

CORRECTED REPORT (05/10/2005)

AB 401
LRB 05-2675/2

Joint Committee for Review of Administrative Rules

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- **NR 1.016 (s. 1 CR 04-066)**

Report to the Legislature
Natural Resources 1.016 (Section 1, Clearinghouse Rule 04-066)

The Joint Committee for Administrative Rules

Produced pursuant to 227.19(6)(a), Stats.

NR 1.016, promulgated by the Department of Natural Resources (DNR), is a policy statement regarding the responsibilities of the DNR and the Natural Resources Board to conserve and enhance the public waters of Wisconsin.

Description of the Problem

2004 Wisconsin Act 118, which became effective February 6, 2004, required emergency rules to be written implementing the legislation. In accordance with Act 118, the DNR drafted an emergency rule package. Included in this package was Section NR 1.016, a policy statement written by DNR outlining their authority as a trustee of the public waters. At a Joint Committee for Review of Administrative Rules public hearing held on June 24, 2004, over 500 people in attendance raised many issues. Numerous individuals questioned whether the DNR in drafting s.NR 1.016 had gone beyond the Legislature's intent and the statutory authority of Act 118.

On June 24, 2004, the Joint Committee for Review of Administrative Rules held a public hearing on Emergency Rule 1.016, 1.05, 1.06 and 1.07. An executive session was held on July 21, 2004. The committee passed a motion on a 9 to 1 vote, pursuant to s.227.26(2)(d), Stats., and for the reasons set forth in s.227.19(4)(d)3. and 6., Stats., to suspend NR 1.016.

On December 8, 2004, the Natural Resources Board voted to adopt FH-36-04, revisions to NR 1. Clearinghouse Rule 04-066 was submitted to the Legislature on

January 11, 2005 as part of a package of permanent rules drafted to implement the provisions of 2003 Act 118.

The Assembly Committee on Natural Resources and the Senate Committee on Natural Resources and Transportation held a joint public hearing on February 23, 2005. On March 2, 2005, pursuant to s.227.19(4)(b)5. and (d), Stats., the Assembly Committee on Natural Resources voted, 9 to 5, to object to NR 1.016 (Section 1 of Clearinghouse Rule 04-066), on the grounds that this portion of the rule fails to comply with legislative intent and is arbitrary, capricious, and imposes an undue hardship.

Arguments in Favor of Objection

- NR 1.016 is entirely a policy statement without statutory authority. 2004 Wisconsin Act 118 does not instruct the DNR to write any rule outlining their responsibility over public waters.
- The Legislature did not intend for Act 118 to authorize the DNR to include the NR 1.016 policy statement.
- NR 1.016 has no practical effect and is confusing as far as its purpose in carrying out the authorizing statute.
- NR 1.016 presents a biased view of case law, and should either be balanced by other case law or removed.

Arguments Against Objection

- Since this portion of the rule is simply a policy statement, it will not affect the implementation of Act 118.
- NR 1.016 puts NR 1 into context with respect to the public trust doctrine.

Action by Joint Committee for Administrative Rules

On March 31, 2005, the Joint Committee for Review of Administrative Rules held a public hearing and executive session on NR 1.016 (Section 1 of Clearinghouse Rule 04-066). The committee passed a motion on a 5 to 4 vote, pursuant to s. 227.19(4)(d)3. and 6. and (5)(d), Stats., to object to NR 1.016 on the basis that it fails to comply with legislative intent, and it is arbitrary, capricious or imposes an undue hardship.