

Clearinghouse Rule 09-016
ORDER OF THE STATE OF WISCONSIN NATURAL RESOURCES BOARD
AMENDING AND CREATING RULES

The Wisconsin Natural Resources Board proposes to amend ss. NR 25.02 (39), 25.03 (1) (b) to (d), (2) and (3), 25.06 (2) (a) 2. (intro.) and (3) (a) 2. and 6., 25.07 (3) (a) to (c), and 25.135 (1) (a) 1.; and to create s. NR 25.06 (2) (a) 3., and (3m), relating to commercial fishing in outlying waters and affecting small business

FH-21-08

Analysis Prepared by Department of Natural Resources

- 1. Statutes interpreted.** Sections 23.09, 29.011 (1) and (2), 29.014 (1), 29.041, and 29.519, Stats.
- 2. Statutory authority.** Sections 23.11 (1), 29.014 (1), 29.041, 29.519 (1m) (b) and (c) and (2) (d), and 227.11 (2) (a), Stats.
- 3. Explanation of agency authority to promulgate the proposed rules under the statutory authority.** Section 23.11 (1), Stats., grants the department such 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 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, and s. 29.041, Stats., provides that the department may regulate fishing on and in all interstate boundary waters, and outlying waters.

Section 29.519 (1m) (b), Stats., authorizes the department to limit the number of Great Lakes commercial fishing licenses and to designate the areas in the outlying waters under the jurisdiction of this state where commercial fishing operations are restricted. Section 29.519 (1m) (b), Stats., also authorizes the department to promulgate rules to establish formulas for the allocation of the species harvest limits among commercial fishing licensees or for the allotment of individual licensee catch quotas.

Under s. 29.519 (1m) (c), Stats., the department may promulgate rules defining the qualifications of licensees in the reasonable exercise of this authority, giving due consideration to residency, past record including compliance with the records requirements, fishing and navigation ability and quantity and quality of equipment possessed.

Under s. 29.519 (2) (d), Stats., the department must promulgate rules governing the transfer of commercial fishing licenses between individuals equally qualified to hold the licenses and to members of a licensee's immediate family, provided the rules assure the wise use and conservation of the fish resources being harvested under the license. These rules shall relate only to those waters in which the number of licenses is limited.

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 statutes.

- 29.539 Sale of game or fish.
- 29.563 Fee schedule.
- 29.924 Investigations; searches.
- 29.931 Seizures.
- 29.971 General penalty provisions.
- 29.973 Commercial fish reporting system.
- 29.984 Commercial fish protection surcharge.
- 29.99 Great Lakes resource surcharge.
- 29.991 Fishing net removal surcharge.

5. Plain language analysis of the proposed rule. SECTION 1. of the Order changes the definition of the outlying waters commercial fishing “license year” from fiscal year to calendar year, but only after an 18-month long transition license year.

SECTION 2. of the Order pertains to licensing of commercial fishers on Lake Superior. Beginning with applications due in 2011 for licensing during the 2012 license year, a minimum harvest requirement for annual relicensing is established, parallel with the requirement for Lake Michigan as revised by SECTION 3. of the Order. Under the proposed rule, the applicant must have reported whichever is less: a harvest during the previous year of at least 5,000 pounds, or 20 times the lesser of a) the average daily reported harvest taken by gill net during the 12 months ending 2 months before the end of the license year by all fishers on Lake Superior, or b) the average daily reported harvest taken by trap net during the 12 months ending 2 months before the end of the license year by all fishers on Lake Superior. As with Lake Michigan, special provisions are made for years when harvest limits are changed by the department and when unavoidable circumstances prevented an applicant from meeting the minimum harvest requirement. This SECTION also amends the priority system used to rank applications for issuance of licenses.

SECTION 3. of the Order addresses 4 issues in licensing of commercial fishers on Lake Michigan.

- 1) It allows up to 65 commercial licenses in any license year, replacing a provision under which the number of available licenses in any license year was reduced if a license is not renewed.
- 2) It establishes a priority system to rank applications for issuance of licenses that parallels the priority system used for Lake Superior.
- 3) It reduces the alternate minimum harvest requirement and changes the reference period used in computing the alternate minimum. Under the current rule, to qualify for relicensing, an applicant must show (for smelt only or for all commercial species other than smelt taken together) that during the preceding license year, he or she reported the harvest from any geographic zone of a) a specified poundage or b) at least 30 times the average daily reported harvest by all fishers in the same geographic zone during the 12 months ending one month before the end of the license year, whichever is less. Under the proposed rule, the standards for annual relicensing are amended so that an applicant’s harvest during preceding license year is compared with 20 times the average daily reported harvest, instead of 30 times the average daily

reported harvest, of all commercial fishers in that zone and the reference year is changed from the 12 months ending one month before the end of the license year to the 12 months ending two months before the end of the license year.

4) It specifies some examples of unavoidable circumstances that the department may consider in issuing licenses despite an applicant's failure to meet the minimum harvest requirement. The current rules provide that a license may be reissued even if the minimum catch requirement is not met, if the department determines that unavoidable circumstances prevented an applicant from meeting it.

SECTIONS 4. and 5. of the Order realign the northern chub fishing zone's harvest periods beginning January 1, 2011 to correspond with the calendar year-based definition of the outlying waters commercial fishing "license year" established by SECTION 1. of the Order.

SECTIONS 6. and 7. of the Order clarify the requirement that lake trout tags issued on Lake Superior are issued for the lake trout open season, as intended by the 2005 State-Tribal Lake Superior Agreement.

SECTION 8. of the Order provides that for the single 18-month license year required for transition from the current fiscal-year-based license year to the new calendar-year-based license year, the "annual" commercial harvest limits for Lake Michigan shall be 2.0 times greater than those that apply to 12-month license years, but with limitations as to when during the 18-month transition license year the fish may be harvested by Lake Michigan licensees who have individual catch quotas.

SECTION 9. of the Order makes housekeeping changes to the quota allocation system needed to correspond with the new calendar-year-based license year.

SECTION 10. of the Order makes a housekeeping change to the fleet reporting rule to correspond with the Lake Superior annual relicensing criteria established by SECTION 2. of the Order.

6. Summary of and preliminary comparison with any existing or proposed federal regulation that is intended to address the activities to be regulated by the proposed rule.
The department is not aware of any existing or proposed federal regulation that would govern commercial fishing in Wisconsin's waters of Lake Michigan and Green Bay or Lake Superior.

7. Comparison of similar rules in adjacent states (Minnesota, Iowa, Illinois and Michigan).
Iowa has no Great Lakes waters and therefore no commercial fishing regulations applicable to such waters. The central issues in this rule proposal are 1) number of Great Lakes licenses, 2) annual relicensing criteria, and 3) duration of the license year.

Number of Great Lakes commercial fishing licenses

Illinois – The number of licenses is fixed at 5.

Michigan – The number is limited to the number issued the previous year. The number issued during the current license year is 56. This does not include Native American commercial fishers fishing under Tribal authority.

Minnesota – The number of Lake Superior master licenses is limited to a maximum of 25.

Commercial fishing license year

Illinois – April 1 through March 31 of the following year.

Michigan – January 1 through December 31.

Minnesota – March 1 through February 28 of the following year.

Relicensing requirements

Illinois – Commercial licenses are re-issued every 3 years if several requirements are met. Licenses may be issued to corporations. The licensing requirements for individuals and corporations are a) actual residence (for individuals) or incorporation (for corporations) in Illinois for the immediately preceding year, b) legal ownership or legal control of a vessel of at least 12 net tons with valid current Coast Guard documentation, an Illinois port of registration, and demonstrated compliance with all State requirements for such vessels, c) possession of at least 6,000 feet of gill net meeting specified standards, d) agreement to keep appropriate daily records, e) an annual operational plan for the coming year, f) agreement to permit Illinois DNR biologists and conservation police officers to obtain information about the harvest as deemed necessary, g) licensing of all equipment as required by state law, h) a boat captain who is a legal resident of Illinois.

Michigan – Annual relicensing requires legal possession of the license during the entire previous year or acquisition of the license by transfer during that year.

Minnesota – To qualify for relicensing, an applicant must have landed fish in the previous year with a value of at least \$1,500, and must have engaged in commercial fishing for at least 30 days of the previous year. An applicant may be issued a license, at the discretion of the commissioner, if failure to meet the requirements for the dollar value of fish landed or number of days fished resulted from illness or other mitigating circumstances, or the applicant has reached the age of 65 and has been licensed at least five of the previous ten years.

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. This rule was not based on a technical analysis of data. It was developed in consultation with commercial fishers to address expressed concerns regarding relicensing criteria for Great Lakes commercial fishing licenses and the dates marking the start and end of a commercial fishing license year.

9. 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. We know that small businesses engaged in commercial fishing and wholesale fish dealing may be affected by the rule. However, we currently have no basis for quantifying the economic impacts of the rule.

10. Effects on small business, including how the rule will be enforced. This rule is of interest to commercial fishers and was initiated in response to their expressed concerns. For commercial fishers on Lake Michigan it will allow annual relicensing in some situations that would otherwise have led to denial of relicensing requests. For commercial fishers on Lake Superior, new minimum catch requirements are established that may require additional fishing effort by some individuals in order to remain licensed in succeeding years. The establishment of a calendar-year-based license year will improve business planning for some licensees by making the license

year complement the biological fishing year for some commercial fish species.

The rule will be enforced by department Conservation Wardens under the authority of chapters 23 and 29, Stats., through routine patrols, record audits of wholesale fish dealers and commercial fishers and follow up investigations of citizen complaints.

11. Agency contact person (including e-mail and telephone number).

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SECTION 1. NR 25.02 (39) is amended to read:

NR 25.02 **(39)** “License year” means that period from July 1 through June 30 of the succeeding year until June 30, 2010, after which “license year” means the period of July 1, 2010 through December 31, 2011. Beginning January 1, 2012, “license year” means the period of January 1 through December 31.

SECTION 2. NR 25.03 (1) (b) to (d) are amended to read:

NR 25.03 **(1)** (b) Applications for licenses authorizing commercial fishing on Lake Superior which have been filed in accordance with sub. (3) shall be reviewed and approved or denied pursuant to the following criteria:

1. ~~For the first year of eligibility the applicant must show proof of a \$5,000 investment in commercial fishing equipment.~~ The applicant shall show proof of a \$5,000 investment in commercial fishing equipment not to include vehicles other than those directly employed in operating nets.

2. ~~To retain eligibility for the second year and thereafter, the applicant shall show proof of a \$5,000 investment in commercial fishing equipment not to include vehicles other than those directly employed in operating nets.~~ Except as provided in subd. 3. or 4., for the license years beginning January 1, 2012 and thereafter, the applicant or, where the applicant obtained the license by transfer, the transferor and applicant jointly shall have reported a minimum commercial harvest during the previous license year of at least 5,000 pounds or X pounds, whichever is less, where X = 20 times the lesser of the average reported daily harvest of commercial fish taken by gill nets or the average reported daily harvest of commercial fish taken

by trap nets by all licensed commercial fishers on Lake Superior during the 12 months preceding 2 months before the end of the license year preceding the license year for which application is being made.

3. Notwithstanding subd. 2., for the license year immediately following a reduction in the harvest limit of any commercial fish species, the minimum commercial harvest required for licensing shall, for each applicant, be reduced by an amount equal to that applicant's reported harvest of that species for the license year before the harvest limit was reduced or, where the applicant obtained the license by transfer, the transferor's and applicant's combined reported harvest, of that species for the license year before the harvest limit was reduced.

4. Neither subd. 2. or 3. applies if the department determines that unavoidable circumstances prevented the applicant or the transferor from complying with subd. 2. or 3. Examples of unavoidable circumstances may include but are not limited to serious injury to or illness of the applicant or an immediate family member, sudden unavailability of qualified crew members, mechanical breakdown of or structural damage to the applicant's vessel, and extended or recurring bad weather.

5. Any applicant failing to meet the criteria of ~~par. (b)~~ this paragraph will not be eligible to reapply for ~~such a~~ license until the application period for the succeeding license year.

(c) Licenses shall be issued according to the following priorities to applicants otherwise qualified under par. (b):

1. First to individuals who have been licensed commercial fishers on Lake Superior during the preceding license year and who are applying for renewal of that license.

2. Next to individuals who were not licensed the preceding license year, but who had been licensed commercial fishers on Lake Superior for at least 2 years.

3. Next to individuals who worked as a licensed crew member on Lake Superior under s. 29.519 (4) (a), Stats., for at least 2 years.

4. Next to other Wisconsin residents and nonresidents residing in states allowing Wisconsin residents similar privileges.

5. When the number of qualified applicants for licenses exceed the number of licenses available and those applicants are not affected by the priorities established in ~~par. (e)~~ subds. 1. to 4., the licenses shall be awarded on the basis of random selection from all eligible applications.

(d) The Lake Superior commercial fishing board shall review applications for licenses and recommend approval or denial of licenses to the department no later than ~~May 31~~ one month before the end of the license year preceding the license year for which application is being made.

SECTION 3. NR 25.03 (2) and (3) are amended to read:

NR 25.03 (2) LAKE MICHIGAN. (a) ~~The number of licenses authorizing commercial fishing in Lake Michigan issued for any license year shall be limited to the number issued for the previous year.~~ No more than 65 licenses authorizing commercial fishing in Lake Michigan may be issued for each license year. This section does not apply to licenses for fishing only for the harvest of rough fish from outlying waters under a permit or contract issued under s. 29.417 or 29.421, Stats.

(am) A person may hold more than one license under s. 29.519 (1m), Stats., for commercial fishing on Lake Michigan, if the person meets the criteria of par. (b) for each license separately.

(b) Applications for licenses authorizing commercial fishing in Lake Michigan which have been filed in accordance with sub. (3) shall be reviewed and approved or denied pursuant to the following criteria:

1. The applicant shall show proof of a \$5,000 investment in commercial fishing equipment not to include vehicles other than those directly employed in operating nets.

~~2. The applicant held a Lake Michigan commercial fishing license throughout the previous license year or received a license by transfer under s. NR 25.04.~~

~~3. 2.~~ Except as provided in ~~subd. 4. or 5.~~ subd. 3. or 4., the applicant or, where the applicant obtained the license by transfer, the transferor and applicant jointly shall have reported a minimum commercial harvest during the previous license year of either of the following:

a. Smelt of at least 147,870 or X1 total pounds, whichever is less, from zone 1, or 76,770 or X3 total pounds, whichever is less, from zone 3, where X1 and X3 = 30 times the average reported total daily harvest of smelt taken by trawls from zone 1 or 3, respectively, by all licensed commercial fishers during the 12 ~~months~~ month period preceding June 1 ~~2 months before the end of the previous license year~~ preceding the license year for which application is being made.

b. ~~Yellow perch, menominees, whitefish, chubs or any combination of these species~~ Commercial fish other than smelt of at least 3,570 or X1 total pounds, whichever is less, from zone 1, 13,656 or X2 total pounds, whichever is less, from zone 2, or 19,638 or X3 total pounds, whichever is less, from zone 3, where X1, X2 and X3 = ~~30~~ 20 times the average reported total daily harvest of ~~yellow perch, menominees, whitefish and chubs~~ commercial fish other than smelt from zone 1, 2 or 3, respectively, by all licensed commercial fishers on Lake Michigan during the 12 months preceding ~~June 1~~ 2 months before the end of the previous license year preceding the license year for which application is being made.

~~4. 3.~~ Notwithstanding ~~subd. 3.~~ subd. 2., for the license year immediately following a reduction in the harvest limit of ~~yellow perch, whitefish, chubs or menominee~~ any commercial fish other than smelt, the minimum commercial harvest from each zone required for licensing shall, for each applicant, be reduced by an amount equal to that applicant's reported harvest or, where the applicant obtained the license by transfer, the transferor's and applicant's combined reported harvest, of that species from that zone for the license year before the harvest limit was reduced.

~~5. 4.~~ Neither ~~subd. 3. or 4.~~ subd. 2. or 3. applies if the department determines that unavoidable circumstances prevented the applicant or the transferor from complying with ~~subd. 3. or 4.~~ subd. 2. or 3. Examples of unavoidable circumstances may include but are not limited to serious injury to or illness of the applicant or an immediate family member, sudden unavailability of qualified crew members, mechanical breakdown of or structural damage to the applicant's vessel and extended or recurring bad weather.

5. Any applicant failing to meet the criteria of this paragraph will not be eligible to reapply for a license until the application period for the succeeding license year.

(c) Licenses shall be issued according to the following priorities to applicants otherwise qualified under par. (b):

1. First to individuals who have been licensed commercial fishers on Lake Michigan during the preceding license year and who are applying for renewal of that license.

2. Next to individuals who were not licensed the preceding license year, but who had been licensed commercial fishers on Lake Michigan for at least 2 years.

3. Next to individuals who worked as a licensed crew member on Lake Michigan under s. 29.519 (4) (a), Stats., for at least 2 years.

4. Next to other Wisconsin residents and nonresidents residing in states allowing Wisconsin residents similar privileges.

5. When the number of qualified applicants for licenses exceed the number of licenses available and those applicants are not affected by the priorities established in subds. 1. to 4., the licenses shall be awarded on the basis of random selection from all eligible applications.

(d) The Lake Michigan commercial fishing board shall review applications for licenses and recommend approval or denial of licenses to the department no later than one month before the end of the license year preceding the license year for which application is being made.

(3) APPLICATION. Application for licenses authorizing commercial fishing in the outlying waters shall be made on forms available from the department and shall be returned to the department no later than ~~April 30 preceding~~ 60 days before the license year for which application

is being made. To be timely, applications, if mailed, must be postmarked no later than ~~April 30~~ preceding 60 days before the license year for which application is being made and if submitted to the department other than by mail must be received and stamped with a date stamp of the department indicating receipt no later than ~~April 30~~ preceding 60 days before the license year for which application is being made. Late applications for licenses may not be acted upon by the department but shall be returned to the applicant along with the applicant's license fee.

SECTION 4. NR 25.06 (2) (a) 2. (intro.) is amended to read:

NR 25.06 **(2)** (a) 2. (intro.) All permittees under subd. 1. who select the northern chub fishing zone under sub. (3) (d) shall be subject to the following limitations through December 31, 2011:

SECTION 5. NR 25.06 (2) (a) 3. is created to read:

NR 25.06 **(2)** (a) 3. All permittees under subd. 1. who select the northern chub fishing zone under sub. (3) (d) shall be subject to the following limitations beginning January 1, 2012:

a. No more than 150,000 pounds of chubs may be harvested during the quota period of January 1 through the end of February; no more than 300,000 pounds of chubs may be harvested during the quota period of March 1 through September 30, except that this amount shall be increased to include the portion of the allowable harvest for the previous period that is not reported as harvested in that period or decreased by the amount the reported harvest during the previous period exceeded the harvest limit for that period; and no more than 150,000 pounds of chubs may be harvested during the quota period of October 1 through December 31, except that this amount shall be increased to include the portion of the allowable harvest for the previous period that is not reported as harvested in that period or decreased by the amount the reported harvest during the previous period exceeded the harvest limit for that period.

b. During the quota periods of January 1 through the end of February and March 1 through September 30, the department shall notify all licensed commercial fishers to cease fishing upon receipt of information that 85% of the period quotas as established in subd. 3. a. have been harvested except that all nets in the water shall be lifted under s. NR 25.09 (2) (a) 10., and the legal fish harvested. During the quota period of October 1 through December 31, the department shall notify all licensed commercial fishers to cease fishing upon receipt of information that 80% of the period quota as established in subd. 3. a. has been harvested except that all nets in the water shall be lifted under s. NR 25.09 (2) (a) 10., and the legal fish harvested.

SECTION 6. NR 25.06 (3) (a) 2. is amended to read:

NR 25.06 **(3)** (a) 2. Tags shall be color-coded by ~~year~~ lake trout open season in a color which does not repeat in the next consecutive ~~year~~ lake trout open season.

SECTION 7. NR 25.06 (3) (a) 6. is amended to read:

NR 25.06 **(3)** (a) 6. Tags are valid for use only for the ~~license season~~ lake trout open season for which they are issued.

SECTION 8. NR 25.06 (3m) is created to read:

NR 25.06 **(3m)** TEMPORARY EXCEPTION FOR LAKE MICHIGAN. Notwithstanding the amounts in sub. (2) (a) 1. to 4., (b) 1. to 3., (c) 1., (d) 2. and (e) 3., for the license year July 1, 2010 through December 31, 2011, the amounts shall be 2.0 times those specified in sub. (2) (a) 1. to 4., (b) 1. to 3., (c) 1., (d) 2. and (e) 3., except that for the license year July 1, 2010 through December 31, 2011, for each fish species for which individual licensee catch quotas are allotted or allocated under s. NR 25.07 (2), no licensee may harvest more than one-half of his or her individual catch quota for that license year for each species during July 1, 2010 through June 30, 2011, or harvest more than one-half of his or her individual catch quota for that license year for each species during January 1, 2011 through December 31, 2011.

SECTION 9. NR 25.07 (3) (a) to (c) are amended to read:

NR 25.07 **(3)** APPLICATION. (a) Applications for individual licensee catch quotas and fishing permits under this section shall be made ~~annually~~ on forms available from the department and shall be returned to the department no later than ~~April 30~~ preceding 60 days before the license year for which application is being made.

(b) To be timely, applications, if mailed, must be postmarked no later than ~~April 30~~ preceding 60 days before the license year for which application is being made and if submitted to the department other than by mail must be received and stamped with a date stamp of the department indicating receipt no later than ~~April 30~~ preceding 60 days before the license year for which application is being made. Late applications for individual licensee catch quotas and fishing permits may not be acted upon by the department but shall be returned to the applicant.

(c) The applications shall be reviewed by the department and approved or denied no later than ~~June 15~~ preceding 15 days before the license year for which application is being made, unless there are circumstances that may prevent the applicant from being ~~a~~ as a commercial fisher on ~~July 1~~ the first day of the license year for which application is being made.

In those cases, the applicant shall be notified of the approval or denial of the application in conjunction with the notice of approval or denial of the license authorizing commercial fishing on the outlying waters.

SECTION 10. NR 25.135 (1) (a) 1. is amended to read:

NR 25.135 (1) (a) 1. The application shall include the person's name, commercial fishing license numbers, ~~and~~ descriptions of the boats to be included in the fleet reporting program, and the order of the licenses to which the person's daily reported catch will be credited until the minimum production criteria of s. NR 25.03 (1) (b) are met for each license.

SECTION 11. EFFECTIVE DATE. This rule 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 12. BOARD ADOPTION. The foregoing rule was approved and adopted by the State of Wisconsin Natural Resources Board on August 12, 2009.

Dated at Madison, Wisconsin _____.

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

By _____
Matthew J. Frank, Secretary

(SEAL)