

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

The statement of scope for this rule, SS 037-16, was approved by the Governor on May 9, 2016, published in Register No. 725A3 on May 16, 2016, and approved by the Natural Resources Board on June 22, 2016. This rule was approved by the Governor on .

The Wisconsin Natural Resources Board proposes an order to amend NR 21.11 (1) (i) and 22.11 (10); and to create NR 21.11 (1) (im), 21.11 (2) (b) 7., and 22.11 (11) relating to commercial fishing in Wisconsin-Minnesota and Wisconsin-Iowa boundary waters and affecting small business.

**FH-11-16**

**Analysis Prepared by the Department of Natural Resources**

**1. Statutes Interpreted:** Sections 29.014(1), 29.041, and 29.604 (1) and (6m), Stats.

**2. Statutory Authority:** Sections 29.014(1), 29.041, and 29.604 (1) and (6m), Stats.

**3. Explanation of Agency Authority:**

Section 29.014(1), Stats., directs the Department to establish and maintain any bag limits and conditions governing the taking of fish that will conserve the fish supply and ensure the citizens of this state continued opportunities for good fishing.

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

Section 29.604 (1) and (6m), Stats., find that certain wild animals are endangered or threatened and are entitled to preservation and protection as a matter of general state concern, and that the department may issue a permit authorizing a taking that otherwise is prohibited if the taking is only incidental to an otherwise lawful activity.

**4. Related Statutes or Rules:**

To promote best management practices and ensure commercial fishing activity is compliant with the State's incidental take laws (NR 27, Wis. Adm. Code), the department developed a permit for incidental take of threatened species for commercial fishing activities in the Mississippi River and its connected waters. For more information: <http://dnr.wi.gov/topic/ERReview/Take.html>

**5. Plain Language Analysis:**

In conjunction with the existing incidental take permit noted in 4. above, the proposed rule prohibits the use of gill nets in most of Lake Pepin, an area of the Mississippi River about 60 miles south of St. Paul, Minnesota. The rule also clarifies reporting requirements when commercial fishers incidentally catch living or dead endangered, threatened, or special concern species.

The objective is to reduce and prevent the unintentional bycatch of endangered, threatened, or special concern species when conducting commercial fishing activities on the Mississippi River and its connected waters. It will also provide guidance to commercial fishers if they do encounter rare species.

SECTIONS 1 and 4 require licensed commercial fishers using nets and setlines on the Wisconsin-Minnesota and Wisconsin-Iowa boundary waters to report to the department on monthly report forms all fish caught, obtained, transferred, sold, or kept, except for fish immediately released alive and unharmed. Previously only fish sold and kept were reported. This will allow the department to better track the number and species of fish that are caught using commercial gear.



## **6. Summary of, and Comparison with, Existing or Proposed Federal Statutes and Regulations:**

None of the proposed changes violate or conflict with federal regulations. The department works in conjunction with the U.S. Fish and Wildlife Service to protect rare species under the Federal Endangered Species Act.

## **7. Comparison with Similar Rules in Adjacent States:**

The waters affected by this rule are Wisconsin-Minnesota boundary waters. Minnesota also has rules that prohibit taking, purchasing, importing, possessing, transporting, or selling endangered or threatened animals without a permit. Minnesota has also prohibited the use of gill nets in Lake Pepin year round.

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

In July 2015, the Minnesota Department of Natural Resources notified WI DNR that several lake sturgeon (a special concern species) and paddlefish (a threatened species) had come ashore with gill net marks and slit bellies, a sign that commercial fishers had caught and released the fish. This happened in the Lake Pepin area of the Mississippi River where both WI and MN commercial fishers are active. Both WI and MN implemented a temporary closure of gill net commercial fishing in Lake Pepin, and WI made plans to create best management practices and ensure commercial fishing activity on the water was compliant with the state's incidental take laws (NR27). The department has since developed a permit for incidental take of threatened species for commercial fishing activities in the Mississippi River and its connected waters. It also has created best management practices in conjunction with commercial fishers to reduce the take of the rare species in the system.

Commercial fishing in the Mississippi River and connected waters is typically conducted by individuals using nets and setlines. Any WI resident may purchase a net license or setline license. Gill nets are a type of entanglement net in which fish gills become tangled in the net, typically resulting in death of the fish. Gill net seasons are open year-round along the WI-MN and WI-IA boundary waters. There are already areas of the Mississippi River designated in code where gill nets are not allowed.

The rule codifies some of the best management practices, including the closure of gill net fishing in Lake Pepin. The State of Minnesota has also prohibited the use of gill nets in Lake Pepin. Under s. NR 21.11 (1) (p) and NR 22.11 (15), the department is currently able to require any commercial fisher to cease fishing operations when they are destructive to game fish or will endanger any other species of wild animal. Rather than annually using this policy authority, the changes will be made permanent in chapter NR 21 and 22.

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

There are approximately 60 commercial fishers with net licenses who may fish anywhere along the Wisconsin waters of the Mississippi River. Only six commercial fishers with net licenses actively fish in Lake Pepin and only during certain times of the year. Approximately 100 people have setline licenses that they are able to use in Wisconsin waters of the Mississippi River, but a majority of those people use setlines solely for recreational fishing. To help alleviate any potential loss of fishing activity, the department plans to allow gill net fishing in two bays in the upper portions of Lake Pepin, known as Wacouta Bay and Catharine's Pass, because it is uncommon for paddlefish and lake sturgeon to use these bays.

In March 2016, two public meetings were held in Pepin and Prairie du Chien. Commercial fishers in attendance were made aware of the changes under the incidental take permit. Attendees requested that handouts be created to help identify threatened river redhorse and black buffalo fish species, which has been done. They also requested and the department has supplied an exact boundary for Wacouta Bay and

Catharine's Pass in which gill netting will still be allowed.

There were a few other requests that the department discussed and decided not to advance at this time: allowing gill nets under the ice, the setting of gill nets at night, and gill netting with constant net attendance. The department will wait until information is collected from a Minnesota sturgeon tagging study before allowing nets under the ice or in colder times of the year. The study will help determine where and when sturgeon are traveling throughout the year. The main issue behind setting gill nets at night is to avoid problems/interactions with recreational fishers. The department will focus on education and signage so all parties know how to recognize nets and how to travel around them, rather than making any change to fishing practices. And the preference is to close Lake Pepin to all gill nets, no exceptions, not even allowing them if they are attended. This matches Minnesota's plan as well.

The department will conduct an economic impact analysis to gather comments from any individuals, businesses, local governments, or other entities that expect to be affected economically by the rule change.

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

It is expected that the proposed rule would have minimal economic impact overall and on small commercial fishing businesses. (Governor's Executive Order 50, level 3 economic impact analysis of less than \$50,000) Only six commercial fishers actively fish Lake Pepin with gill nets, and only during certain times of the year. To help alleviate any potential loss of fishing activity, the department allows gill net fishing in two bays in the upper portions of Lake Pepin, known as Wacouta Bay and Catharine's Pass, because it is uncommon for paddlefish and lake sturgeon to use these bays.

**11. Agency Contact Person:**

Steve Hewett, Fisheries Management Bureau  
P.O. Box 7921, Madison, WI 53707-7921  
Steven.hewett@wisconsin.gov 608-267-7501

**12. Place where comments are to be submitted and deadline for submission:**

Written comments may be submitted at the public hearings or by regular mail, fax or email to the contact person listed above. Written comments may also be submitted to the department using the Wisconsin Administrative Rules website at <http://docs-preview.legis.wisconsin.gov/code/comment>

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

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**SECTION 1. NR 21.11 (1) (i) is amended to read:**

**NR 21.11 (1) (i)** All fishers required to be licensed under the provisions of ss. 29.523 and 29.533, Stats., shall complete and submit monthly reports on forms available from the department. All reports shall be submitted to the department by the 10th of the month following each month the commercial fisher is required to be licensed. Each monthly report shall be signed by the commercial fisher. Each commercial fisher shall report: ~~all fish sold or kept whether these~~

~~fish were legally or illegally taken or obtained, the buyers name, address and phone number, and all other information requested on the report form.~~

1. All fish caught, obtained, transferred, sold or kept whether these fish were legally or illegally taken or obtained, but fish caught and immediately released alive and unharmed need not be reported.

2. The buyers name, address, and phone number.

3. All other information requested on the report form.

**SECTION 2. NR 21.11 (1) (im) is created to read:**

NR 21.11 (1) (im) All fishers required to be licensed under the provisions of ss. 29.523 and 29.533, Stats., shall report all mortally injured or dead threatened fish species to the department immediately or when returning to shore by calling 1-800-TIP-WDNR (1-800-847-9367). Dead threatened fish species must be kept on ice and brought to a department official or office within 24 hours of being taken into possession or by the next business day. All capture or take of threatened species shall also be reported following the requirements in par. (i).

**SECTION 3. NR 21.11 (2) (b) 7. is created to read:**

NR 21.11 (2) (b) 7. Lake Pepin (WBIC 731800), except dead set gill nets may be used on Wacouta Bay and Catharine's Pass at the upstream end of Lake Pepin.

**SECTION 4. NR 22.11 (10) is amended to read:**

NR 22.11 (10) All fishers licensed under the provisions of ss. 29.523, 29.526, 29.529, and 29.533, Stats., shall complete and submit monthly reports on forms available from the department. All reports shall be submitted by the 10th of the month following each month the commercial fisher is required to be licensed. Each monthly report shall be signed by the commercial fisher. Each commercial fisher shall report and shall include complete and accurate information on: ~~all fish sold or kept whether these fish were legally or illegally taken or obtained,~~

~~the buyers name, address and phone number, and all other information requested on the report form.~~

1. All fish caught, obtained, transferred, sold or kept whether these fish were legally or illegally taken or obtained, but fish caught and immediately released alive and unharmed need not be reported.

2. The buyers name, address, and phone number.

3. All other information requested on the report form.

**SECTION 5. NR 22.11 (11) is created to read:**

NR 22.11 (11) All fishers licensed under the provisions of ss. 29.523, 29.526, 29.529, and 29.533, Stats., shall report all mortally injured or dead threatened fish species to the department immediately or when returning to shore by calling 1-800-TIP-WDNR (1-800-847-9367). Dead threatened fish species must be kept on ice and brought to a department official or office within 24 hours of being taken into possession or by the next business day. All capture or take of threatened species shall also be reported following the requirements in sub. (10).

**SECTION 6. EFFECTIVE DATE.** This rule takes effect on the first day of the month following publication in the Wisconsin Administrative Register as provided in s. 227.22 (2) (intro.), Stats. OR This rule shall take effect on [DATE].

**SECTION 7. BOARD ADOPTION.** This rule was approved and adopted by the State of Wisconsin Natural Resources Board on [DATE].

Dated at Madison, Wisconsin \_\_\_\_\_.

STATE OF Wisconsin DNR

DEPARTMENT OF NATURAL RESOURCES

BY \_\_\_\_\_

Cathy Stepp, Secretary

(SEAL)