

Publication Date: May 23, 2011
Effective Dates: May 23, 2011 through October 19, 2011

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

The Wisconsin Natural Resources Board proposes an order to amend NR 25.09(2)(b)2.a and f, and create NR 25.09(1)(b)11., relating to commercial fishing in outlying waters.

FH-10-11(E)

Analysis

Prepared by Department of Natural Resources

- 1. Statutes interpreted.** Sections 29.014(1), 29.041 and 29.519(1m)(b), Stats.
- 2. Statutory authority.** Sections 23.11(1), 29.014(1), 29.041, 29.519(1m)(b), 227.11(2)(a), and 30.74(2)(a) Stats.
- 3. Explanation of agency authority to promulgate the proposed rules under the statutory authority.** Section 23.11 (1), Stats., grants the department such powers as may be necessary or convenient to enable it to exercise the functions and perform the duties required of it by ch. 23, Stats., and by other provisions of law.

Section 29.014 (1), Stats., directs the department to establish and maintain conditions governing the taking of fish that will conserve the fish supply and ensure the citizens of this state continued opportunities for good fishing, and s. 29.041, Stats., provides that the department may regulate fishing on and in all interstate boundary waters, and outlying waters.

Section 29.519 (1m) (b), Stats., authorizes the department to limit the number of Great Lakes commercial fishing licenses, designate the areas in the outlying waters under the jurisdiction of this state where commercial fishing operations are restricted, and designate the kind, size and amount of gear to be used in the harvest.

Section 227.11 (2) (a), Stats., expressly confers rulemaking authority on the department to promulgate rules interpreting any statute enforced or administered by it, if the agency considers it necessary to effectuate the purpose of the statute.

Finally, s. 30.74(2)(a), Stats., authorizes the department to establish by rule uniform marking of the water areas of this state through the placement of aids to navigation and regulatory markers, including but not limited to fishing buoys.

4. Related statutes.

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

5. Plain language analysis of the proposed rule. SECTION 1. of the Order prohibits persons from trolling with downriggers on the Great Lakes without direct and immediate access to a wire cutter or other device capable of severing any line pulled behind the boat.

SECTION 2. of the Order establishes net-marking requirements for Lake Superior that are identical to the net-marking requirements for Lake Michigan, as affected by SECTION 4 of the Order.

SECTION 3. of the Order specifies that from June 29 to Labor Day south of a line extending from the Lake Michigan shoreline along 44°52'30" north latitude all parts of trap nets must be in water 150 feet or shallower and 60 feet or deeper .

SECTION 4. of the Order revises net-marking requirements for Lake Michigan by requiring that staffs be marked with reflective tape.

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

7. Comparison of similar rules in adjacent states (Minnesota, Iowa, Illinois and Michigan). Trap nets are not used in Illinois or Minnesota waters of the Great Lakes, and of course Iowa has no Great Lakes waters.

The State of Michigan has uniform trap net-marking requirements for all of its Great Lakes Waters (parts of Lakes Superior, Michigan, Huron, and Erie). Those net-marking requirements are similar but not identical to those proposed here for Wisconsin waters of Lakes Michigan and Superior.

The Michigan Department of Natural Resources and Environment has the authority to limit trap netting by individual license holders if and when conflicts arise. Pursuant to that authority the MDNRE prohibits trap nets during June, July, and August in one area near Tawas on Lake Huron.

8. Summary of the factual data and analytical methodologies that the agency used in support of the proposed rule and how any related findings support the regulatory approach chosen for the proposed rule. SECTION 1 and 3 of the rule reflects an effort by the department to take steps to minimize the risk of conflicts between sport trollers and commercial trap nets, the intent of the original petition. SECTION 2 and SECTION 4 modify net-marking requirements for Lake Superior and Lake Michigan. Those changes reflect the judgment of Fisheries and Law Enforcement staff following examination of Great Lakes accident data, discussions with appropriate sport and commercial advisory groups, and internal discussions, and subsequently amended in light of public comment.

9. Analysis and supporting documentation that the agency used in support of the agency's determination of the rule's effect on small businesses under s. 227.114, Stats., or that was used when the agency prepared an economic impact report. We know that small businesses engaged in commercial fishing and wholesale fish dealing may be affected by the rule. We currently have no basis for quantifying the economic impacts of the rule. However, in testimony at public hearings on the rule, Lake Michigan commercial fishers indicated that the time and area restrictions set out in the original version of the rule might have an impact on their catch, and thus have a negative economic impact. These and other comments are reflected in the changes made to the rule.

10. Effects on small business, including how the rule will be enforced. This rule is of interest to commercial fishers and was initiated in response to the expressed concerns of recreational fishers. The impact on commercial fishers is discussed in paragraph 9, above.

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

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

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SECTION. NR 19.058 **Sport trolling.** No operator of a boat may engage in trolling as defined in s. NR 20.03(40), with the use of downriggers, on outlying waters without direct and immediate access to a wire cutter or other hand-held device on board capable of immediately severing any fishing line or cable being used in the water behind the boat.

SECTION 2. NR 25.09(1)(b)11 is created to read

NR 25.09(1)(b)11. Shall each be marked and maintained with 2 flags, one above the other, on a single staff attached to the inside or shallow lead end of the net, one flag on a staff attached to the pot or lifting buoy, one flag on a staff attached to the anchor at the outward end of the king line, and one float measuring a minimum of 5" in diameter attached to the anchor at the outward end of each net wing. All staffs shall be marked with reflective tape. All flags shall measure not less than 9" high by 18" wide and shall be displayed so that the top edge of the flag is not less than 5' above the water, except that the lower of 2 flags on one staff shall be displayed so that the bottom edge is not less than 3' above the water. Two flags displayed on one staff shall be separated by not less than 6". All floats and all flags except the flag attached to the king line anchor shall be of a highly visible color commonly referred to as hunter orange or blaze orange with a color range between 595 nm and 605 nm. The flag attached to the king line anchor shall be a dark color other than orange. The license number or fleet reporting number of the commercial fishing license holder to whom each net belongs shall be displayed and maintained in legible, block figures at least 1" high on the bowl of the pot or lifting buoy. Flags are not required October 16 through April 14.

SECTION 3. NR 25.09(2)(b)2.a. is amended to read:

NR 25.09(2)(b)2.a. Only when the pot or crib is set, placed or operated in water not more than 150 feet (25 fathoms) deep and from June 29 to Labor Day south of a line extending from the Lake Michigan shoreline along 44°52'30" north latitude only when ~~the pot or crib entire net, including the lead,~~ is set, placed or operated in water not more than 150 feet (25 fathoms) or less than 75 feet (12.5 fathoms) 60 feet (10 fathoms).

SECTION 4. NR 25.09(2)(b)2.f. is amended to read:

NR 25.09(2)(b)2.f. Shall each be marked and maintained with 2 flags, one above the other, on a single staff attached to the inside or shallow lead end of the net, one flag on a staff attached to the pot or lifting buoy, one flag on a staff attached to the anchor at the outward end of the king line, and one float measuring a minimum of 5" in diameter attached to the anchor at the outward end of each net wing. All staffs shall be marked with reflective tape. All flags shall measure not less than 9" high by 18" wide and shall be displayed so that the top edge of the flag is not less than 5' above the water, except that the lower of 2 flags on one staff shall be displayed so that the bottom edge is not less than 3' above the water. Two flags displayed on one staff shall be separated by not less than 6". All floats and all flags except the flag attached to the king line anchor shall be of a highly visible color commonly referred to as hunter orange or blaze orange with a color range between 595 nm and 605 nm. The flag attached to the king line anchor shall be a dark color other than orange. The license number or fleet reporting number of the commercial fishing license holder to whom each net belongs shall be displayed and maintained in legible, block figures at least 1" high on the bowl of the pot or lifting buoy. Flags are not required October 16 through April 14.

SECTION 5. STATEMENT OF EMERGENCY. The Department of Natural Resources finds that an emergency exists and the foregoing rules are necessary for the immediate preservation of the public peace, health, safety or welfare. A statement of facts constituting the emergency is:

Commercial trap nets in Lake Michigan pose a hazard to the safety of recreational fishermen trolling submerged fishing lines. The preservation of public safety requires appropriate measures to assure that recreational boaters can know the location of trap nets and are able to release themselves from entanglement with the commercial nets. Accordingly, this NRB Order requires that 1) boat operators engaged in trolling with downriggers carry wire cutters on board capable of severing fishing line or downrigger cable, 2) the enhanced net marking requirements on Lake Michigan be applied to trap nets on Lake Superior, 3) all parts of trap nets set in Zone 3 of Lake Michigan between June 29 and Labor Day be within designated areas, and 4) the marking of trap nets in Lake Michigan be enhanced by the use of reflective tape on buoy staffs.

SECTION 6. EFFECTIVE DATE. This rule shall take effect upon publication in the official state newspaper.

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

Dated at Madison, Wisconsin _____

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

By _____
Cathy Stepp, Secretary

(SEAL)