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(FORM UPDATED: 08/11/2010)

WISCONSIN STATE LEGISLATURE ...
PUBLIC HEARING - COMMITTEE RECORDS

2011-12
(session year)

Assembly
(Assembly, Senate or Joint)

Committee on Natural Resources...

COMMITTEE NOTICES ...

- Committee Reports ... **CR**
- Executive Sessions ... **ES**
- Public Hearings ... **PH**

INFORMATION COLLECTED BY COMMITTEE FOR AND AGAINST PROPOSAL

- Appointments ... **Appt** (w/Record of Comm. Proceedings)
- Clearinghouse Rules ... **CRule** (w/Record of Comm. Proceedings)
- Hearing Records ... bills and resolutions (w/Record of Comm. Proceedings)
  (**ab** = Assembly Bill) (**ar** = Assembly Resolution) (**ajr** = Assembly Joint Resolution)
  (**sb** = Senate Bill) (**sr** = Senate Resolution) (**sjr** = Senate Joint Resolution)
- Miscellaneous ... **Misc**

* Contents organized for archiving by: Stefanie Rose (LRB) (August 2013)

Assembly

Record of Committee Proceedings

Committee on Natural Resources

Assembly Bill 176

Relating to: minimum harvesting requirements for commercial fishing in the Great Lakes.

By Representatives Bies, Jacque, Kaufert and Van Roy; cosponsored by Senator Lasee.

June 13, 2011 Referred to Committee on Natural Resources.

September 14, 2011 **PUBLIC HEARING HELD**

Present:	(16)	Representatives Mursau, Rivard, Williams, Kleefisch, Nerison, Severson, Steineke, Tiffany, Stroebel, Litjens, Mason, Molepske Jr, Danou, Clark, Milroy and Hulsey.
Absent:	(0)	None.
Excused:	(0)	None.

Appearances For

- Garey Bies, Madison — Representative, 1st Assembly District
- Dan Anderson, Milwaukee — Paragon Fish Corporation
- Charles Henrikson, Sister Bay — Wisconsin Commercial Fisheries Association

Appearances Against

- George Meyer, Madison — Wisconsin Wildlife Federation

Appearances for Information Only

- None.

Registrations For

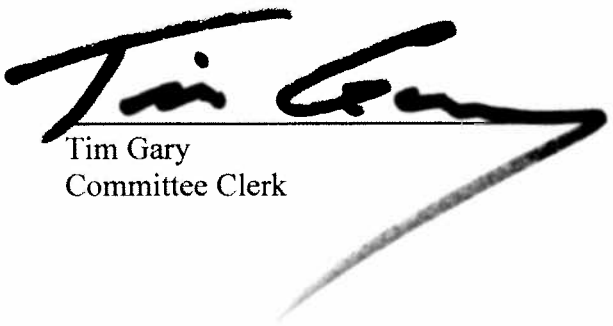
- None.

Registrations Against

- None.

Registrations for Information Only

- None.



Tim Gary
Committee Clerk

Assembly

Record of Committee Proceedings

Committee on Natural Resources

Assembly Bill 176

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Absent:	(0)	None.
Excused:	(0)	None.

Appearances For

- Garey Bies, Madison — Representative, 1st Assembly District
- Dan Anderson, Milwaukee — Paragon Fish Corporation
- Charles Henrikson, Sister Bay — Wisconsin Commercial Fisheries Association

Appearances Against

- George Meyer, Madison — Wisconsin Wildlife Federation

Appearances for Information Only

- None.

Registrations For

- None.

Registrations Against

- None.

Registrations for Information Only

- None.

October 20, 2011 **EXECUTIVE SESSION HELD**

Present: (16) Representatives Mursau, Rivard, Williams, Kleefisch, Nerison, Severson, Steineke, Tiffany, Stroebel, Litjens, Molepske Jr, Mason, Danou, Clark, Milroy and Hulsey.
Absent: (0) None.
Excused: (0) None.

Moved by Representative Mursau, seconded by Representative Rivard that **Assembly Bill 176** be recommended for indefinite postponement.

Ayes: (16) Representatives Mursau, Rivard, Williams, Kleefisch, Nerison, Severson, Steineke, Tiffany, Stroebel, Litjens, Molepske Jr, Mason, Danou, Clark, Milroy and Hulsey.
Noes: (0) None.

INDEFINITE POSTPONEMENT RECOMMENDED, Ayes 16, Noes 0

November 3, 2011 **EXECUTIVE SESSION HELD**

Present: (12) Representatives Mursau, Rivard, Kleefisch, Nerison, Severson, Steineke, Tiffany, Litjens, Molepske Jr, Mason, Danou and Milroy.
Absent: (4) Representatives Williams, Stroebel, Clark and Hulsey.
Excused: (0) None.

Moved by Representative Kleefisch, seconded by Representative Steineke that **Assembly Bill 176** be recommended for passage.

Ayes: (12) Representatives Mursau, Rivard, Kleefisch, Nerison, Severson, Steineke, Tiffany, Litjens, Molepske Jr, Mason, Danou and Milroy.
Noes: (0) None.
Absent: (4) Representatives Williams, Stroebel, Clark and Hulsey.

PASSAGE RECOMMENDED, Ayes 12, Noes 0

Tim Gary
Committee Clerk

Vote Record
Committee on Natural Resources

Date: 11-3-2011

Moved by: Kleefisch Seconded by: Steineke

AB 176 SB _____ Clearinghouse Rule _____

AJR _____ SJR _____ Appointment _____

AR _____ SR _____ Other _____

A/S Amdt _____

A/S Amdt _____ to A/S Amdt _____

A/S Sub Amdt _____

A/S Amdt _____ to A/S Sub Amdt _____

A/S Amdt _____ to A/S Amdt _____ to A/S Sub Amdt _____

Be recommended for:

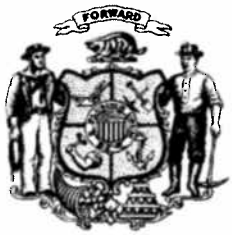
☑ Passage ☐ Adoption ☐ Confirmation ☐ Concurrence ☐ Indefinite Postponement

☐ Introduction ☐ Rejection ☐ Tabling ☐ Nonconcurrence

Committee Member	Aye	No	Absent	Not Voting
Representative Jeffrey Mursau, Chair	☑	☐	☐	☐
Representative Roger Rivard	☑	☐	☐	☐
Representative Mary Williams	☐	☐	☑	☐
Representative Joel Kleefisch	☑	☐	☐	☐
Representative Lee Nerison	☑	☐	☐	☐
Representative Erik Severson	☑	☐	☐	☐
Representative Jim Steineke	☑	☐	☐	☐
Representative Thomas Tiffany	☑	☐	☐	☐
Representative Duey Stroebel	☐	☐	☑	☐
Representative Michelle Litjens	☑	☐	☐	☐
Representative Louis Molepske Jr	☑	☐	☐	☐
Representative Cory Mason	☑	☐	☐	☐
Representative Chris Danou	☑	☐	☐	☐
Representative Fred Clark	☐	☐	☑	☐
Representative Nick Milroy	☑	☐	☐	☐
Representative Brett Hulsey	☐	☐	☑	☐
Totals:	12	0	4	___

☑ Motion Carried ☐ Motion Failed


WISCONSIN STATE LEGISLATURE


FORWARD

Wisconsin Federation of Great Lakes Sport Fishing Clubs

September 13, 2011

Representative Jeffrey Mursau
Assembly Committee on Natural Resources

Representative Mursau:

On behalf of the Wisconsin Federation of Great Lakes Sport Fishing Clubs consisting of 13 individual clubs consisting of some 6000 members and the Northeastern Wisconsin Great Lakes Sport Fishermen this submittal provides comments on Assembly Bill 176.

The goal of managing the fishery is to provide for optimum use and enjoyment of Wisconsin resources. This means the State must consider the needs of both commercial and sport fishermen in any statutory legislation

The Wisconsin Federation of Great Lakes Sport Fishing Clubs and the Northeastern Wisconsin Great Lakes Sport Fishermen OPPOSE this legislation due to the possibility of creating property rights for a fishery belonging to the public.

Property rights for public property may produce the following issues:

1. May bundle rights of ownership for specific entities.
2. Could produce limitations on ownership rights.
3. Can provide exclusive authority to determine how a resource is used whether owned by government or public.
4. Might provide the probability of creating an exemption of ownership.
5. Interferes with the rights of others to determine how a resource is used.
6. Reduces the DNR's ability to manage the resource.
7. Create financial harm to the state via subsidy payments for species depletement.

This letter is written to call your attention to the potential serious concerns and challenges and the possible outcomes of this pending legislation.

Thank you for the opportunity to provide input on AB 176.

Sincerely,

Thom Gulash, President, Wisconsin Federation of Great Lakes Sport Fishing Clubs

Cc: Thom Gulash, Secretary, Northeastern Wisconsin Great Lakes Sport Fishermen
Charles Weier, Legislative Chair, WFGLSFC
John Hansen, Vice President, WFGLSFC
Robert Wincek, Secretary, WFGLSFC
Representative, Robert Zeigelbauer
Tom Kocourek, President NEWGLSF
Mike Rusch, Legislative Co-Chair NEWGLSF
Senator Joe Leibham, District 9

To: Luanne Kostelic
Fax number: 608-282-3625
Pages to Follow: 2

Date: September 13, 2011

A facsimile from

Color Craft Graphic Arts, Inc.
Thom Gulash
Ph: 920-652-1427
Email: thom2561@ccga.com
Fax: 920-652-1481

Luanne, your help is appreciated. Appreciate your taking this to Committee

Thom


FORWARD

Wisconsin Wildlife Federation

September 14, 2011

Thank you Chairman Mursau and members of the Assembly Natural Resources Committee for this opportunity to testify here today on Assembly Bill 176. The Federation represents 170 hunting, fishing and trapping groups including several Great Lakes sportsfishing groups especially including the Wisconsin Federation of Great Lakes Sports Fishing Clubs. Wisconsin sportsmen have a great interest in Great Lakes commercial fishing for two reasons:

1. The fish in the Great Lakes are a shared publicly-owned commercial/sports fishery and commercial fishing directly impacts our sports fishing and
2. Secondly, and just as importantly, it is the sportsmen that are paying the freight for DNR to manage the commercial fishery in the Great Lakes through our hunting and fishing dollars. Over 90% of the DNR's cost for management and enforcement of Great Lakes commercial fishing comes from sports hunting and fishing licenses.

The Wildlife Federation opposes Assembly Bill 176 because it removes the minimum harvest requirement for commercial fishing licenses. While we are sympathetic to the needs of commercial fishermen to have a flexible minimum harvest minimum harvest requirement because of the potential for Acts of God, illness, high gas prices and other events beyond their control that may prevent a commercial fisherman from meeting their minimum harvest limits, that flexibility is already built into DNR regulation NR.25. If those need improvement we stand ready to work with the commercial fishermen and DNR to do that.

We oppose the bill because it will either be sports anglers or the general taxpayer that will end up paying the high costs of this bill. Here is why there will be a high cost:

As we know the fishery is public. DNR is required to manage the fishery to protect its long-term sustainability. As a result the DNR periodically needs to adjust commercial fishing seasons, quotas, gear and reporting requirements. At times, this will cost commercial fishermen money or reduce their income. If the minimum harvest level requirement is removed, the commercial fishermen will likely file a lawsuit to say that they have property rights in their license and their quota and need to be compensated by the DNR for the financial loss incurred by DNR's management decision.

You may be thinking, that this is far-fetched. No, that is in fact what the Lake Michigan commercial fishermen have been seeking for over the last 70 years. The Federation requests the Committee to review the following courts cases brought by commercial fishermen to seek what are called "compensable property rights" in their harvest levels. The cases are: **Olson vs. State Conservation Commission**, 235 Wis. 473 (1940),

LeClair vs. Swift, 76 F. Supp. 729 (E.D.Wis. 1948) and more recently **LeClair vs. Natural Resources Board**, 483 NW 2d 278, (Wis. Court of Appeal 1992). Removal of the "minimum harvest" requirement will remove the most meaningful commercial licensing requirement and will enable the commercial fishermen to successfully argue the next time DNR's management costs them money, that there has been a "government taking" of a compensable property right. DNR will then either have to back off the proposed regulatory change or pay damages to the commercial fishermen. As sports fishermen we know that we will get stuck with that bill, either from our license dollars or our tax dollars.

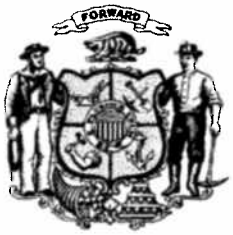
The above-position is not just that of the Wildlife Federation, it is also the long-standing position of the Department of Natural Resources. To illustrate that the Federation has attached to this testimony:

1. The DNR memo to the Governor analyzing companion bill, SB 13;
2. DNR Board Order FH-21-08, dated August 3, 2009, which is the last time that the DNR adjusted the requirements of the minimum harvest level rule;
3. **LeClair vs. Swift**, 76 F. Supp. 729 (E.D. Wis. 1948) and
4. **LeClair vs. Natural Resources Board**, 483 NW 2d 278 (Wis. Court of Appeals 1992).

Chairman Mursau, Committee members, thank you very much for this opportunity to testify before you today.

George Meyer
Executive Director
Wisconsin Wildlife Federation


WISCONSIN STATE LEGISLATURE


FORWARD

Wisconsin Commercial Fisheries Association
Charles W. Henriksen, *President*
11214 N Sand Bay Lane
Sister Bay, WI 54234
920-421-1540

To: Members of the Assembly Committee on Natural Resources
From: Wisconsin Commercial Fisheries Association
Re: Assembly Bill 176
Date: November 1, 2011

The Assembly Committee on Natural Resources is scheduled to take executive action on Assembly Bill 176 on Wednesday, November 2nd. This simple bill passed the State Assembly on a voice vote during the 2007-08 Legislative Session. It eliminates the outdated minimum production requirement, which has been proven to be burdensome to the family operated commercial fishing industry in recent years. We would appreciate the committee consider the following information as they deliberate on AB 176.

- Assembly Bill 176 aims to eliminate an onerous rule that is difficult for some fishers to comply with. With decimated fish populations, some commercial fisherman are being required to fish when it is not economically viable for their business to do so. With the commercial fishing industry already hurting, the minimum harvest requirement is a threat to some fishermen's livelihood.

- This rule was put in place more than twenty years ago when over 250 licenses were issued by the state. Inactive licenses have been eliminated, and now less than 60 licenses currently exist.

- The minimum harvest requirement has had little effect on fish management, and as fish stocks have varied, collapsed and/or otherwise changed, the minimum catch requirement was waived, modified, and has been generally ineffective overall.

- The court cases cited by George Meyer of the Wisconsin Wildlife Federation are not directly related to the issue of the minimum harvest requirement. Further, they do not consider or address the individual transferable program that had recently been instituted and that we have fished under since 1989. His objections

are not germane to anything current in the fishery, and certainly can't be used to predict how a future court will rule on the property rights issue.

- The minimum harvest requirement is not the only requirement that the statutes/administrative code require as necessary to renew a license. Commercial fishing licenses aren't renewed automatically, which is a distinction courts have looked at when looking at the property rights issue.

- Nothing in AB 176 prevents the Department of Natural Resources from establishing other criteria through administrative rules to define "active" fisherman. In fact, one of the statutory duties of the Lake Michigan Commercial Fishing Board is to assist the department in establishing criteria for identifying inactive licenses. If the department is concerned that removal of this provision strengthens a property right, they are free to forward a separate solution to address that concern.

Thank you for your consideration of these points, and we would appreciate your support of Assembly Bill 176.

STATE REPRESENTATIVE
Garey Bies
1ST ASSEMBLY DISTRICT

Testimony of Representative Garey Bies
Assembly Committee on Natural Resources
Assembly Bill 176 – Minimum Harvest Requirements

Chairman Mursau, committee members. Thank you for the opportunity to submit testimony on Assembly Bill 176 relating to minimum harvest requirements for commercial fishing licenses.

Assembly Bill 176 eliminates a provision of state law that requires commercial fisherman to meet minimum harvest requirements to maintain their commercial fishing licenses. First implemented in the 1980s, the requirements were designed to "weed out" inactive commercial fishing licenses. In the years since the requirements were put in place, the number of fishermen holding commercial fishing licenses has decreased significantly. The need to eliminate inactive licenses no longer exists.

In addition, the commercial fishing industry has changed significantly in the last 30 years. With invasive species and dwindling fish stocks, commercial fishing is a troubled industry. I believe that it is not sensible to require commercial fisherman to venture out and incur the costs of running their boats in order to fish questionably viable fish populations in order to maintain their licenses.

For these two reasons I believe that we should eliminate the minimum harvest requirements.

Given the current economic difficulties and challenged fish populations, now is not the time to place hurdles before our commercial fishermen. Instead, we need to help ensure that our Wisconsin commercial fishermen are able to cast off from the docks and ply our state's waters when the markets and fish populations warrant.

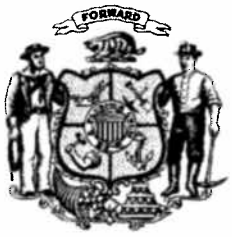
Once again thank you for the opportunity to testify on Assembly Bill 176 and I will be happy to answer any questions you may have.

First for Wisconsin!

Capitol: P.O. 8952, Madison, WI 53708-8952 • (608) 266-5350 • Fax: (608) 282-3601
Toll-Free: (888) 482-0001 • Rep.Bies@legis.wi.gov
www.legis.state.wi.us/assembly/asm01/news/

Home: 2520 Settlement Road, Sister Bay, WI 54234 • (920) 854-2811


WISCONSIN STATE LEGISLATURE


FORWARD

Wisconsin Commercial Fisheries Association
Charles W. Hendrickson, President
920-421-1610

In 1988 Wisconsin fully implemented limited entry in the Great lakes Commercial Fishery as called for by the legislature in 1977. Legislative intent called for an economically viable and stable commercial fishery. The most important part of the implementation was the allocation of quota shares (by percentage of allowable harvest)in all of our high-value species. This allowed the state to determine the total allowable harvest and was intended to create some stability in the commercial fishery and a vested, protectable interest that has value to commercial fishers. These shares were permanently allocated and can be permenantly transferred, temporarily transferred and transferred by designation in the event of the quota holder's death or disability.

Another component of this implementation changed the method for identifying inactive fishers from a thirty days lifting nets requirement to a minimum catch requirement. This requirement (MPS) has had little effect on fish management and as fish stocks have varied, collapsed and/or otherwise changed been waived, modified and generally ineffective. By transferring licenses fishers who choose not to fish , usually for economic reasons, are still able to maintain their licenses – but create an amazing amount of extra paperwork for themselves and the DNR

The commercial Fishery has consolidated from nearly 250 license holders in 1988 to about 60 statewide today. We have created a minimum number for licenses and have less than is allowed. The value in the fishery is in the allocated shares and /or the ability to participate. The license is necessary to attach the quotas to but has no value as a stand alone entity.

There is no longer a need for the state to have an outdated MPS and it should be eliminated.

There is some concern ,perpetuated mostly by anti-commercial fishing interests in the DNR,that eliminating the MPS will make the commercial fishery unmanageable by creating a property right. Whatever type of protectable interest the fishery has was created long ago with the allocated quota system. The state owns the resource and charges the DNR with managing it. The commercial fishery only wants to be economically viable and operate in a stable,sensible business climate.


FORWARD
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Form 1100-001
(R 9/07)

NATURAL RESOURCES BOARD AGENDA ITEM

Item No. 3.B.3

SUBJECT: Adoption of Order FH-21-08 to amend Ch. NR 25 relating to commercial fishing on the Great Lakes

p. 4-6

FOR: AUGUST **BOARD MEETING**

TO BE PRESENTED BY: Michael Staggs

SUMMARY:

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

License year. The current license year starts on July 1 of any year and runs through June 30 of the following year. The proposed rule changes the license year to correspond with the calendar year. Licensing requirements. A Lake Michigan commercial fishing licensee must report a specified minimum harvest (catch) during the license year in order to qualify for annual relicensing. That minimum catch requirement serves the statutorily mandated need of identifying inactive license holders. There is currently no minimum catch requirement on Lake Superior. Under the proposed rule the minimum catch requirement for Lake Michigan in years of generally poor fishing would be reduced by one-third. Also, a minimum catch requirement would be established for Lake Superior license holders. Number of licenses. Currently there are 10 commercial licenses on Lake Superior and 61 on Lake Michigan. The handling of vacant licenses differs between the two lakes. On Lake Superior vacant licenses remain available for issuance to new applicants, so the number remains constant. 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 a new applicant may only obtain a license by transfer from an existing license holder, and if a license is not reissued or transferred before the end of a fishing year it is extinguished. Therefore the number of licenses on Lake Michigan declines every year. 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.

RECOMMENDATION: Adopt NRB Order FH-21-08

LIST OF ATTACHED MATERIALS:

No	☐	Fiscal Estimate Required	Yes ☑	Attached
No	☑	Environmental Assessment or Impact Statement Required	Yes ☐	Attached
No	☐	Background Memo	Yes ☑	Attached

APPROVED:

Bureau Director, Michael Staggs — Date 7/6/2009

Administrator, Todd Ambs — Date 7/10/09

Secretary, Matt Frank — Date 8/3/09

cc: Laurie J. Ross - AD/8
Todd Ambs - AD/8
Mike Staggs - FH/4
Pete Flaherty - LS/8
Ron Kazmierczak - NER
Gloria McCutcheon - SER
John Gozdzialski - NOR
Charlie Henriksen - WCF
Rick Johnson - LMCFB
Chuck Weier - WF/GLSFC
Dale Maas - GLSC
Bill Horns - FH/4 (25 copies)
Larry Freitag - WWF

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.

Working with representatives of the commercial fishing industry, we evaluated alternatives. A test based on minimum annual income from fishing would not be acceptable to the commercial fishing industry and DNR does not have the in-house expertise to evaluate appraisals of the value of gear and boats for a bona-fide minimum investment test. Without an effective substitute, elimination of the minimum catch requirement is not an option. An effective way to identify inactive licensees is essential to help maintain an economically viable and stable commercial fishery as well as for long-term protection of fish populations for commercial fishers and recreational anglers alike.

2. Summary of the 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 a harvest during the previous year of whichever is less: 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 establishes a minimum number of commercial licenses (65), replacing a provision under which the number of available licenses in any 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 2 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.

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 carried out the State's 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 identifying inactive licensees, the minimum catch requirement serves two important purposes -- helping to maintain an economically viable and stable commercial fishery and protecting Great lakes fish stocks for the long-term. For these reasons, the minimum catch requirement must be retained unless it is replaced with other, equally meaningful annual relicensing criteria.

The 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 private legal right and the State would lose the ability to regulate commercial fishing to protect fish populations without compensating 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 was discontinued 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 either 1) harvest a specified minimum poundage of all species taken from one of 3 geographic zones or 2) harvest an amount exceeding 30 times the average daily harvest of all species from one of the zones. Very few license renewal applications have ever been denied for failure to meet the minimum catch requirement.

Furthermore, DNR's 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 minimum catch requirement has been modified twice to make it more flexible, and we now propose further rule changes to assure that the requirement remains reasonable in light of the changing conditions faced by the commercial fishing industry.

In the 1990s, the State overcame court challenges by several 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 hearings and other procedural due process requirements before the right may be taken away – and 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 the State'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."

The 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 property rights claim. The Court of Appeals 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 the State has meaningful criteria that must be met for relicensing. 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, DNR 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, paying for each restriction necessary to fairly allocate the resources or to protect the fish population. Sport anglers express concerns today that commercial fishing doesn't contribute license fees equal to the proportion of the fish allocation it uses. Until alternative relicensing criteria are established that are equally meaningful, the minimum catch requirement must be retained. The Department believes that a test based on minimum annual income from fishing would not be acceptable to the commercial fishing industry as an alternative, and DNR does not have the in-house expertise to confidently appraise the value of gear and boats for a bona-fide minimum investment test.

The minimum catch requirement also helps maintain a viable and stable commercial fishing industry. Part of the Legislative goal in revising the commercial fishing statute in 1978 was to give the Department the tools to reserve licenses for the serious, stable commercial fishers. The sheer number of occasional commercial fishers had created user conflicts and law enforcement headaches. Some commercial fishers

argue that the minimum catch requirement is no longer needed because today there are only about 60 licensees remaining on Lake Michigan. While initially the minimum catch requirement did have the effect of reducing the number of occasional commercial fishers, the purpose of the minimum catch requirement was to accomplish the legislative mandate to manage the fishery so that the industry as a whole remains economically viable and stable.

Although attrition and consolidation of fishing operations have reduced the number of licensees over the years, DNR still has a legal obligation to manage the commercial fishery to be stable and economically viable, regardless of the number of participants. If there are licensees who are inactive (as identified by falling below the minimum catch without hardship conditions or by some other meaningful performance standard, if one can be developed), the economic viability of the industry as a whole is compromised, and ultimately its stability is jeopardized.

Individually-allocated catch quotas and the limit on the number of available licenses provide commercial fishers with extraordinary legal protection. 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 diversify or re-target their operations to other fish species would be reduced or eliminated, fewer fish would come to market 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) The NRB established 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) The NRB provided 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 2 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. Hearing synopsis

Public hearings were held in Ashland on March 18 and Cleveland on March 20. Ten individuals attended the Ashland hearing, with 8 submitting hearing appearance slips and 6 commercial fishers making oral comments. All appearance slips were marked, "in opposition". Six individuals attended the hearing in Cleveland, with 5 submitting hearing slips and 3 commercial fishers making oral comments. Two appearance slips were marked, "as interest may appear" and 2 were marked, "in support". Written comments were received from 8 individuals, including State Representative Gary Sherman.

In general, commercial fishers do not support retaining a minimum catch requirement to help identify inactive fishers. Lake Michigan commercial fishers support changing the license year and freezing the number of licenses. The following comments were received in oral or written form:

1) The rule is not needed. Existing license holders are working as hard as they can.
   Department response: The rationale behind the minimum catch requirement is explained above. The great majority of commercial fishers are active and will not be affected by this rule.
2) Lake Superior should be handled differently from Lake Michigan.
   Department response: The lakes do differ in significant ways, but the need to have an objective basis for identifying inactive license holders applies equally to both lakes. It is fair to have the same general method and principles apply on both lakes.
3) Clarification is needed regarding lake trout harvest limits in Lake Superior during the 18-month transition year.
   Department response: We agree, and note that our ability to modify lake trout harvest limits is also constrained by terms of the state/tribal Lake Superior Fishing Agreement 2005-2015. Under the rule as revised, annual lake trout tag allocations will not be changed and will continue to be issued prior to each lake trout open season.
4) Complications arising regarding lake trout in Lake Superior could be avoided by keeping the existing license year on Lake Superior, while changing it on Lake Michigan.
   Department response: In the interest of consistency we believe the license years for the two lakes should correspond. The complications can be managed.
5) On Lake Superior separate minimum catch standards should be established for gill net fishing and trap net fishing.
   Department response: The Department recognizes that commercial fishers relying on gill nets have, at least recently, reported lower harvests than those relying on trap nets. We have tried to address this concern in 2 ways. First, the fixed minimum catch requirement has been reduced from 20,000 pounds to 5,000 pounds. Second, the alternate minimum catch has been amended to provide separate standards for gill netter and trap netters, based on separate industry averages for the 2 types of fishing gear.
6) The minimum investment requirement is adequate to identify active fishers. One fisher suggested raising the minimum investment requirement to $50,000 or $100,000.
   Department response: The application of the minimum investment standard has proven to be impractical. It is not possible for Department staff to objectively appraise the value of most depreciated commercial gear, and funds are not available to contract for expert appraisal services.
7) It is not right for the DNR to decide who is worthy of holding a license.
   Department response: The question is not who is worthy of holding a license, but who is an active participant in the commercial fishery.
8) The increased fishing effort that sometimes might be needed to meet the minimum catch requirement could harm the fishery.
   Department response: Department biologists do not believe that fishing effort needed to achieve the minimum catch standards proposed here would require enough fishing to harm fishery resources.
9) The lake has changed and the minimum catch requirement has outlived its purpose.
   Department response: We agree the lakes and the fisheries have changed substantially, but the principles and legal requirements underlying the need for objective standards for identifying inactive fishers have not changed.

6. Changes to the rule in response to hearing comments or other new information

Changes in response to hearing comments:

- The fixed minimum catch requirement for Lake Superior commercial fishers was reduced from 20,000 pounds to 5,000 pounds.

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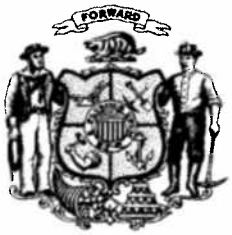

Attachment A

CORRESPONDENCE/Memorandum State of Wisconsin

p. 3

Date: June 8, 2011

To: Governor's Office

From: Department of Natural Resources

Subject: Preliminary Analysis of Senate Bill 113 regarding minimum harvesting requirements for commercial fishing in the Great Lakes.

1. Effect on Existing State Law

SB 113 would eliminate the Department's authority to use annual minimum harvest requirements in its rules governing the renewal of Great Lakes commercial fishing licenses. Minimum harvest requirements are one element of a Great Lakes commercial fishing management system that provides to a small number of licensed commercial fishers (10 active licenses on Lake Superior and 57 active licenses on Lake Michigan) the special protected privilege of exploiting fish resources that are held in trust for all citizens of the state. Two elements of that system, limited entry and individual transferable quotas, support individual license holders and stabilize the fishery. Current policy requires that, as a condition for retaining this privilege, license holders meet the minimum harvest requirement in order to demonstrate that they are active participants in the fishery. The following paragraphs provide background information.

In major revisions to the commercial fishing laws that took effect in 1978 with the adoption of Ch. 418, Laws of 1977, the Legislature established the basis for limited entry in Wisconsin's Great Lakes commercial fisheries as another tool for managing commercial fishing. In non-statutory provisions of Ch. 418, Laws of 1977, Section 923, the Legislature declared that "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 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 will 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."

The Department has for the past 30 years implemented a limited entry policy in which annual minimum fishing effort or catch requirements, minimum investment in gear, residency, age, and other factors were used to identify qualified applicants for relicensing as Lake Michigan commercial fishers. Initially, one key requirement was minimum fishing effort, or the number of days per year during which a licensee lifted nets. In 1989 that criterion was replaced with the minimum harvest requirement: unless prevented by unavoidable circumstances, to qualify for annual relicensing each 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. Although very few license renewal applications have been denied for failure to meet the minimum harvest requirement, it remains problematic for some commercial fishers.

In the past 15 years the Department adopted three administrative rules addressing Great Lakes commercial fishing relicensing requirements. In 1997 two changes were adopted to provide flexibility and minimize each license holder's risk of failing to meet the relicensing requirements: 1) Alternate minimum harvest requirements were established 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) The Department provided that for the license year immediately following a reduction in harvest limits, the minimum harvest 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 two additional changes were adopted: 1) The concept of an alternative minimum harvest was applied to smelt. 2) The reference period for the alternative minimum harvest requirement was changed from the license year to the year ending one month before the end of the license year. The latter provision gives commercial fishers advance notice in years when they are in danger of not meeting the minimum harvest requirement. Finally, in 2009 the NRB froze the number of commercial fishing licenses available on Lake Michigan at 65. Because the numbers of licensed fishers at that time was 61 and has now dropped further, this allows fishers who are not able to qualify for relicensing to obtain a new license for the subsequent license year.

Adoption of the bill would bar the Department from using any minimum harvesting requirement as a measure of a licensee's performance, forcing the Department to identify other ways of meaningfully measuring a license applicant's fishing and navigation ability.

2. Legislative Action in Previous Session

Identical legislation was proposed to the 2007-2008 Legislature as AB 634 and SB 357. Hearings on these bills were held by the Assembly Committee and Natural Resources and the Senate Committee on Environment and Natural Resources.

3. Policy Significance

The minimum harvest rule serves two important purposes -- to prevent Wisconsin from moving towards a property-rights based commercial fishery, and to help DNR maintain an economically viable and stable commercial fishery by identifying inactive licensees. For these reasons, the minimum harvest rule must be retained unless it is replaced with other equally meaningful annual relicensing criteria.

Property Rights
In the 1990s, the State overcame two 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. The courts identified the minimum harvest rule as an important factor in their decision to reject these property rights arguments.

The minimum harvest rule demonstrated to the courts that there are meaningful criteria that have to be met in order to get relicensed. The courts 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 "takings". 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, DNR 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 minimum harvest requirement were made too weak or repealed, licenses would virtually be renewable "as a matter of right" and Wisconsin would thereby move further toward a property rights-based commercial fishery. Until alternative relicensing criteria are established that are equally meaningful, DNR must not repeal the minimum harvest rule. We know that a test based on minimum annual income from fishing would not be acceptable to the commercial fishing industry as an alternative, and DNR does not have the in-house expertise to appraise the value of gear and boats for a bona-fide minimum investment test.

Maintaining an economically viable and stable commercial fishery
The minimum harvest rule is also used to help maintain a viable and stable commercial fishing industry. Part of the Legislative goal in revising the commercial fishing statute in 1978 was to give the Department the tools to gradually exclude

"part-timers" from the commercial fishery. Their numbers alone created user conflicts and law enforcement headaches. Some commercial fishers have argued that the minimum harvest rule is no longer needed because there are only 65 licensees remaining on Lake Michigan. But the purpose of the minimum harvest requirement was never to reduce the number of participants in the fishery, and DNR has never used it as such, although DNR has the authority to reduce the number of licensees under the limited entry statute. 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.

Although attrition and consolidation of fishing operations have reduced the number of licensees over the years, DNR still has a legal obligation to manage the commercial fishery to be stable and economically viable, regardless of the number of participants. If there are licensees who are inactive (as identified by their failure to make the minimum harvest or by some other meaningful performance standard, if one can be developed), the economic viability of the industry as a whole is compromised, and ultimately its stability is jeopardized.

Individually allocated catch quotas and the strict limit on the number of available licenses already provide commercial fishers with extraordinary legal protection from competition. By eliminating the minimum harvest rule, 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 diversify or re-target 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.

DNR's minimum harvest rule allows for case-by-case hardship exceptions. DNR uses the "unavoidable circumstances" exception nearly every year to excuse applicants who failed to make the minimum harvest due to a wide variety of problems, ranging from poor health of a dependent to poor fishing. The minimum harvest rule has already been modified to allow for an alternative minimum harvest based on actual prior zone-wide harvests, and licensees even get "credit" for the prior year's catch in the year following a quota reduction.

4. Administrative Significance

The bill would not significantly affect administrative procedures, organizational arrangements, or management practices. The proposed legislation would require some investment of staff time to adapt administrative rules.

5. Fiscal Effect

There are currently 57 active licenses for Lake Michigan and 10 active licenses for Lake Superior, for an overall total of 67 active commercial licenses. The current cost for a commercial fishing license is $899.25 for resident and $6,499.25 for nonresident.

The bill would have no impact on the costs that the Department would incur to manage and regulate the state's commercial fishing industry, nor is it expected to impact the number licenses that are issued annually by the Department.

However, in the long-term, by moving Wisconsin toward the recognition of licenses and quotas as property rights, the bill could dramatically increase the cost of managing and regulating commercial fishing by requiring prior payment by the State for any compensable "takings".

6. Laws/Experience in Other States

Great Lakes commercial fishing licensing requirements in Illinois and Michigan are summarized here: 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.

Analysis Prepared by: William Horns
Phone Number: 608-266-8782

Michael Staggs, Bureau Director

Kenneth Johnson, Division Administrator

Joe Polasek, Director
Management and Budget


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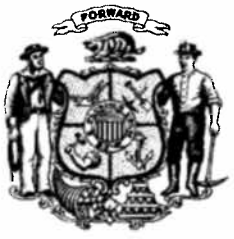
FORWARD

168 Wis.2d 227 (1992)
483 N.W.2d 278

Daniel P. LECLAIR, Michael J. LeClair, Dean Swaer, Judy Swaer, Todd Ruleau, and Louis J. Ruleau, Plaintiffs-Appellants, [†]

v.

NATURAL RESOURCES BOARD, and Department of Natural Resources, Defendants-Respondents.

No. 91-2316.

Court of Appeals of Wisconsin.

Submitted on briefs January 8, 1992.
Decided March 19, 1992.

229 *229 For the plaintiffs-appellants the cause was submitted on the briefs of *Jon P. Axelrod,*
230 *Stephen E. Babitch* *230 and *William D. Molinay* of *DeWitt, Porter, Huggett, Schumacher & Morgan, S.C.,* of Madison.

For the defendants-respondents the cause was submitted on the brief of *James E. Doyle,* attorney general, and *Philip Peterson,* assistant attorney general.

Before Eich, C.J., Gartzke, P.J., and Dykman, J.

EICH, C.J.

Daniel LeClair and five other Lake Michigan commercial fishers appeal from a summary judgment dismissing their action against the Wisconsin Department of Natural Resources and the Natural Resources Board. The issues are whether certain rules promulgated by the department: (1) operate to revoke appellants' fishing permits and thus require an adjudicatory hearing under sec. 227.51(3), Stats.; (2) are improperly directed at a closed class; (3) constitute an unconstitutional "taking" of their property; or (4) conflict with the Wisconsin safe place law. We resolve all issues in favor of the department and affirm the judgment.

The facts are not in dispute. Appellants are, and have been for many years, "trawlers" who make their living harvesting forage fish, such as alewives, chubs and smelt, in the waters of Lake Michigan and Green Bay. They tow large nets, called "trawls," through the waters to catch the fish, which are used principally for industrial purposes and in the manufacture of pet foods (although some smelt are gathered for human consumption).

Appellants hold annual forage fish "Harvest Quota Permits" issued by the department which expire on June 30 of each year. These appellants, in fact, hold all trawling permits issued for Lake Michigan. The permits are issued pursuant to **Wis.** Adm. Code ch. NR 25, and they authorize the holders to take specified amounts of each species of fish in specified waters.
231 The actual fish quotas *231 are set forth in various administrative rules in ch. NR 25.

In March, 1991, the Natural Resources Board adopted rules repealing, recreating and amending several sections of ch. NR 25, including those setting the forage fish quotas. Among other things, the rules end commercial alewife fishing on the lake and restrict the amount of chubs and smelt which can be taken (and, with respect to smelt, they limit the fishing to nighttime hours). The board adopted a set of identical emergency rules which took effect immediately—on April 1, 1991—and remained in effect until August 29, 1991, when they were replaced by the permanent rules.

The rules were promulgated by the department in order to conserve the forage fish population in the lake, which department studies had shown to be in serious danger of depletion.[1] They
232 were adopted after several *232 quasi-legislative hearings conducted under the rulemaking procedures prescribed in ch. **227**, Stats., and appellants participated at every level. They provided written comments at the hearings and personally appeared before the Natural Resources Board.

Appellants operated under their existing permits—pursuant to the "new" quotas established by the emergency rules—from April 1 to June 30, 1991, when their permits were renewed,

and continued to do so thereafter. Then, on August 30, the day before the permanent rules took effect, they sued for a declaratory judgment that the rules were invalid and sought a temporary restraining order prohibiting the department from enforcing them during the pendency of the action.

After a lengthy hearing, the trial court denied the motion for temporary relief on grounds that appellants had not established a reasonable likelihood of succeeding on the merits of their challenge. In order to expedite consideration of an appeal, both parties moved for summary judgment and the court granted the department's motion.

[1]

In reviewing summary judgments, we employ the same analysis as the trial court. *Spring Green Farms v. Kersten*, 136 **Wis. 2d** 304, 315-17, 401 N.W.**2d** 816, 820-21 (1987). Generally, summary judgment is appropriate where, as here, there are no issues of material fact and the moving party is entitled to judgment as a matter of law. *In re Cherokee Park Plat*, 113 **Wis. 2d** 112, 115-16, 334 N.W.**2d** 580, 582-83 (Ct. App. 1983).

233 *233 [2]

A judgment declaring an administrative rule invalid may be entered in three circumstances: (1) if the rule violates the constitution; (2) if it exceeds the statutory authority of the agency adopting it; or (3) if it was adopted without compliance with statutory rulemaking procedures. Sec. 227.40(4)(a), Stats.; *Liberty Homes, Inc. v. DILHR*, 136 **Wis. 2d** 368, 373, 401 N.W.**2d** 805, 807 (1987).

Appellants argue first that the department's rules are in conflict with state law because they "revoke, annul or withdraw [their fishing] rights without providing for the mechanism of a hearing." We consider this a claim that the rule exceeds the department's statutory authority.

The argument proceeds as follows: (1) forage fish trawling permits are "licenses"; (2) in Wisconsin, licenses cannot be revoked without an adjudicatory hearing; and (3) since there was no adjudicatory hearing before the rules were changed, the changes conflict with sec. 227.51(3), Stats., which provides:

> Except as otherwise specifically provided by law, no revocation, suspension, annulment or withdrawal of any license is lawful unless the agency gives notice by mail to the licensee of facts or conduct which warrant the intended action and the licensee is given an opportunity to show compliance with all lawful requirements for the retention of the license.

[3]

We reject the argument. Appellants' permits were not "revo[ked], suspend[ed], annul[ed] or
234 withdrawn." The department simply promulgated new rules to protect *234 the environment, as it has authority to do.[2] As a result of the changes, their permits—which, by their terms, allow appellants to fish commercially in Lake Michigan "in accordance with the provisions of Chapter NR 25"—became subject to, and were renewed with, the new fish harvest quotas. An adjudicatory hearing is not required in this situation, nor would one serve any purpose.

As we have noted, an adjudicatory hearing is designed to give the licensee "an opportunity to show compliance with all lawful requirements for the retention of the license." Section 227.51 (3), Stats. There is no question in this case of appellants' compliance with the requirements for retention of their trawling permits, and their permits were in fact renewed (with the new quotas).

What appellants really argue here is that because the new rules impact negatively upon them, they are entitled to have an adjudicatory hearing rather than (or in addition to) the legislative-type hearings that are part of the rule-making process. We agree with the department, however, that if appellants' position were to prevail, any change in statutes or rules that might negatively affect a permit holder would constitute a "revocation" of the permit
235 requiring an adjudicatory hearing, and that such a process would seriously hinder *235 the department in carrying out its regulatory responsibilities in this area.

Appellants have not established any right, statutory or otherwise, to an adjudicatory hearing as a condition to the department's exercise of its statutory authority to establish (and amend) the rules and regulations applicable to commercial fishing on Lake Michigan.

Appellants next argue that the rules are invalid because they are directed to a "closed class" in violation of sec. 227.01(13), Stats., the definitional section of ch. **227**, which states that the term "rule" does not include "any action . . . which . . . [i]s an order directed to a specifically named person or to a group of specifically named persons that does not constitute a general class . . ."

[4]

The new rules promulgated by the DNR were not directed to a closed class. They apply to all commercial fishers who held forage fish trawling permits.[3] Although there are not many people who fit this category—indeed, as we noted earlier, these six appellants hold all

permits issued by the department—the rule applies to them as members of a general class of commercial forage fishers. It is not directed to them individually or as a group.

Appellants next argue that the rule revision constitutes a "taking" of their property—the permits authorizing them to fish under the former quotas—within the meaning of the
236 fourteenth amendment to the United States Constitution and art. I, sec. 13 of the Wisconsin *236 Constitution,[4] entitling them to hearings and other procedural due process requirements before the right may be taken away—and to compensation for the taking.[5] Again, we disagree.

[5]

We begin by noting the familiar rule that, like statutes enacted by the legislature, regulations adopted by administrative agencies "carry a heavy presumption of constitutionality and the challenger has the burden of proving unconstitutionality beyond a reasonable doubt." Skow v. Goodrich, 162 Wis. 2d 448, 450, 469 N.W.2d 888, 889 (Ct. App. 1991).

[6]

The due process clauses "impose[] constraints on governmental decisions that deprive individuals of . . . property interests . . .." Patterson v. Bd. of Regents, 114 Wis. 2d 495, 500, 339 N.W.2d 130, 132 (Ct. App. 1983). Thus, to succeed on this claim, appellants must establish that they had a property interest in their quota permits. See Board of Regents v. Roth, 408 U.S. 564, 571 (1972). And they can have a property interest in the permits only if they have "a legitimate claim of entitlement to [them]." Roth, 408 U.S. at 577. In this context,
237 "entitlement" is something more "than an abstract need or *237 desire"—or "a unilateral expectation"—that the permits would continue unaltered. *Id.*

[7]

We also note that "[p]roperty interests are not created by the Constitution." Taplick v. City of Madison Personnel Board, 97 Wis. 2d 162, 170, 293 N.W.2d 173, 177 (1980); Roth, 408 U.S. at 577. Rather, they "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." Roth, 408 U.S. at 577; Taplick, 97 Wis. 2d at 170, 293 N.W.2d at 177.

[8]

The benefit to which appellants claim entitlement is the right to be issued renewed forage fish trawling permits each year with the same quotas as their existing permits; and they maintain that if those quotas are changed, they are entitled to the same protections and remedies as persons suffering governmental taking of their real or personal property. But the applicable state law—the department's commercial fishing regulations[6]—plainly states that no one may fish for forage fish commercially without a permit, and that permit holders must hold a valid fishing license, which must be renewed every year. Wis. Adm. Code sec. NR 25.07(2)(c).[7] There is nothing in state statutes or rules granting any "entitlement" to forage fishing licenses, or to indefinite continuation of the fish quotas and time and area restrictions contained in
238 existing permits. Nor do the terms of permits themselves—which, as we have *238 noted, allow commercial fishing only "in accordance with the provisions of Chapter NR 25"—suggest the existence of any such right or entitlement. We agree with the following analysis by Professor Andrea Peterson:

> [W]hen the government grants [an] economically valuable right [to an individual] against other private parties or the government, it often reserves the power to modify or eliminate those rights through a change in the law reflecting a change in public policy. When the government subsequently acts pursuant to that reserved power, no deprivation of property occurs, because the government does not thereby take away anything it had unconditionally given . . ..

A. Peterson, *The Takings Clause: In Search of Underlying Principles Part II—Takings as Intentional Deprivations of Property Without Moral Justification*, 78 CAL. L. REV. 55, 62-63 (1990).

Such a view is consistent with Olson v. State Conservation Comm'n, 235 Wis. 473, 484, 293 N.W. 262, 267 (1940), where the supreme court held that commercial fishers on Green Bay had no right to restrain the State Conservation Commission from enforcing commercial fishing regulations because the fishers' licenses "create[d] no vested or permanent rights." In a later case, LeClair v. Swift, 76 F. Supp. 729 (E.D. Wis. 1948), a commercial fisher sought to enjoin the Conservation Commission from "interfering" with his Lake Michigan fishing activities. The district court rejected the claim, and while the case is not binding precedent in Wisconsin courts, Professional Office Bldgs. v. Royal Indem. Co., 145 Wis. 2d 573, 580-81, 427 N.W.2d 427, 429-30 (Ct. App. 1988), we agree with the court's analysis:

> Section 29.02, Wis. Stats., provides: "(1) The legal title to, and the custody and
> 239 protection of, all *239 wild animals within this state is vested in the state for the purposes of regulating the enjoyment, use, disposition, and conservation thereof."[8] . . . Section 29.01(1), Wis. Stats., [the present sec. 29.01(14)] defines the term "wild animal" to mean any mammal, bird, fish, or other creature

> of a wild nature . . .;
>
> . . ..
>
> It should be kept in mind that commercial fisher[s] . . . do not have any absolute right to fish in waters under the control of the State of Wisconsin. Any property right in the fish in Wisconsin waters is in the State prior to the time they may be caught.
>
> It is not only the right, but the duty, of the State to preserve for the benefit of the general public, the fish in its waters from destruction or undue reduction in numbers . . .. As trustee for the people, in the exercise of this right and duty, the State may conserve fish and wild life by regulating or prohibiting the taking of same . . .. It is well established . . . that by virtue of residual sovereignty, a State, as the representative of its people and for the common benefit of all of its citizens, may control the fish and game within its borders, and may regulate or prohibit such fishing . . ..
>
> . . ..
>
> Plaintiff is licensed as a commercial fisher[ ] by the State of Wisconsin. Without a State license he would not be permitted to engage in commercial fishing in . . . Lake Michigan . . .. Such licenses are not contracts and create no vested or permanent rights. In accepting such a license to operate as a commercial fisher [ ] plaintiff agreed to take fish in accordance with the pertinent State laws and regulations. *LeClair*, 76 F. Supp. at 732-33 [citations omitted].

Appellants argue, however, that *Olson* and *LeClair* are outdated, and that "[u]nder modern
240 constitutional *240 analysis" a commercial fisher's interest in his or her quota permit "constitutes a property interest meriting constitutional protection." In support of the argument, they refer us to *Bell v. Burson*, 402 U.S. 535 (1971). In that case, the plaintiff, an uninsured motorist, was involved in an auto accident, and his license was taken away under Georgia law until such time as he either posted cash or a bond in the amount of damages claimed by the other party or until his liability was determined in court. The Supreme Court, recognizing that the plaintiff's ability to drive a car was essential to the pursuit of his livelihood, ruled that his license could not be taken away "without that procedural due process required by the Fourteenth Amendment." *Id.*, 402 U.S. at 539.

The instant case, however, is not one in which an individual licensee or permittee has had his or her license revoked or suspended. Appellants retain their permits, albeit with added restrictions on the catch; and while they claim the restrictions will have a serious effect on their incomes, they have not been prohibited from forage fishing. Nor, as we have said earlier, have they been singled out; the challenged rules apply to all holders of forage fish permits. We note in this regard the Supreme Court's statement in *Bell*, to the effect that if the Georgia statute had "barred the issuance of licenses to all motorists who did not carry liability insurance or who did not post security" there would be no due process problem. *Id.*[9]

241 *241 Appellants also suggest that "modern Wisconsin case law" has repudiated the holdings in *Olson* and *LeClair*, and refer us, without discussion, to *Waste Management of Wisconsin v. DNR*, 128 **Wis. 2d** 59, 77, 381 N.W.**2d** 318, 326 (1986) (***WM I***), and *Waste Management of Wisconsin v. DNR*, 145 **Wis. 2d** 495, 498, 427 N.W.**2d** 404, 406 (Ct. App. 1988) (***WM II***).

WM I involved a permit issued by the department for operation of a landfill site. The permit was conditioned "upon compliance with the provisions of any plan approval and subsequent modifications thereof . . .." Because the operator's overall plan included construction specifications in addition to operational plans, and because the construction had been specifically approved by the department as required by statute, the court held that the license
242 created a "legitimate claim of entitlement" to operate the site without being required to modify *242 its construction. *Id.*, 128 **Wis. 2d** at 77, 381 N.W.**2d** at 326. The court also held, however, that the license *did not* create any such claim of entitlement to operate the site free from any other restrictions or modifications. ***WM I***'s holding is thus grounded on a specific "prior approval" statute, and because there is no similar statute in this case, we do not see ***WM I*** as requiring the result appellants seek. As for ***WM II***, the page to which appellants have referred us simply cites ***WM I*** for the above proposition.

Finally, appellants point to a federal court of claims case, *Jackson v. United States*, 103 F. Supp. 1019 (Ct. Cl. 1952), as supporting their assertion that "[o]ther courts have specifically recognized that fishing rights constitute property meriting constitutional protection." In that case, however, the fishing permit was renewable as "a matter of right, unless misconduct should occur justifying refusal of renewal." *Id.* at 1020. In addition, the licensee could sell or devise the license, or let it pass to his or her estate upon death. The court held that, given those terms, the license carried property rights which were taken away when the government took over his fishing grounds for military purposes during World War II. Appellants' permits provide no such renewal rights and are not devisable.[10]

As indicated earlier, the new rules limit appellants' smelt fishing to nighttime hours in order to avoid incidental catches of alewives. Appellants argue that, due to the increased dangers involved in night fishing, this section of the rule conflicts with the Wisconsin safe place law,
243 sec. 101.11, Stats., and thus violates sec. 227.10(2), *243 Stats., which states that "[n]o agency may promulgate a rule which conflicts with state law." We disagree.

Section 101.11, Stats., requires every employer to furnish employment "which shall be safe for the employes . . . and shall do every other thing reasonably necessary to protect the life, health, safety, and welfare of such employes . . .." The statute requires an employer to make the work place "as safe as the nature of the place will reasonably permit." *Dykstra v. Arthur G. McKee & Co.*, 92 Wis. 2d 17, 26, 284 N.W.2d 692, 697 (Ct. App. 1979).

Appellants supported their argument in the trial court with the affidavit of a commercial fishing captain who outlined what he believed to be the dangers of night trawling. He stated: "It is irresponsible of me to take my crew and vessel and place us in a continual position of danger."

[9]

Other than quoting from the affidavit, appellants do not further describe the nature of the "conflict," and we see none. The department's actions do not violate sec. 101.11, Stats., because it is not the "employer" of any of the appellants' officers or crews. Nor do the department's rules require appellants or anyone else to trawl at night, any more than they require trawling in stormy or foggy weather when being on the water might be more dangerous than at other times. Finally, the department points out that the captain's affidavit is based on his assumption that "all such (nighttime) trawling must be done in a narrow area on Green Bay" in the same location as the Green Bay shipping channel, which is a "very congested area," whereas the actual smelt trawling area encompasses more than 157 square
244 miles and is as much as eleven miles wide. Appellants have not persuaded us "244 that the rule is nullified by the safe place law.[11]

By the Court.—Judgment affirmed.

[†] Petition to review denied.

[1] A report accompanying the rule proposals placed before the board summarized the necessity for the rule changes:

Special task forces of the Great Lakes Fishery Commission concluded that alewives need protection to recover from precariously low levels. Recent studies indicate commercial harvest and salmonid predation of alewives exceed safe levels. Alewife commercial harvest and salmon stocking must both be dramatically reduced to allow recovery of alewife stocks.

These same task forces also feel strongly that the salmon sport fishery will not recover until alewife populations recover sufficiently to provide an adequate forage base. Disease epidemics brought on by diet-related stress will continue to devastate chinook salmon stocks and the sport fishery.

Smelt are also an important forage for sport fish in Lake Michigan. Although studies of smelt population dynamics are not complete, preliminary observations suggest smelt stocks have also declined. Spring smelt spawning runs in Green Bay tributaries have not occurred at all in the last 5 years. Smelt harvest by sport dippers has shrunk to virtually nothing in the last few years.

Staff feel that a better balance between forage fish stocks, commercial harvest and predation by sport fish must be achieved to maintain a healthy and stable Lake Michigan fishery. The proposed rule will stop commercial harvest of alewives and limit commercial harvest of smelt to allow recovery of these stocks. Salmon stocking will also be reduced to allow better survival of both predator and prey fish stocks.

[2] The department's rule-making authority is set forth in sec. 29.33(1), Stats.:

The [DNR] may . . . designate the areas . . . under the jurisdiction of this state where commercial fishing operations shall be restricted. The [DNR] may establish harvest limits and allocate the harvest limits among commercial fishing licensees . . .. The limitations on licenses . . . shall be based on the available harvestable population of fish and in the wise use and conservation of the fish so as to prevent overexploitation.

[3] Persons are eligible for forage fish trawling permits if they hold a valid commercial fishing license and reported a commercial harvest of forage fish by trawls between January 1, 1984, and December 31, 1985. Thus, the rules are directed to a "general" class, not to specifically named persons.

[4] "The property of no person shall be taken for public use without just compensation therefor." Art. I, sec. 13, Wis. Const. "[P]rivate property [shall not] be taken for public use, without just compensation." U.S. Const. Amdt. 5.

[5] As we have noted above, appellants were subject to the new fishing restrictions when the emergency rule became effective on April 1, 1991, and their permits expired and were renewed three months later on June 30. And, as indicated, they did not challenge the emergency rule, but brought this action several months later when the final rules came into effect.

[6] Duly enacted administrative regulations, such as those found in ch. NR 25, have the force of law in Wisconsin.

[7] This provision has since been repealed to reflect the rule changes.

[8] The statute reads the same today.

[9] The other case cited by appellants on this point, *Bundo v. City of Walled Lake*, 238 N.W.2d 154 (Mich. 1976), involved suspension of a resort's liquor license. Citing *Board of Regents v. Roth*, *supra*, and similar cases, the Michigan court ruled that because the resort owner could be said to have an interest in renewal of the license, he was entitled to "rudimentary due process" before it could be taken away. *Bundo*, 238 N.W.2d at 165. First, as we noted with respect to *Bell*, this case does not involve revocation or failure to renew the appellants' permits. Second, the *Bundo* court's conclusion flowed largely from the Michigan statute which provided a considerably less strict standard for renewal of licenses than for initial licensing. Indeed, the court characterized the statute as being "geared to permit renewal of licenses to take place as a matter of course." *Id.*, 238 N.W.2d at 161. Thus, said the court, the resort owner'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." *Id.* at 161. 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 are issued, to indicate that renewal was a mere formality and would be done simply as a "matter of course" each year with unchanged quotas or other restrictions, provide ample grounds for concluding that *Bundo* has little application to the issues before us.

[10] A second court of claims case cited by appellants, *Todd v. United States*, 292 F.2d 841 (Ct. Cl. 1961), involved the

permits issued under the same Maryland statute as those at issue in Jackson.

[11] LeClair submitted a letter January 31, 1992, to this court making additional arguments based on two documents recently issued by the DNR. Since the briefing schedule for this case had already been completed, we do not consider them. *See* sec. 809.83(2), Stats.


FORWARD
E PLURIBUS UNUM

76 F.Supp. 729 (1948)

LE CLAIR
v.
SWIFT et al.

Civil Action No. 4511.

District Court, E. D. Wisconsin.

March 29, 1948.

730 *730 *731 Harney B. Stover, of Stover & Stover, all of Milwaukee, Wis., for plaintiff.

John E. Martin, Atty. Gen., Stewart G. Honeck, Deputy to Atty. Gen., and Roy G. Tulane, Asst. Atty. Gen., for defendants.

DUFFY, District Judge.

In this action plaintiff, a commercial fisherman, upon behalf of himself and 35 unnamed others allegedly similarly situated, seeks an injunction to restrain the defendants from interfering with his and their vessels and equipment while engaged in the fishing trade on Lake Michigan, and from boarding or attempting to board his and their vessels while under way in navigable waters.

The complaint alleges that plaintiff is the owner of an enrolled and licensed fishing vessel utilized on the navigable waters of Lake Michigan within the jurisdiction of this court; that defendant Swift is Director of the State Conservation Commission, which is a branch of the government of the State of Wisconsin; that said commission is the owner of the oil screw, "Barney Devine"; and that defendant Hadland is the chief game warden, and that defendants Eurs and Weborg, employees of said commission, are respectively the master and engineer of the "Barney Devine."

Plaintiff alleges that in the operation of the "Barney Devine" upon Lake Michigan defendants have followed a practice of preventing the plaintiff and the others whom he represents from following the ordinary pursuits of fishing, and threaten to continue such practice, by (a) interfering with the lifting and setting of nets; (b) boarding vessels while under way and compelling alteration of their courses; (c) seizing and attempting to seize nets which are a part of the tackle of said vessels while same are under way in navigable waters; (d) lifting nets which have been set in fishing waters and dropping them to the bottom where they lie piled up and useless, and tearing nets, and lifting and examining them with unreasonable frequency; (e) seizing or moving nets without notice to plaintiff and those he represents with the result that the crews of fishing vessels spend days in fruitless search for said nets; (f) exercising their alleged right to stop, board, and search the vessels of the plaintiff and others while such vessels are under way in navigable waters.

Plaintiff alleges that he is the owner of the oil screw, "Susie Q." and that the practices of the defendants in interfering with the navigation of his vessel and the vessels of others similarly situated have caused irreparable damage for which they have no adequate remedy at law; that the conduct of the defendants in boarding the vessels while same are under way is in violation of federal statutes; that the fish caught in Lake Michigan by the plaintiff and others similarly situated are intended to and do move in interstate commerce, and that the acts of defendants constitute unreasonable restraint upon such commerce; that unless defendants are restrained by this court, plaintiff and the others will be involved in a multiplicity of legal procedures as they are threatened with arrest.

Defendants move to dismiss this action upon three grounds: (1) That the complaint fails to state a claim upon which relief can be granted and that said complaint is wholly without equity; (2) that the persons constituting the alleged class are in fact not so numerous as to make it impracticable to bring them all before the court; (3) that this court lacks jurisdiction in that the complaint challenges the right of the State of Wisconsin to enforce its fishing regulations relating to the Great Lakes.

Although the complaint fails to disclose "a short and plain statement of the grounds upon which the court's jurisdiction depends," as required by Rule 8(a), Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c, nevertheless it is possible, by construing the complaint liberally, to spell out the basis of plaintiff's resort to this court. Plaintiff grounds his
732 complaint upon the alleged interference by defendants *732 with his right to navigate his vessel upon the navigable waters of Lake Michigan. The complaint charges that the conduct

of the defendants is in violation "of federal statutes," particularly of Sections 241 to 294 of Title 33 (complaint erroneously states Title 22), U.S.C.A., entitled, "Navigation Rules for Great Lakes and Their Connecting and Tributary Waters." In this connection the complaint refers particularly to the alleged boarding of plaintiff's vessel while under way.

Defendants' motion to dismiss concedes the truth of all well pleaded facts in the complaint, but does not concede the truth or accuracy of the legal conclusions pleaded. Federal Life Ins. Co. v. Ettman, 8 Cir., 120 F 2d 837, 839. A motion to dismiss does not admit arguments, inferences and legal conclusions. Green v. Brophy, App.D.C., 110 F 2d 539, 544. Thus, allegations that interstate commerce is not involved, or vice versa, are conclusions of law and not admitted upon a motion to dismiss. Newport News Shipbuilding & Dry Dock Co. v. Schauffler, 303 U.S. 54, 57, 58 S.Ct. 466, 82 L.Ed. 646. Also, the truth of general conclusions of fact or law, stated in a complaint attacking State regulation, are not admitted by a motion to dismiss, nor do they rebut the presumption of constitutionality of State action. Pacific States Box & Basket Co. v. White, 296 U.S. 176, 184, 185, 56 S.Ct. 159, 80 L.Ed. 138, 101 A.L.R. 853.

The Conservation Commission of Wisconsin was created by Section 23.09, **Wis.** Stats., to carry out the purposes of the Conservation Act. Among such purposes was "to provide an adequate and flexible system for the protection, development and use of forests, fish and game, lakes, streams, plant life, flowers and other outdoor resources in the State of Wisconsin." The commission was given very broad and comprehensive powers to carry out such purposes. Serious question has never been raised in the State courts as to the validity of the law establishing the Conservation Commission. The Wisconsin Supreme Court in State v. Sorenson, 218 **Wis.** 295, 260 N.W. 662, specifically approved of Section 29.065, **Wis.**Stats., which provides: "The conservation commission is hereby authorized to regulate hunting and fishing on and in all interstate boundary waters, * * *. Any act of the conservation commission in so regulating the hunting and fishing on and in such interstate boundary waters * * * shall be valid, all other provisions of the statute notwithstanding, * * *." In the Sorenson case the statute above quoted had been attacked as being unconstitutional as an unlawful delegation of legislative power. See also: Olson v. State Conservation Commission, 235 **Wis.** 473, 293 N.W. 262.

Section 29.02, **Wis.**Stats., provides: "(1) The legal title to, and the custody and protection of, all wild animals within this state is vested in the state for the purpose of regulating the enjoyment, use, disposition, and conservation thereof. (2) The legal title to any such wild animal, or carcass or part thereof, taken or reduced to possession in violation of this chapter, remains in the state; and the title to any such wild animal, or carcass or part thereof, lawfully acquired, is subject to the condition that upon the violation of any of the provisions of this chapter relating to the possession, use, giving, sale, barter, or transportation of such wild animal, or carcass or part thereof, by the holder of such title, the same shall revert, ipso facto, to the state. In either case, any such wild animal, or carcass or part thereof, *may be seized forwith, wherever found,* by the state conservation commission or its deputies." Section 29.01 (1), **Wis.**Stats., defines the term "wild animal" to mean any mammal, bird, fish, or other creature of a wild nature endowed with sensation and with the power of voluntary motion.

Under Section 29.03, **Wis.**Stats., the following are declared public nuisances: "(1) Any unlicensed net of any kind * * * or any licensed net * * * set, placed, or found in any waters where the same is prohibited to be used, or in any manner prohibited by law. * * * (6) Any boat, together with its machinery, sails, tackle and equipment * * * used in violation of this chapter; * * *". Section 29.05 (6), **Wis.**Stats., provides: "They (the conservation commission and its deputies) shall seize and confiscate in the name of the state any wild animal, or
733 carcass or *733 part thereof, caught, killed, taken, had in possession or under control, sold or transported in violation of this chapter; and any such officer may, with or without warrant, open, enter and examine all buildings, camps, vessels or boats in inland or outlying waters, * * * and other receptacles and places where he has reason to believe that wild animals, taken or held in violation of this chapter, are to be found; but no dwelling house or sealed railroad cars shall be searched for the above purposes without a warrant." Under the foregoing section conservation wardens may board boats on waters of the Great Lakes over which Wisconsin has jurisdiction and search for contraband fish and make inspections for illegal fishing gear unless for some reason the State is prohibited from exercising such power and authority because of the federal government's control over navigation.

It should be kept in mind that commercial fishermen, including the plaintiff, do not have any absolute right to fish in waters under the control of the State of Wisconsin. Any property right in the fish in Wisconsin waters is in the State prior to the time they may be caught.

It is not only the right, but the duty, of the State to preserve for the benefit of the general public, the fish in its waters from destruction or undue reduction in numbers, whether caused by improvidence or greed of any interests. As trustee for the people, in the exercise of this right and duty, the State may conserve fish and wild life by regulating or prohibiting the taking of same, as long as such action does not violate any organic law of the land. It is well established by the authorities that by virtue of residual sovereignty, a State, as the representative of its people and for the common benefit of all of its citizens, may control the fish and game within its borders, and may regulate or prohibit such fishing and hunting (Manchester v. Massachusetts, 138 U.S. 240, 11 S.Ct. 559, 35 L.Ed. 159; Lawton v. Steele, 152 U.S. 133, 14 S.Ct. 499, 38 L.Ed. 385; Geer v. Connecticut, 161 U.S. 519, 16 S.Ct. 600, 40 L.Ed. 793), subject however to the absence of conflicting federal legislation. Skiriotes v. Florida, 313 U.S. 69, 75, 61 S.Ct. 924, 85 L.Ed. 1193.

Plaintiff argues, however, that conflicting federal legislation does exist in the statutes pertaining to navigation upon the Great Lakes. What plaintiff is, in effect, saying is that,

although the State of Wisconsin may regulate the taking of fish in its waters, while plaintiff is riding about Lake Michigan in his "Susie Q" he is engaging in "navigation," and that at least during the time he stays aboard his ship and keeps moving about he is immune from inspection by the game wardens, and that any such checking or inspection would be an interference with navigation. Such contention is entirely unwarranted and unsound.

Plaintiff is licensed as a commercial fisherman by the State of Wisconsin. Without a State license he would not be permitted to engage in commercial fishing in Wisconsin streams or waters of Lake Michigan controlled by Wisconsin. Such licenses are not contracts and create no vested or permanent rights. Olson v. State Conservation Commission, supra, 235 Wis. at page 484, 293 N.W. at page 267. In accepting such a license to operate as a commercial fisherman plaintiff agreed to take fish in accordance with the pertinent State laws and regulations. The State statute, Section 29.05(6), gave to the commission and its deputies the right to inspect the boats of all commercial fishermen, including plaintiff, to ascertain whether or not any violation of such laws and regulations have occurred.

The right of the federal government to control navigation and the right of the State of Wisconsin to regulate fishing within its boundaries do not conflict. The United States Supreme Court in Manchester v. Massachusetts, supra, 139 U.S. at page 262, 11 S.Ct. at page 564, 35 L.Ed. 159, said: "* * * there is no necessary conflict between the right of the state to regulate the fisheries in a given locality and the right of the United States to regulate commerce and navigation in the same locality. * * *" And the Supreme Court of Wisconsin in
734 Krenz v. Nichols, 197 Wis. 394, 402, 222 N.W. 300, 303, 62 *734 A.L.R. 466, said: "While hunting and fishing may be an incident of navigation, it does not depend on navigation, nor does navigation depend upon the privilege of hunting and fishing. They are distinct and independent of each other, and are drawn from different sources. * * *"

I reach the conclusion that the representatives of the State Conservation Commission had the right to inspect plaintiff's boat, "Susie Q," while the crew was engaged in fishing on Lake Michigan in waters within the boundaries of the State of Wisconsin, and that the carrying out of such inspection was not an interference with navigation. It is true that plaintiff alleges that defendants have acted in an arbitrary and oppressive manner, but even if any such abuses have existed and similar conduct is threatened or anticipated in the future, this court would not have jurisdiction of the controversy.

An additional reason why plaintiff cannot prevail in this action was not argued in the briefs. The question is whether in an action of this kind equitable relief can be granted under the circumstances as set forth in the complaint.

This is an action to enjoin threatened acts by State officials to enforce State laws. It is a well established principle that courts of equity do not ordinarily restrain criminal prosecutions. Hygrade Provision Co., Inc., et al. v. Sherman, 266 U.S. 497, 500, 45 S.Ct. 141, 69 L.Ed. 402; Davis and Farnum Manufacturing Co. v. Los Angeles, 189 U.S. 207, 23 S.Ct. 498, 47 L.Ed. 778. "* * * No citizen or member of the community is immune from prosecution, in good faith, for his alleged criminal acts. The imminence of such a prosecution even though alleged to be unauthorized and hence unlawful is not alone ground for relief in equity which exerts its extraordinary powers only to prevent irreparable injury to the plaintiff who seeks its aid. * * *" Beal v. Missouri Pac. R. R. Corporation, 312 U.S. 45, 49, 61 S.Ct. 418, 420, 85 L.Ed. 577. Hence, interference with the processes of the criminal law in State courts, in whose control they are lodged by the Constitution, and the determination of the questions of criminal liability under State law by federal courts of equity can only be justified in the most exceptional circumstances, and upon clear showing that an injunction is necessary in order to prevent irreparable injury. Beal v. Missouri Pac. R. R. Corporation, supra, 312 U.S. at page 50, 61 S.Ct. at page 421, 85 L.Ed. 577.

In the Beal case, 312 U.S. at page 50, 61 S.Ct. at page 421, 85 L.Ed. 577, hereinabove quoted, the court held that the danger of irreparable injury in the threatened multiplicity of prosecutions and the fact that the aggregate fines might be very large did not justify the interference by a federal court exercising equitable jurisdiction, and the court said: "* * * And in the exercise of the sound discretion, which guides the determination of courts of equity, scrupulous regard must be had for the rightful independence of state governments and a remedy infringing that independence which might otherwise be given should be withheld if sought on slight or inconsequential grounds. * * *"

In this connection it should be noted that allegations that enforcement of State regulation of one's business will cause irreparable damage and deprivation of "rights, liberties, properties and immunities," are in themselves conclusions of law which will not sustain the jurisdiction of equity to enjoin threatened action by State officials. Spielman Motor Sales Co. v. Dodge, 295 U.S. 89, 96, 55 S.Ct. 678, 79 L.Ed. 1322.

Defendants' motion to dismiss is granted, without leave to amend the complaint since it clearly appears that, however it may be amended, it would be dismissed upon final hearing.