

NATURAL RESOURCES BOARD AGENDA ITEM

SUBJECT: Adoption of Board Order FH-23-09 to revise Ch. NR 25 relating to the total allowable commercial harvest of whitefish in Lake Michigan (William Horns, 15 minutes)

FOR: DECEMBER, 2009 BOARD MEETING

TO BE PRESENTED BY: William Horns

SUMMARY:

The Order increases annual commercial harvest limits for lake whitefish from Wisconsin waters of Lake Michigan and Green Bay. Separate harvest limits exist for each of three zones. The annual total allowable commercial harvest (TACH) of whitefish in Lake Michigan and Green Bay is increased from 2,470,000 to 2,880,001 pounds. This is a 16.6% increase. The increase is allocated equally among the three zones. The harvest limit for zone 1 is changed from 225,518 to 362,185 pounds. The harvest limit for zone 2 is changed from 2,029,662 to 2,166,329 pounds. The harvest limit for zone 3 is changed from 214,820 to 351,487 pounds. The Order also provides that only the portion of the TACH that is greater than 2,470,000 or less than 2,880,001 pounds, is to be allocated equally among zones, with the remainder to be allocated according to zone-specific proportions used in the past.

The zone allocation formula reflects the recommendation of the Lake Michigan Commercial Fishing Board, but will be controversial with some recreational anglers in zones 1 and 3, who have objected to the sharply increased commercial harvest limits in those zones.

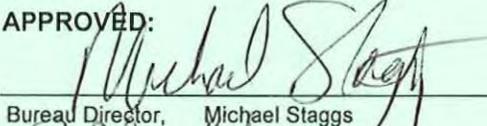
RECOMMENDATION: Adopt proposed Order FH-23-09

LIST OF ATTACHED MATERIALS:

- No Fiscal Estimate Required
- No Environmental Assessment or Impact Statement Required
- No Background Memo

- Yes Attached
- Yes Attached
- Yes Attached

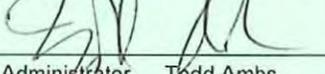
APPROVED:



Bureau Director, Michael Staggs

11/10/2009

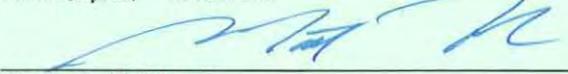
Date



Administrator, Todd Ambs

11/10/09

Date



Secretary, Matt Frank

11/19/09

Date

- cc: Laurie J. Ross - AD/8
- Todd Ambs - AD/8
- Mike Staggs - FH/4
- Pete Flaherty - LS/8
- Bill Horns - FH/4

DATE: November 9, 2009

FILE REF: 3600

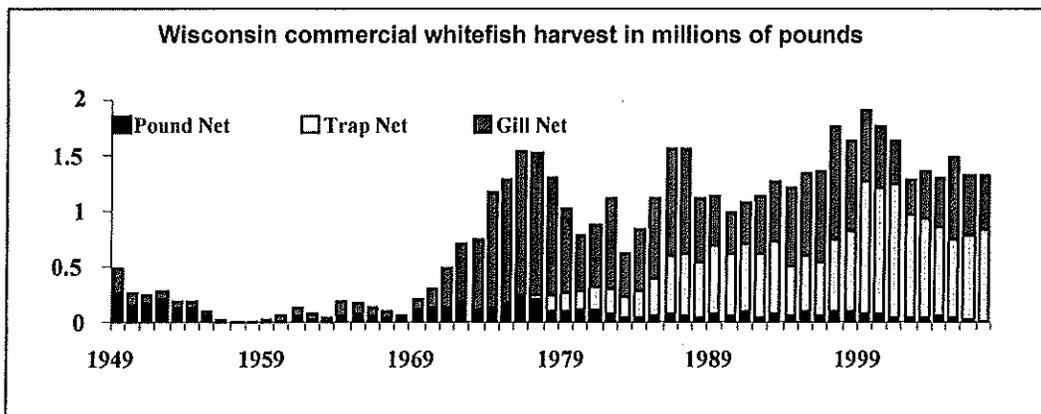
TO: Natural Resources Board

FROM: Matthew J. Frank

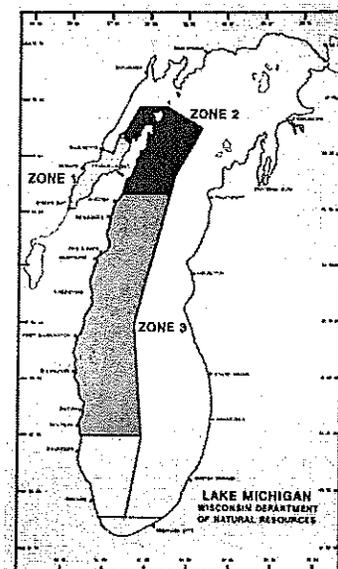
SUBJECT: Adoption of proposed Order FH-23-09, pertaining to Great Lakes commercial fishing

1. Why is the rule being proposed?

Commercial fishing annual harvest limits for lake whitefish¹ on Lake Michigan are specified in Chapter NR 25, Wis. Adm. Code. They are modified from time to time as the whitefish population fluctuates. The annual total allowable commercial harvest (TACH) of whitefish from Lake Michigan is currently 2,470,000 pounds, and was last changed in 1999. As illustrated in the following chart, for over 20 years the lake whitefish fishery in Wisconsin has been stable and productive.



The annual TACH is split among three commercial fishing zones (see chart at right) following a percentage-based allocation formula that has been in effect since our current system of individual transferable quotas was first applied to whitefish in 1989. The annual TACH of whitefish for each zone is divided by the Department on a percentage basis among license holders, with the shares referred to as individual transferable quotas. Department rules also allow license holders to acquire quota shares by transfer from other licensees, and licensees can establish fishing operations in any zone, but quota shares cannot be transferred from one zone to another. When a license is re-issued each year, the quota shares associated with that license normally are also re-issued to the applicant. Commercial fishers generally view the continuity of the quota allocation system and its allocation formulas as central to the stability of their businesses, and view any reallocation of quota shares, whether among license holders or commercial fishing zones, as a potential threat. For this reason the Department is reluctant to reallocate harvests among zones in the absence of a strong biological argument,



¹ Here the terms "whitefish" and "lake whitefish" are used interchangeably. The round whitefish is a separate species.

such as the identification of discrete spawning stocks.

The lake whitefish population of Lake Michigan appears to be stable or growing, but the picture is not completely clear. The situation is complicated by changes in the ecosystem, apparently driven primarily by the proliferation of invasive mussels (dreissenids^{2,3}). Among the manifestations of those changes is a decline in size-at-age of whitefish over the past 15 years.

Because of the importance of lake whitefish for state-licensed commercial fishers in both Wisconsin and Michigan and for tribal fishers in Michigan, a great deal of recent work has focused on better defining the stock structure, on estimating and tracking the population size, and on developing criteria for setting sustainable harvest levels. Our biologists have worked with colleagues in the Michigan DNR, the Chippewa/Ottawa Resource Authority, and the Fish and Wildlife Service to better understand these issues and to develop the recommendation reflected in the proposed rule. In interpreting fisheries data and developing harvest recommendations we try to apply the “precautionary approach”, as recommended by the National Research Council’s Committee on Ecosystem Management for Sustainable Marine Fisheries⁴.

The whitefish stock that our fishers utilize is referred to as the North/Moonlight Bay stock because that is the primary spawning area for these fish. Our biologists applied statistical catch-at-age (SCAA) analysis to estimate the population size. This method should be considered one tool in developing harvest recommendations, and other factors must be considered. SCAA is applied widely in the Great Lakes and, in particular, is used for lake whitefish harvested from Michigan waters under terms of the 1836 Great Lakes Treaty Waters Consent Decree. Our SCAA analysis indicated an expanding lake whitefish population, but our biologists recognize uncertainty in the analysis and, in keeping with the precautionary approach, applied some conservative assumptions in developing the recommendation that is reflected in the present rule proposal. Specifically, we are setting the annual TACH to allow a total annual mortality rate of 35%, rather than the 65% used to set harvest limits in tribal waters. Some factors that contribute to uncertainty are 1) a substantial and growing recreational whitefish harvest in our waters, 2) the harvest by Michigan commercial fishers of fish from the North/Moonlight Bay stock when they move seasonally into Michigan waters, 3) ecosystem changes reflected in slower whitefish growth rates and delayed maturity, and 4) reliance on fishery-dependent data in the analysis.

The Lake Michigan Commercial Fishing Board is charged by statute with advising the Department regarding species harvest limits, allocation formulas, and other matters. In January of 2009 the LMCFB recommended increasing the annual TACH by 200,000 pounds, with that amount to be split between Zones 1 and 3. This recommendation was largely in response to arguments advanced by Zone 3 commercial fishers for changing the zone allocation formula, based on the fact that in some years the zone-specific harvest limits have been reached in Zone 3 but not in Zone 2. Although this was the formal recommendation of the LMCFB, it should be noted that only three of the seven members voted on the matter. Three members abstained and one was absent. The Department did not adopt the LMCFB’s recommendation.

Instead, based on the population analyses summarized above, the Department advanced a proposal in which the annual TACH would be increased by 410,000 pounds. The increase in the allowable harvest

² Hecky, R.E., Smith, R.E.H., Barton, D.R., Guildford, S.J., Taylor, W.D., Charlton, M.N., and Howell, T. 2004. The nearshore phosphorus shunt: a consequence of ecosystem engineering by dreissenids in the Laurentian Great Lakes. *Can. J. Fish. Aquat. Sci.* 61: 1285-1293.

³ Clapp, D.F. and W. Horns [EDS.]. 2008. The state of Lake Michigan in 2005. *Great Lakes Fish Comm. Spec. Pub.* 08-02.

⁴ Sustaining Marine Fisheries. National Academy Press. 1999

would have been allocated among the three zones in proportion to the allocation of the existing harvest limit. That is to say, we would have increased the harvest limits in all zones by the same proportion, approximately 17%. The Natural Resources Board approved hearings on that proposal. Subsequently, but before hearings were held, the Lake Michigan Commercial Fishing Board recommended that the increase be split equally among the three zones. We believe that the intent of the Board was that this would be a one-time only departure from the current zone allocation formula.

2. Summary of the Rule.

The rule increases the annual TACH of lake whitefish from all three fishing zones in Lake Michigan. The overall annual TACH is increased from 2,470,000 pounds to 2,880,001 pounds. For each of the three zones the increase is 136,667 pounds. Zone 1 – 225,518 to 362,185 pounds, Zone 2 – 2,029,662 to 2,166,329 pounds, and Zone 3 – 214,820 to 351,487 pounds. The rule also provides that if, in the future, the annual TACH is set below 2,470,000, it will be divided among zones in proportion to current allocations and that if the annual TACH is set above 2,880,000, the increment in excess of that value will also be allocated according to current proportions.

Sportfishing regulations are not changed by this proposal.

3. How does this proposal affect existing policy?

For the most part this does not affect existing policy, it is simply an increase in the allowable harvest within the existing management framework. However, by dividing the increase in the allowable harvest equally among zones, this rule departs from the long-standing policy of not changing the commercial allocation formula.

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

The Natural Resources Board has changed harvest limits for lake whitefish several times in the past. Harvest limits for lake whitefish from Lake Michigan were first established in 1989, with a limit of 1,150,000 pounds. At that time the current proportional allocation to zones was established based on historic distribution of lake whitefish harvest, with 9.1% going to Zone 1, 82.2% going to Zone 2, and 8.7% going to Zone 3. The annual TACH was increased to 1,300,000 pounds in 1991, to 1,450,000 pounds in 1995, to 1,770,000 pounds in 1996, and to 2,470,000 pounds in 1999.

5. Hearing synopsis

A public hearing was held in Sturgeon Bay on October 26, 2009. It was attended by six members of the public, with five indicating opposition to the proposal and one indicating support. Nine additional individuals submitted written comments or commented by telephone. Of those ten additional individual written or telephone comments, six were in support and four were in opposition. Finally, comments were submitted on behalf of four organizations. The Wisconsin Federation of Great Lakes Sport Fishing Clubs and the Northeast Wisconsin Great Lakes Sport Fishermen support a quota increase in Zones 1 and 2, but not 3. The City of Two Rivers and the Wisconsin Commercial Fisheries Association support the proposed harvest increase, and also support the recommendation of the Lake Michigan Commercial Fishing Board that the increase be divided equally among the three fishing zones. The oral and written comments included the following specific ideas:

- 1) The increase in the TACH should be divided equally among the three fishing zones.

Department response: This was the recommendation of the Lake Michigan Commercial Fishing Board. It has been incorporated into the proposed rule.

- 2) If the proposed increase in the harvest limit (410,001 pounds) is allocated equally among the three zones, the Department should provide assurances that a) if the TACH is later reduced, any reduction up to 410,001 pounds will also be equally allocated among the zones and b) if the TACH is later increased further, the increase should be divided among zones in proportion to the current allocation of harvest.

Department response: This request reflects the intent of the Lake Michigan Commercial Fishing Board. It is not possible to limit the options available to future Natural Resources Board, so no absolute assurances are possible. However, the rule has been drafted to express the desired assurances.

- 3) Because of the increased interest in recreational fishing for whitefish in Zone 1, the economic value of that fishery, and the possibility that a substantial increase in harvest from Zone 3 could harm that recreational fishery, the increased allowable commercial harvest should be limited to Zones 2 and 3.

Department response: The development of a recreational fishery for whitefish in Green Bay is a welcomed addition to the opportunities available in Wisconsin. We cannot at this time accurately estimate the magnitude of the harvest or its economic value, but expect to supplement our existing creel survey to capture data on this part of the recreational fishery. Because we believe that whitefish from the larger North/Moonlight Bay stock move into and out of Green Bay, it is very difficult to estimate the impact of the commercial harvest on that local recreational fishery. Sport fishing regulations are not changed by this rule.

- 4) In light of the strong resistance of sport fishers when summer commercial trap netting for whitefish was introduced near Manitowoc and Two Rivers a few years ago, and in light of the possibility that an increased harvest limit in Zone 3 will lead to increased pressure for further relaxation of the trap netting rules in that area (more nets, larger allowed fishing area), the increased allowable harvest should be limited to Zones 1 and 2.

Department response: We know that many sport fishermen in the Manitowoc and Two Rivers area have a strong objection to the summer commercial harvest from that area, but because that commercial fishery is limited as to the number of nets, where they may be placed, and when they may fished, we do not believe that the proposed change will materially affect the recreational fishery. We have no intention of further relaxing trap netting rules. Because sport fishing regulations are not changed and because there will be no changes in the numbers of allowed trap nets, their allowed locations, or their allowed dates of use, we believe that sport fishing will not be affected. We will continue to discuss this with the sport fishing community through meetings of the Wisconsin Federation of Great Lakes Sport Fishing Clubs, the Great Lakes Study Committee, and other opportunities.

- 5) Because commercial fishers are not always able to harvest the entire TACH in all three zones, the rules should provide an opportunity for unfished quotas to be transferred between zones.

Department response: This interesting suggestion would be a significant departure from existing allocation policy. The Department would welcome advice from the Commercial Fishing Board on this idea.

- 6) Because revenues from the sale of commercial fishing licenses do not cover the full cost of managing the commercial fishery and part of the cost is paid using revenues from the sale of recreational fishing and hunting licenses, the whitefish harvest limit should not be increased unless reducing the whitefish population would serve other purposes.

Department response: Because the proposed rule change will not require the Department to increase its spending for management of the commercial fishery, we do not believe that this issue is relevant to this proposal.

- 7) Commercial fishers need the increased harvest limit to sustain their businesses and continue to provide the public benefit of supplying fish for local restaurants.

Department response: We understand the benefits of a stable and viable commercial fishery. We believe that the larger management framework, with limited entry and individual transferable quotas, along with vigilant regulation of the harvest, helps us to meet that goal.

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

The original rule has been modified to change the allocation among zones of the proposed increase in the annual TACH, as recommended by the Lake Michigan Commercial Fishing Board. Under the final proposal the increase will be equally allocated among the three zones.

7. Environmental assessment

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

8. Small business analysis --Final Regulatory Flexibility Analysis

- a. **Describe the type of small business that will be affected by the rule.** Some commercial fishing businesses will be affected. The rule will increase the allowable harvest for all commercial fishing licensees who hold Lake Michigan lake whitefish quotas.
- b. **Briefly explain the reporting, bookkeeping and other procedures required for compliance with the rule.** None.
- c. **Describe the type of professional skills necessary for compliance with the rule.** None.

Fiscal Estimate — 2009 Session

<input type="checkbox"/> Original	<input type="checkbox"/> Updated	LRB Number	Amendment Number if Applicable
<input type="checkbox"/> Corrected	<input type="checkbox"/> Supplemental	Bill Number	Administrative Rule Number FH-23-09

Subject
 NR 25--Commercial Fishing - Outlying Waters

Fiscal Effect

State: No State Fiscal Effect
 Indeterminate

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

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

Increase Costs — May be possible to absorb within agency's budget.
 Yes No

Decrease Costs

Local: No Local Government Costs
 Indeterminate

1. Increase Costs
 Permissive Mandatory
2. Decrease Costs
 Permissive Mandatory

3. Increase Revenues
 Permissive Mandatory
4. Decrease Revenues
 Permissive Mandatory

5. Types of Local Governmental Units Affected:
 Towns Villages Cities
 Counties Others _____
 School Districts WTCS Districts

Fund Sources Affected

GPR FED PRO PRS SEG SEG-S

Affected Chapter 20 Appropriations

Assumptions Used in Arriving at Fiscal Estimate

The proposed rule changes harvest limits for lake whitefish from three commercial fishing zones in Lake Michigan. These changes will have no fiscal impact at either the state or local level.

Long-Range Fiscal Implications

Prepared By: Joe Polasck	Telephone No. 266-2794	Agency Department of Natural Resources
Authorized Signature 	Telephone No. 266-2794	Date (mm/dd/ccyy) 07-17-09

Fiscal Estimate Worksheet — 2009 Session
 Detailed Estimate of Annual Fiscal Effect

- Original Updated
 Corrected Supplemental

LRB Number	Amendment Number If Applicable
Bill Number	Administrative Rule Number PH-23-09

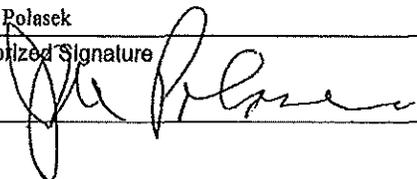
Subject
 NR 25--Commercial Fishing - Outlying Waters

One-time Costs or Revenue Impacts for State and/or Local Government (do not include in annualized fiscal effect):

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

Net Annualized Fiscal Impact

	State	Local
Net Change in Costs	\$ _____	\$ _____
Net Change in Revenues	\$ _____	\$ _____

Prepared By: Joe Polasek	Telephone No. 266-2794	Agency Department of Natural Resources
Authorized Signature 	Telephone No. 266-2794	Date (mm/dd/ccyy) 07-17-09

**ORDER OF THE STATE OF WISCONSIN NATURAL RESOURCES BOARD
REPEALING AND RECREATING RULES**

The Wisconsin Natural Resources Board proposes a rule to repeal and recreate s. NR 25.06 (2) (e) 2., relating to commercial fishing for lake whitefish in outlying waters and affecting small business

FH-23-09

Analysis Prepared by Department of Natural Resources

- 1. Statutes interpreted.** Sections 23.09, 29.011 (1) and (2), 29.014 (1), 29.041, and 29.519, Stats.
- 2. Statutory authority.** Sections 23.11 (1), 29.014 (1), 29.041, 29.519 (1m) (b), and 227.11 (2) (a), Stats.
- 3. Explanation of agency authority to promulgate the proposed rules under the statutory authority.** Section 23.11 (1), Stats., grants the department such powers as may be necessary or convenient to enable it to exercise the functions and perform the duties required of it by ch. 23, Stats., and by other provisions of law.

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

Section 29.519 (1m) (b), Stats., authorizes the department to promulgate rules to establish species harvest limits and formulas for the allocation of the species harvest limits among commercial fishing licensees or for the allotment of individual licensee catch quotas.

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

4. Related statutes.

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

5. Plain language analysis of the proposed rule. The Order revises annual harvest limits for lake whitefish from Wisconsin waters of Lake Michigan and Green Bay. Separate harvest limits exist for each of three commercial fishing zones. The annual total allowable commercial harvest (TACH) of whitefish in Lake Michigan and Green Bay is increased from 2,470,000 to 2,880,001 pounds. The increase of 410,001 pounds is allocated equally among the three commercial fishing zones. This is a departure from the current allocation formula, in which zone 1 receives 9.1%, zone 2 receives 82.2%, and zone 3 receives 8.7% of the annual TACH. The Order also specifies

a general formula for future allocation of annual TACHs among zones: Harvests limits less than 2,470,000 pounds will be allocated among zones according to current proportions, any increment between 2,470,000 and 2,880,001 pounds will be allocated equally among zones, and any additional increment above 2,880,001 pounds will be allocated among zones according to current proportions.

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. Federal regulations do not apply; the State of Wisconsin has exclusive authority to regulate commercial fishing in Wisconsin waters of the Great Lakes.

7. Comparison of similar rules in adjacent states (Minnesota, Iowa, Illinois and Michigan). Of these states the only meaningful comparison is harvest limits established for lake whitefish from Michigan waters of Lake Michigan. The department adopted the methods employed by the State of Michigan and the Chippewa/Ottawa Resource Authority under terms of a negotiated Consent Decree issued by a United States District Court in Michigan. Iowa has no Great Lakes waters. The harvest of lake whitefish from Minnesota waters of Lake Superior is not regulated by harvest limits. There is no commercial harvest of lake whitefish from Illinois waters of Lake Michigan.

8. Summary of the factual data and analytical methodologies that the agency used in support of the proposed rule and how any related findings support the regulatory approach chosen for the proposed rule. This rule was based on modern conventional methods for assessing fish populations and for setting harvest limits. Fish stocks were assessed using standard data from commercial harvests employing statistical-catch-at-age modeling. Harvest limits were set based on the estimated population using standards and methods also used for state and tribal whitefish fisheries in the State of Michigan.

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. Small businesses owned by licensed individuals engaged in commercial fishing and wholesale fish dealers may be affected by the rule. However, the department currently has no basis for quantifying the economic impacts of the rule.

10. Effects on small business, including how the rule will be enforced. This rule is of interest to commercial fishers and was initiated in response to their expressed concerns. 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).

William Horns
Department of Natural Resources
P.O. Box 7921
Madison, WI 53707-7921
Telephone: (608) 266-8732
E-mail: William.Horns@wisconsin.gov

SECTION 1. NR 25.06 (2) (e) 2. is repealed and recreated to read:

NR 25.06 (2) (e) 2. a. If the total allowable commercial harvest of whitefish in Lake Michigan and Green Bay set in subdivision paragraph b. is less than or equal to 2,470,000 pounds, no more than 9.13% may be taken from zone 1, no more than 82.17% may be taken from zone 2, and no more than 8.70% may be taken from zone 3. If the total allowable commercial harvest of whitefish in Lake Michigan and Green Bay is greater than 2,470,000 pounds and less than or equal to 2,880,001 pounds, no more than 225,518 plus one-third X may be taken from zone 1, no more than 2,029,662 plus one-third X may be taken from zone 2, and no more than 214,820 plus one-third X may be taken from zone 3, where X equals the difference between the total allowable commercial harvest and 2,470,000 pounds. If the total allowable commercial harvest of whitefish in Lake Michigan and Green Bay exceeds 2,880,001 pounds, no more than 362,185 plus 0.0913 times Y may be taken from zone 1, no more than 2,166,328 plus 0.8217 times Y may be taken from zone 2, and no more than 351,487 plus 0.087 times Y may be taken from zone 3, where Y equals the difference between the total allowable commercial harvest and 2,880,001 pounds.

b. The total allowable commercial harvest of whitefish in Lake Michigan and Green Bay may not exceed 2,880,001 pounds in any license year.

SECTION 2. EFFECTIVE DATE. This rule shall take effect on the first day of the month following publication in the Wisconsin administrative register, as provided in s. 227.22 (2) (intro.), Stats.

SECTION 3. BOARD ADOPTION. The foregoing rule was approved and adopted by the State of Wisconsin Natural Resources Board on _____.

Dated at Madison, Wisconsin _____.

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

By _____
Matthew J. Frank, Secretary

(SEAL)