

DATE: December 22, 2008 FILE REF: 3600

TO: Natural Resources Board

FROM: Matthew J. Frank

SUBJECT: Request authorization for public hearings for proposed Order FH-21-08, pertaining to Great Lakes commercial fishing

1. Why is the rule being proposed?

The rule addresses three issues: the definition of the commercial fishing “license year”, licensing requirements for Great Lakes commercial fishers, and the number of available licenses.

License year. Currently the commercial fishing license year runs from July 1 through June 30 of the next year, corresponding to the State’s fiscal year. For yellow perch commercial fishers on Green Bay, this definition of the license year breaks the normal summer fishing season, which opens on May 20, into two parts, complicating business decisions about when to harvest allocated quotas. Yellow perch fishers, supported by the Lake Michigan Commercial Fishing Board, have requested that the license year be changed to correspond with the calendar year.

Licensing requirements. Wisconsin’s commercial fishing law is designed to maintain an economically viable and stable commercial fishery and an active recreational fishery. To achieve this intent, the Department has for the past 30 years implemented a limited entry system by rule in which minimum harvest (catch) requirements for annual relicensing are used to identify inactive Lake Michigan commercial fishers. On Lake Michigan the minimum catch requirement involves meeting either a fixed minimum catch based on historic harvest records or an alternative computed minimum catch based on harvests by all fishers during a recent 12-month reference period. Commercial fishers on Lake Michigan have repeatedly objected to these requirements, saying they impose unreasonable expectations on fishers in years of poor fishing. In response to commercial fishers concerns and in particular because of current economic conditions, we sought new ideas and reviewed the full range of alternatives for demonstrating license activity. We reviewed potential solutions for effectiveness, consistency and reasonability. As a result of this review, we propose to modify the alternative computed minimum catch by a) reducing the alternative computed number by one-third and b) by changing the reference period used in the calculation of the alternative minimum. Because minimum catch requirements are not currently in place for Lake Superior commercial fishers, potentially allowing the relicensing of fishers who are not active, the proposed rule will establish minimum catch standards for relicensing on Lake Superior like those on Lake Michigan. This method of reporting on actual fishing activity over a given time period is proposed because it is effective in helping maintain an economically viable and stable fishery, can be administered consistently, and allows increased flexibility over the current measure.

If there are licensees who are inactive, the economic viability of the industry as a whole is compromised, and ultimately its stability is jeopardized. By eliminating the minimum catch requirement, individuals who are no longer actively engaged in commercial fishing would be able to remain licensed and receive near-complete protection from competition, market forces and changes in the abundance of species. Incentives for individuals to bring fish products to market by diversifying or re-targeting their operations to other fish species would be reduced or eliminated, and over time the industry as a whole would become less stable and less economically viable.

In the absence of meaningful relicensing criteria, the commercial harvest of fish would take on the nature of a legal right and the State would lose the ability to regulate commercial fishing without compensating commercial fishers. Regulation is critical to avoid overfishing as environmental or other conditions change, for example the decline of Lake Michigan's yellow perch population, or to remedy user conflicts between sport anglers and commercial fishers.

Number of licenses. Currently there are 10 commercial licenses on Lake Superior and 62 on Lake Michigan. The handling of vacant licenses differs between the two lakes. On Lake Superior the number remains constant, so vacant licenses remain available for issuance to new applicants. This offers the possibility that a license holder can drop out of the fishery during bad times, but still hope to re-enter when prospects improve. On Lake Michigan the number of licenses either remains constant or declines every year. Therefore a new applicant must obtain a license by transfer from an existing license holder, because if a license is not reissued or transferred before the end of a fishing year it is extinguished. In order to provide Lake Michigan fishers the same opportunity that Lake Superior fishers have to re-enter the business after allowing a license to lapse, we are proposing to freeze the number of available Lake Michigan licenses at 65.

2. Summary of the Rule

SECTION 1 of the Order amends the definition of the outlying waters commercial fishing "license year" from the current fiscal year to correspond with the 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 to be consistent with the requirement for Lake Michigan as revised by SECTION 3 of the Order. Under the proposed Order, the applicant must have reported a harvest during the previous year of at least 20 times the average daily reported harvest for a recent 12 month period 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 prevent an applicant from meeting the minimum harvest requirement. This SECTION also amends the criteria used to rank applications for issuance of licenses.

SECTION 3 of the Order pertains to licensing of commercial fishers on Lake Michigan. It establishes a minimum number of commercial licenses (65), replacing a provision under which the number of available licenses in any year is reduced when a license is not renewed.

Under the current rule, to qualify for relicensing, an applicant must show that during the preceding license year, he or she either:

- (a) reported the harvest of a specified poundage of smelt (by trawling) from any geographic zone or have reported the harvest from any geographic zone of at least 30 times the average daily reported harvest of smelt (by trawling) during the year by all fishers in the same geographic zone, whichever is less, or
- (b) reported the harvest of a specified poundage of all commercial fish except smelt from any geographic zone, or have reported the harvest from any geographic zone of at least 30 times the average daily reported harvest of all commercial fish except smelt during the year by all fishers in the same geographic zone, whichever is less.

Under the proposed Order, the standards for annual relicensing are amended so that an applicant's harvest

during the 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.

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 it. The Order clarifies the concept of unavoidable circumstances by specifying some of examples that the department may consider.

SECTION 4 of the Order establishes a priority system used to rank applications for issuance of licenses that parallels the priority system used for Lake Superior.

SECTION 5 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, harvest limits shall be twice those that apply to all 12-month license years, but with limitations as to when during the 18-month transition license year an individual licensee may harvest his or her individual catch quota; no more than one 12-month individual catch quota may be harvested by a licensee during the first or last 12 months of the 18-month transition year.

SECTION 6 of the Order makes housekeeping changes needed to implement the new calendar-year-based license year.

3. How does this proposal affect existing policy?

The license year change is an administrative adjustment with no effect on policy, but the revisions to licensing requirements bear on some important policy issues. The Department has for the past 30 years implemented a limited entry policy in issuing Great Lakes commercial fishing licenses. An essential element of that policy is the identification of inactive licensees using criteria defined by rule. By helping to identify inactive licensees, the minimum catch requirement serves two important purposes -- helping the Department maintain an economically viable and stable commercial fishery, while avoiding the pitfalls of a property-right based commercial fishery. For these reasons, the minimum catch requirement must be retained unless it is replaced with equally meaningful annual relicensing criteria.

Our limited entry system provides commercial fishers with an extraordinary privilege, the protected ability to harvest a public resource for private gain. The minimum catch requirement and other relicensing criteria assure that the individuals enjoying that privilege are serious participants in the fishery. In the absence of meaningful relicensing criteria, the commercial harvest of fish would take on the nature of a legal right and the State would lose the ability to regulate commercial fishing without compensating commercial fishers. Regulation is critical to avoid overfishing as environmental or other conditions change, for example the decline of Lake Michigan's yellow perch population, or to remedy user conflicts between sport anglers and commercial fishers.

Major revisions to Wisconsin's Great Lakes commercial fishing laws took effect in 1978 when the Legislature established the legal basis for individual transferable quotas and for limited entry with the passage of Ch. 418, Laws of 1977. A key non-statutory provision stated, "The intent of the legislature in revising commercial fishing laws is to provide for multi-use management of the Great Lakes fishery, including an economically viable and stable commercial fishery and an active recreational fishery. To reach this management objective, the legislature recognizes that it may be necessary to limit participation in the commercial fishery and to limit the harvest of commercially fished species . . ." (Section 923 (37) (d) 3. of ch. 418, Laws of 1977.)

Section 29.519 (1m) (b), Stats., provides that “The department may limit the number of licenses issued under this section” and s. 29.519 (1m) (c), Stats., sets out the criteria for deciding who may receive one of the limited number of available licenses: “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 of sub. (5), fishing and navigation ability and quantity and quality of equipment possessed”. (Underline added.) Finally, s. 29.519 (7), Stats., provides that “The [commercial fishing] boards shall assist the department in establishing criteria for identifying inactive licensees.”

In implementing this Legislative policy, the Department has used minimum fishing effort or catch requirements, minimum investment in gear, residency, age, and other factors to identify qualified applicants for licensing (and annual relicensing) as Great Lakes commercial fishers. Initially, one key requirement was minimum fishing effort, or the number of days per year that a licensee lifted nets. In 1989 that criterion was replaced with the minimum catch requirement. The minimum catch requirement is no longer used on Lake Superior, but continues in use on Lake Michigan. Unless prevented by unavoidable circumstances, to qualify for annual relicensing a Lake Michigan licensee must 1) harvest a specified minimum poundage of all species taken from one of three geographic zones or 2) harvest an amount exceeding 30 times the average daily harvest of all species from one of the zones. This is a low threshold, and very few license renewal applications have been denied for failure to meet the minimum catch requirement.

Furthermore, the minimum catch requirement has always allowed for case-by-case hardship exceptions. DNR uses the "unavoidable circumstances" exception nearly every year to excuse applicants who failed to make the minimum catch due to a wide variety of problems, ranging from incapacitating injury or illness to poor fishing.

In the past decade the requirement has been modified twice to make it more flexible, and we are now considering further rule changes to assure that the requirement remains reasonable in the changing conditions that the industry faces. Bills introduced in the Legislature last session at the request of the commercial fishing industry would have barred the Department from using any minimum harvesting requirement as a measure of a licensee’s performance, forcing the State to find other ways of meaningfully measuring a license applicant’s fishing and navigation ability.

In the 1990s, the State overcame court challenges by Wisconsin commercial fishers who argued that they have a constitutionally protected property right in their licenses and quotas, so that DNR can’t change the commercial fishing rules without compensating them first. In *LeClair v. Natural Resources Board*, 168 Wis. 2d 227, 483 N.W.2d 278 (Ct. App. 1992), six licensed Wisconsin commercial fishers contended that a DNR rule revision constituted a “taking” of their property, entitling them under the U.S. and Wisconsin Constitutions to monetary compensation for the taking. The plaintiffs claimed entitlement to the right to be issued renewed Lake Michigan forage fish trawling permits each year with the same quotas as their existing permits.

The Court of Appeals analyzed and discussed the U.S. Supreme Court, Wisconsin and Michigan court decisions cited by the plaintiffs that recognized the existence of property rights in licenses. The Court rejected their arguments for several reasons and ruled in DNR’s favor. However, in a lengthy note on page 241 of the decision, the Court concluded that the plaintiffs’ key Michigan case had little application to the case before it because the Michigan case involved a law that was “geared to permit renewal of licenses to take place as a matter of course.” The Michigan court said the plaintiff’s reliance “upon a

licensing practice which provided for renewal as a matter of course in most instances, has a property interest which would entitle him to due process protection.”

Our Court of Appeals reasoned that LeClair and the other plaintiffs could not rely on the Michigan case because of “the statutes giving the department wide regulatory authority over the natural resources, fish and game of Wisconsin, and the absence of anything in the permits themselves, or the laws and rules under which they were issued, to indicate that renewal was a mere formality and would be done simply as a ‘matter of course’ each year . . .” (Underline added.)

The Court of Appeals also rejected a federal court of claims case that the commercial fishers relied on in support of their claim of property rights. The Court wrote, at page 242 of its decision, “In that case, however, the fishing permit was renewable as ‘a matter of right’, unless misconduct should occur justifying refusal of renewal”. The Court of Appeals then concluded that the permits in the LeClair case provided no such renewal rights.

The clear implication of the Court of Appeal’s reasoning is that a property right may be created in a license or permit if the license or permit is renewed as a matter of course or as a matter of right. Under current DNR rules, Lake Michigan commercial fishing licenses and permits are not renewed as a matter of course. Instead, to qualify for annual renewal, each commercial fisher must show that he or she caught the minimum poundage of fish specified by rule.

The minimum catch requirement demonstrated to the Court that there are meaningful criteria that have to be met in order to get relicensed. The Court agreed with DNR that licenses and the associated quota permits are not personal entitlements or rights under Wisconsin’s limited entry commercial fishing licensing system. If licenses and quotas were private property, any DNR rule change that might reduce the commercial harvest, increase the cost of operation or otherwise affect the productive value of a license would first have to be compensated for by the government, since it would be a regulatory “taking” of property.

Rules that set harvest limits, gear restrictions, recordkeeping and reporting requirements, closed areas and other constraints all have economic impacts on the value of commercial fishers’ licenses and quotas. Unless funds were appropriated for compensation payments, the State would not be able to modify the commercial fishing rules as needed to protect the fishery from overharvest or remedy user conflicts between sport anglers and commercial fishers. The only alternative would be for the state to “buy out” the commercial fishery -- rule by rule, or altogether. Sport anglers already complain that commercial fishing doesn’t pay its own way.

If the criteria for identifying inactive licensees are made too weak or repealed, licenses would virtually be renewable “as a matter of course” and Wisconsin would effectively have a property rights-based commercial fishery. Once property rights are created, they cannot be extinguished by another rule change or by the amendment of a statute — they can only be purchased. Simply purchasing a license is in effect renewal of licenses as a matter of course. Based on discussions with industry, a test based on minimum annual income from fishing would not be acceptable to the commercial fishing industry as an alternative. Ownership of boats and equipment of a certain value is not a fair or consistent measure of license activity nor does DNR have the in-house expertise to appraise the value of gear and boats for a bona-fide minimum investment test.

Part of the Legislative goal in revising the commercial fishing statute in 1978 was to help maintain a viable and stable commercial fishing industry by creating the tools to gradually exclude “part-timers”

from the commercial fishery. Their numbers alone created user conflicts and compliance problems. Some commercial fishers have argued that the inactive licensee requirement is no longer needed because there are only 62 licensees remaining on Lake Michigan. While the bill that established limited entry into the Great Lakes commercial fishery calls upon DNR to adopt rules that identify (and remove) inactive licensees, it also calls upon DNR to manage the fishery so that the industry as a whole remains economically viable and stable. If there are licensees who are inactive, the economic viability of the industry as a whole is compromised, and ultimately its stability is jeopardized. By eliminating the minimum catch requirement, individuals who are no longer actively engaged in commercial fishing would be able to remain licensed and receive near-complete protection from competition, market forces and changes in the abundance of species. Incentives for individuals to bring fish products to market by diversifying or re-targeting their operations to other fish species would be reduced or eliminated, and over time the industry as a whole would become less stable and less economically viable, contrary to Legislative intent.

4. Has Board dealt with these issues before? When? Board Action?

The relicensing requirements for Lake Michigan commercial fishers were revised in 1997 by NRB Order FH-25-07 and in 2001 by NRB Order FH-48-00. There were two changes in 1997: 1) establishment of an alternate minimum catch requirement by which a license holder could qualify for relicensing by reporting a harvest equal to or greater than 30 times the average daily harvest of all commercial fishers in his or her fishing zone during the same license year. 2) provision that for the license year immediately following a reduction in harvest limits, the minimum catch requirement for each licensee would be reduced by an amount equal to his or her harvest the previous year, effectively removing the requirement for the first year of reduced quotas. The changes in 1997 did not apply to smelt. In 2001 there were two further changes: 1) The concept of an alternative minimum catch was applied to smelt. 2) The reference period for the alternative minimum catch requirement was changed from the license year to the year ending one month before the end of the license year.

5. Who will be affected by the proposed rule? How?

NRB Order FH-21-08 will affect state-licensed commercial fishers on Lake Superior and Lake Michigan.

6. Environmental assessment

This is a Type III action under Chapter NR 150, Wis. Admin. Code. No Environmental Assessment is required.

7. Small business analysis --Initial Regulatory Flexibility Analysis

a. Describe the type of small business that will be affected by the rule. Commercial fishing businesses will be affected. Lake Michigan commercial fishing license holders will find re-licensing requirements to be less burdensome. Lake Superior commercial fishing license holders will have additional re-licensing requirements, although the intent is not to affect any license holders who are currently active.

b. Briefly explain the reporting, bookkeeping and other procedures required for compliance with the rule. None.

c. Describe the type of professional skills necessary for compliance with the rule. None.

Fiscal Estimate — 2007 Session

<input checked="" type="checkbox"/> Original <input type="checkbox"/> Updated <input type="checkbox"/> Corrected <input type="checkbox"/> Supplemental	LRB Number Bill Number	Amendment Number if Applicable Administrative Rule Number FH-21-08
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Subject
 Ch. NR 25, Commercial Fishing - Outlying Waters

Fiscal Effect

State: No State Fiscal Effect
 Indeterminate

Check columns below only if bill makes a direct appropriation or affects a sum sufficient appropriation.

- | | |
|--|---|
| <input type="checkbox"/> Increase Existing Appropriation | <input type="checkbox"/> Increase Existing Revenues |
| <input type="checkbox"/> Decrease Existing Appropriation | <input type="checkbox"/> Decrease Existing Revenues |
| <input type="checkbox"/> Create New Appropriation | |

Increase Costs — May be possible to absorb within agency's budget.

Yes No

Decrease Costs

Local: No Local Government Costs
 Indeterminate

- | | |
|--|---|
| 1. <input type="checkbox"/> Increase Costs
<input type="checkbox"/> Permissive <input type="checkbox"/> Mandatory | 3. <input type="checkbox"/> Increase Revenues
<input type="checkbox"/> Permissive <input type="checkbox"/> Mandatory |
| 2. <input type="checkbox"/> Decrease Costs
<input type="checkbox"/> Permissive <input type="checkbox"/> Mandatory | 4. <input type="checkbox"/> Decrease Revenues
<input type="checkbox"/> Permissive <input type="checkbox"/> Mandatory |

5. Types of Local Governmental Units Affected:

- Towns Villages Cities
 Counties Others
 School Districts WTCS Districts

Fund Sources Affected

- GPR FED PRO PRS SEG SEG-S

Affected Chapter 20 Appropriations

Assumptions Used in Arriving at Fiscal Estimate

The proposed rule package makes several changes to the Department's administrative rules for Great Lakes commercial fishing, which include the following:

1. It amends the definition of the outlying waters commercial fishing "license year" from the current fiscal year to correspond with the calendar year, but only after an 18-month long transition year.
2. It reduces the computed alternative minimum catch requirements on Lake Michigan.
3. It establishes minimum catch requirements on Lake Superior that are parallel with the requirements for Lake Michigan.
4. It establishes a minimum number of commercial licenses (65) on Lake Michigan, replacing a provision under which the number of available licenses is reduced by one when a license is not renewed or transferred.
5. It provides 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, and it establishes special license year harvest limits for the transition year.

These changes have no fiscal impact at either the state or local level.

Long-Range Fiscal Implications

none

Prepared By:	Telephone No.	Agency
Joe Polasek	266-2794	Department of Natural Resources
Authorized Signature	Telephone No.	Date (mm/dd/ccyy)
	266-2794	

Fiscal Estimate — 2007 Session

Page 2 Assumptions Narrative Continued

LRB Number	Amendment Number if Applicable
Bill Number	Administrative Rule Number FH-21-08

Assumptions Used in Arriving at Fiscal Estimate – Continued

Fiscal Estimate Worksheet — 2007 Session
 Detailed Estimate of Annual Fiscal Effect

Original Updated
 Corrected Supplemental

LRB Number	Amendment Number if Applicable
Bill Number	Administrative Rule Number FH-21-08

Subject
 Ch. NR 25, Commercial Fishing - Outlying Waters

One-time Costs or Revenue Impacts for State and/or Local Government (do not include in annualized fiscal effect):
 none

Annualized Costs:		Annualized Fiscal Impact on State Funds from:	
A. State Costs by Category		Increased Costs	Decreased Costs
State Operations — Salaries and Fringes		\$	\$ -
(FTE Position Changes)		(FTE)	(- FTE)
State Operations — Other Costs			-
Local Assistance			-
Aids to Individuals or Organizations			-
Total State Costs by Category		\$	\$ -
B. State Costs by Source of Funds		Increased Costs	Decreased Costs
GPR		\$	\$ -
FED			-
PRO/PRS			-
SEG/SEG-S			-
State Revenues		Increased Revenue	Decreased Revenue
<small>Complete this only when proposal will increase or decrease state revenues (e.g., tax increase, decrease in license fee, etc.)</small>			
GPR Taxes		\$	\$ -
GPR Earned			-
FED			-
PRO/PRS			-
SEG/SEG-S			-
Total State Revenues		\$	\$ -

Net Annualized Fiscal Impact

	<u>State</u>	<u>Local</u>
Net Change in Costs	\$ 0	\$ 0
Net Change in Revenues	\$ 0	\$ 0

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

The Wisconsin Natural Resources Board proposes to renumber ss. NR 25.06 (4) and (5); to amend ss. NR 25.02 (18), 25.03 (1) (b) to (d), 25.03 (2) and (3), and 25.07 (3) (a) to (c); and to create s. NR 25.06 (4), 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 amends the definition of the outlying waters commercial fishing “license year” from the current fiscal year to correspond with the 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 to be consistent with the requirement for Lake Michigan as revised by SECTION 3 of the Order. Under the proposed Order, the applicant must have reported a harvest during the previous year of at least 20 times the average daily reported harvest for the past 12 months 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 prevent an applicant from meeting the minimum harvest requirement. This SECTION also amends the criteria used to rank applications for issuance of licenses.

SECTION 3 of the Order pertains to licensing of commercial fishers on Lake Michigan. It establishes a minimum number of commercial licenses (65), replacing a provision under which the number of available licenses in any year is reduced when a license is not renewed.

Under the current rule, to qualify for relicensing, an applicant must show that during the preceding license year, he or she either:

(a) reported the harvest of a specified poundage of smelt (by trawling) from any geographic zone or have reported the harvest from any geographic zone of at least 30 times the average daily reported harvest of smelt (by trawling) during the year by all fishers in the same geographic zone, whichever is less, or

(b) reported the harvest of a specified poundage of all commercial fish except smelt from any geographic zone, or have reported the harvest from any geographic zone of at least 30 times the average daily reported harvest of all commercial fish except smelt during the year by all fishers in the same geographic zone, whichever is less.

Under the proposed Order, 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.

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 it. The Order clarifies the concept of unavoidable circumstances by specifying some of examples that the department may consider.

SECTION 4 of the Order establishes a priority system used to rank applications for issuance of licenses that parallels the priority system used for Lake Superior.

SECTION 5 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, annual harvest limits shall be 2.0 times those that apply to all 12-month license years, but with limitations as to when during the 18-month transition license year the fish may be harvested.

SECTION 6 of the Order makes housekeeping changes needed to implement the new calendar-year-based license year.

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) 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 master licenses is fixed at 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 – None known.

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 relating to 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 authorities 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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12. Place where comments are to be submitted and deadline for submittal: To be determined.

SECTION 1. NR 25.02 (18) is amended to read:

NR 25.02 (18) “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), (c) and (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 total harvest of commercial fish during the previous license year of commercial fish of at least 20,000 or X pounds, whichever is less, where X = 20 times the average reported daily harvest of commercial fish taken by all licensed commercial fishers during the 12 months preceding two months prior to 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 total reported 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.

~~3.~~ 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)~~ subd. 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 prior to 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.

(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 prior to 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 prior to 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 subd. 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 prior to 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 prior to the license year for which application is being made. To be timely, applications, if mailed, must be postmarked no later than April 30 preceding 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 prior to 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 (4) and (5) are renumbered to be (5) and (6), respectively.

SECTION 5. NR 25.06 (4) is created to read:

NR 25.06 (4) EXCEPTION. Notwithstanding subs. (1) and (2), harvest limits, harvest quotas, total allowable annual commercial harvests, total allowable commercial harvests, and annual allowable commercial harvests for the license year July 1, 2010 through December 31, 2011 shall be 2.0 times those specified in those subsections, except that for any species a licensee may not harvest more than one-half his or her individual catch quota during July 1, 2010 through

June 30, 2011 and may not harvest more than one-half his or her individual catch quota during January 1, 2011 through December 31, 2011.

SECTION 6. 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~~ 60 days preceding the license year for which application is being made.

(b) To be timely, applications, if mailed, must be postmarked no later than ~~April 30~~ 60 days preceding 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~~ 60 days preceding 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~~ 15 days preceding the license year for which application is being made, unless there are circumstances that may prevent the applicant from being a licensed commercial fisher on ~~July 4~~ 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 7. 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 8. BOARD ADOPTION. The foregoing rule was approved and adopted by the State of Wisconsin Natural Resources Board on _____.

Dated at Madison, Wisconsin _____.

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

By _____
Matthew J. Frank, Secretary

(SEAL)