 19.05(3), no person may transport live suckers away from Green Bay or Lake Michigan.</u> | Continuous | None | None |
| | 3. Lake Michigan tributaries, major Green Bay tributaries | a. Hook and line, minnow dip netting, minnow trapping and minnow seining for suckers only. <u>Unless authorized under s. NR 19.05(3), no person may transport live suckers away from Lake Michigan tributaries or major Green Bay tributaries or any water connected to these waters, upstream to the first dam or other obstruction impassible to fish.</u> | Continuous | 600 suckers in total | None |
| | 4. All other Green Bay tributaries upstream to the first dam or lake | a. Minnow dip <u>Dip netting, minnow trapping</u> and minnow seining for suckers only. <u>Unless authorized under s. NR 19.05(3), no person may transport live suckers away from all other Green Bay tributaries upstream to the first dam or lake or</u> | Continuous | 600 suckers in total | None |

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| | | <p><u>any water connected to these waters, upstream to the first dam or other obstruction impassible to fish.</u></p> <p>b. Hook and line for suckers only.</p> | <p>First Saturday in May to the first Sunday in March.</p> | <p>600 suckers in total</p> | |
| | <p>5. Trout streams and tributary spring holes inhabited by trout</p> | <p>a. Hook and line, <u>and minnow trapping, except as established under subpar. b.</u> No more than 3 traps per person. Traps must be raised and emptied at least once every 24 hours</p> <p>b. <u>In waters listed in or identified under s. NR 20.14(9), hook and line for suckers only. Unless authorized under s. NR 19.05(3), no person may transport live suckers away from any trout stream or tributary spring hole listed in or identified under s. NR 20.14(9).</u></p> | <p>During the open season for trout</p> <p><u>During the open season for trout</u></p> | <p>600 in total</p> <p><u>600 in total</u></p> | <p>None</p> <p><u>None</u></p> |
| | <p>6. All other waters not listed in subs. (1) to (72) or this paragraph</p> | <p>a. Hook and line, minnow dip netting, minnow seining, <u>and minnow trapping, except as established under subpar. b.</u> Traps must be raised and emptied at least once every 48 hours.</p> <p>b. <u>In waters listed in or identified</u></p> | <p>Continuous</p> <p><u>Continuous</u></p> | <p>600 suckers in total</p> <p><u>600 suckers in total</u></p> | <p>None</p> <p><u>None</u></p> |

| | | | | | |
|--|--|---|--|--|--|
| | | <p><u>under s. NR 20.14(9), hook and line for suckers only. Unless authorized under s. NR 19.05(3), no person may transport live suckers away from any waters of the state.</u></p> | | | |
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SECTION 6. STATEMENT OF EMERGENCY. The Department of Natural Resources finds that an emergency exists and the foregoing rules are necessary for the immediate preservation of the public peace, health, safety or welfare. A statement of facts constituting the emergency is:

The World Health Organization for Animal Health (OIE) lists Viral Hemorrhagic Septicemia (VHS) as a "notifiable" disease, meaning that outbreaks must be reported immediately. On May 11, the Department received notice that freshwater drum collected from Little Lake Butte des Morts (part of the Lake Winnebago system) were infected with the VHS virus. On May 23, May 24, and June 1, respectively, the Department learned that brown trout from Lake Michigan, smallmouth bass from Sturgeon Bay, and lake whitefish from Lake Michigan had tested positive for the virus.

Earlier, VHS had been discovered in the Great Lakes, and was known to be moving from the lower lakes (Ontario and Erie), where it has already caused large-scale fish kills, via Huron, where it has been present since 2005, to the upper lakes (Michigan and Superior). Lake Michigan is connected to the Mississippi River by the Chicago Sanitary and Ship Canal and Illinois River, allowing fish and fish diseases to reach the Mississippi drainage basin. Information obtained pursuant to an emergency rule that took effect May 17 revealed that 88 bait dealers harvest live wild minnows from a large number of state waters, including waters that are near or connected to the Mississippi river, the Lake Winnebago system, Green Bay and Lakes Michigan and Superior.

Twenty-seven species of Wisconsin fish have been identified as susceptible by the OIE or USDA APHIS, including most of our most important recreational and commercial species. It is expected the USDA APHIS will soon expand its emergency order limiting the interstate transportation of these species to apply to all fish species. The VHS virus can be transported from infected areas to areas where it is not yet present via live fish, fish eggs, refrigerated or frozen dead fish, or water where infected fish have been present. The presence of VHS virus in Wisconsin is therefore a threat to the public health or safety or to the environment.

SECTION 7. EFFECTIVE DATE. This rule shall take effect upon publication, as provided in s. 227.24 (1) (d), Stats. Notwithstanding the effective date of these rules, they shall remain in effect only for 150 days from November 2, 2007, the effective date of Order No. FH-40-07(E), unless extended pursuant to s. 227.24 (2), Stats.

SECTION 8. BOARD ADOPTION. The foregoing emergency rule was approved and adopted by the State of Wisconsin Natural Resources Board on March 26, 2008.

Dated at Madison, Wisconsin March 27, 2008.

STATE OF WISCONSIN
 DEPARTMENT OF NATURAL RESOURCES
 By _____
 Matthew J. Frank, Secretary