

Filed with LRB: June 16, 2014
Publication date: June 14, 2014
Effective Dates: June 14, 2014 through November 10, 2014
Hearing Dates: July 14, 2014, July 16, 2014
Extension Through: March 3, 2015

EmR1409

ORDER OF THE STATE OF WISCONSIN NATURAL RESOURCES BOARD
AMENDING RULES

The Wisconsin Natural Resources Board adopts an order to amend NR 20.36(2) and 23.055(2) relating to modifications in daily bag limits and minimum size limits in response to tribal harvest
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The statement of scope for this rule was approved by the governor on February 14, 2014, published in Register No. 698 on February 28, 2014 and approved by the natural Resources Board on March 19, 2014.

This emergency rule was approved by the Natural Resources Board on May 28, 2014, and by the governor on June 6, 2014.

FH-03-14(E)

Analysis Prepared by the Department of Natural Resources

1. Statute Interpreted: Sections 29.014(1) and 29.041, Stats., have been interpreted as giving the department the authority to make changes to fishing regulations on inland, outlying, and boundary waters of Wisconsin.

2. Statutory Authority: ss. 29.014(1) and 29.041, Stats.

3. Explanation of Agency Authority:

Section 29.014(1), Stats., directs the department 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.

Section 29.041, Stats., provides that the department may regulate fishing on and in all interstate boundary waters and outlying waters.

4. Related Statutes or Rules: The department will consider a related permanent rule at a later time that considers long-term tools that provide the flexibility necessary to adjust angler regulations associated with reductions in walleye bag limits on off-reservation waters within the Ceded Territory.

5. Plain Language Analysis: Pursuant to litigation arising from *Lac Courte Oreilles v Voigt*, 700 F. 2d 341 (7th Cir. 1983), the six Wisconsin bands of Lake Superior Ojibwe (Chippewa Bands) have the right to take walleye from off-reservation waters using efficient methods such as spearing and netting. To accommodate harvest by high efficiency capture methods such as spearing and netting, the department adjusts angling regulations in lakes where such harvest occurs. This emergency rule is needed to promote the preservation and protection of public peace, health, safety, and welfare in the Ceded Territory of Wisconsin by minimizing regional social and economic disruption known to be associated with reductions in walleye bag limits on off-reservation waters.

Based on projected harvest goals of the Chippewa Bands on off-reservation lakes each year, daily bag limits for sport anglers (typically 5 walleye/ day) may be adjusted to prevent a total harvest of more than 35% of the adult walleye population, and size limits may be adjusted to prevent a total harvest of more than 27% of the adult muskellunge population. Adjustments to 3, 2, or 1 walleye/day bag limits are typically made in early spring using safe harvest levels determined by the department on individual waters within the Wisconsin Ceded Territory.

In response to actual tribal harvest of walleye or muskellunge, the department may raise the daily bag limit or reduce the minimum size limit as appropriate using the percent of the safe harvest level expected to be harvested through the first Sunday in March of the following year. These readjustments are typically made in late spring or early summer, after spring spearing and netting harvest has diminished.

This rule would continue to allow the department to readjust daily bag limits based on actual tribal harvest, but would enable the department to additionally consider expected harvest by non-tribal anglers. Lower bag limits at the start of the fishing season result in lower angler harvests, particularly in the month of May. It may not be necessary to continue stringent reductions in angler bag limits for the entire duration of the angling season to meet overall goals for the reduction of angler harvest.

Section 1 of the rule provides flexibility for a readjustment of the daily bag limits that considers that reduction of angler harvest realized by reduced angler bag limits during the month of May.

6. Summary of, and Comparison with, Existing or Proposed Federal Statutes and Regulations: The 1991 Voigt Decision affirms that the state bears responsibility and authority for management of all natural resources of the state. However, this responsibility and authority must be exercised in a manner that does not infringe on the Chippewa tribes' treaty rights as determined by the Voigt Decision. As such, the department is required to regulate angler harvest in a manner that both accounts for and accommodates tribal spearing and netting harvest, though the manner of such regulation is not specifically prescribed.

7. Comparison with Similar Rules in Adjacent States: In Minnesota, several bands of Lake Superior Chippewa have harvested walleye and northern pike from Mille Lacs since 2000. Annual allowable total catch quotas are calculated for the lake and apportioned between tribal members and anglers. The State of Minnesota adjusts the size of fish allowed for angler harvest annually (a "harvest slot" limit), based on walleye population size and the age composition of that population.

Off-reservation spear harvest also occurs in Michigan, and the state of Michigan and the Great Lakes Indian Fish and Wildlife Commission use the same model for calculating Safe Harvest that is used in Wisconsin. Michigan has no specific response to tribal harvest in the regulations for state anglers but may consider such adjustments in the near future.

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

To accommodate harvest by high efficiency capture methods such as spearing and netting, the department adjusts angling regulations in lakes where such harvest occurs. In response to actual tribal harvest of walleye or muskellunge, the department may raise the daily bag limit or reduce the minimum size limit as appropriate using the percent of the safe harvest level expected to be harvested through the first Sunday in March of the following year. This rule would continue to allow the department to readjust daily bag limits based on actual tribal harvest, but would enable the department to additionally consider expected harvest by non-tribal anglers.

The department ensures the accuracy, integrity, objectivity and consistency of data used in preparing the proposed rule.

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

Exact economic impact of the rule is unknown. The proposed rule does not directly affect businesses; it affects sport anglers. No expenses are imposed on businesses, business associations, public utility rate payers, or local governmental units.

Current rules limit the department's ability to fully consider all relevant harvest regulations when readjusting bag limits in late spring, and result in unnecessarily restrictive angling regulations that directly affect anglers and indirectly affect those who provide equipment, food, lodging and other support to both local and visiting anglers. Considering additional information when readjusting angler bag limits and/or size limits will allow for implementation of reasonable angling regulations that still provide the necessary degree of protection for walleye populations and do not in any way restrict or infringe upon tribal usufructuary rights. An indeterminate positive impact is expected for businesses that directly or indirectly support anglers by encouraging additional participation in angling.

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

No additional compliance or reporting requirements will be imposed on small businesses as a result of these rule changes. No implementation or compliance costs are expected to be incurred.

11. Agency Contact Person: Steve Hewett, 608-267-7501, steven.hewett@wisconsin.gov

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:

Steve Hewett

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Box 7921

Madison, WI 53707

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Written comments may also be submitted to the Department using the Wisconsin Administrative Rules Internet Web site at <http://adminrules.wisconsin.gov>.

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

SECTION 1. NR 20.36(2) is amended to read:

NR 20.36(2) READJUSTMENT. In response to actual tribal harvest and anticipated angler harvest, the secretary may raise the daily bag limit or reduce the minimum size limit to the limit specified as appropriate using the percent of the safe harvest level expected to be harvested through the first Sunday in March of the next year as indicated in sub. (1). If actual harvest subsequently exceeds the expected harvest level, the daily bag limit for walleye may be reduced

or the minimum size limit for muskellunge may be increased the following year to reflect actual harvest for that year and harvest goals of the Chippewa bands for the next year. If a new population estimate is made, the safe harvest level shall be changed accordingly and the secretary may adjust the daily bag limit or minimum size limit according to the percentage of the new safe harvest level that is expected to be harvested as indicated in sub. (1), where deemed necessary to remain consistent with the safety factors established under *Lac Courte Oreilles v. State of Wis.*, 707 F. Supp. 1034 (W. D. Wis. 1989). The readjusted daily bag and size limits shall be in effect until the first Sunday in March of the year following the tribal harvest.

SECTION 2. NR 23.055(2) is amended to read:

NR 23.055(2) READJUSTMENT. In response to actual tribal harvest and anticipated angler harvest, the secretary may raise the daily bag limit or reduce the minimum size limit to the limit specified as appropriate using the percent of the safe harvest level expected to be harvested as indicated in sub. (1). If a new population estimate is made, the safe harvest level shall be changed accordingly and the daily bag limit or minimum size limit shall be adjusted according to the percentage of the new safe harvest level that is expected to be harvested as indicated in sub. (1). The readjusted daily bag and size limits shall be in effect until the first Sunday in March of the year following the tribal harvest.

SECTION 3. STATEMENT OF EMERGENCY. This emergency rule is needed to promote the preservation and protection of public peace, health, safety, and welfare in the Ceded Territory of Wisconsin by minimizing regional social and economic disruption known to be associated with reductions in walleye bag limits on off-reservation waters.

SECTION 4. EFFECTIVE DATE. This rule shall take effect upon publication in the official state newspaper, as provided in s. 227.24(1)(d), Stats.

SECTION 5. BOARD ADOPTION. This rule was approved and adopted by the State of Wisconsin Natural Resources Board on May 28, 2014.

Dated at Madison, Wisconsin _____.

STATE OF Wisconsin DNR

DEPARTMENT OF NATURAL RESOURCES

BY _____

Cathy Stepp, Secretary

(SEAL)