

FEB 07 2001

State of Wisconsin
Department of Natural Resources

**NOTICE TO PRESIDING OFFICERS
OF PROPOSED RULEMAKING**

Pursuant to s. 227.19, Stats., notice is hereby given that final draft rules are being submitted to the presiding officer of each house of the legislature. The rules being submitted are:

Natural Resources Board Order No. LE-14-00

Legislative Council Rules Clearinghouse Number 00-088

Subject of Rules Implementing the department's
authority to void local hunting, fishing and
trapping ordinances

Date of Transmittal to Presiding Officers February 6, 2001

Send a copy of any correspondence or notices pertaining to this rule to:

Carol Turner, Rules Coordinator
DNR Bureau of Legal Services
LS/5, 101 South Webster

Telephone: 266-1959
e-mail: turnec@dnr.state.wi.us

An electronic copy of the proposed rule may be obtained by contacting Ms. Turner

REPORT TO LEGISLATURE

NR 19.40, Wis. Adm. Code
Implementing the department's authority to void local hunting,
fishing and trapping ordinances

Board Order No. LE-14-00
Clearinghouse Rule No. 00-088

Statement of Need

With the creation of s. 29.038, Stats., the Department was given the authority to void local ordinances which have more than an incidental impact on hunting, fishing or trapping, or which do not have public health and safety as a primary purpose. The proposed rule provides guidance to the Department in determining which local ordinances exceed the local governmental unit's authority.

Due to the wide variety of ordinances and local conditions currently in existence, the Department determined that absolute standards for enforcement of the rule were not practical. Furthermore, the existence of such standards could lead some to believe that the Department would take immediate action when a local ordinance operates contrary to a standard. Instead, the Department creates a "factors to be considered" rule. The rule also establishes the procedures to be used in holding hearings to determine compliance with s. 29.038, Stats., and designates the secretary or the secretary's designee as the final decision-maker for the Department. Decisions of the Department would be appealable in circuit court.

Modifications as a Result of Public Hearings

The following modifications were made:

1. Clarified that the listed factors are factors that favor a voiding of the ordinance.
2. Exempted Wolf River fishing rafts, which are already subject to a separate Department review under s. 30.126, Stats.
3. Changed references from "rescind" to "void" to be consistent with statutory language.
4. Referred to undeveloped lands, as defined in s. 943.13(1e)(f), Stats., rather than unplatted.
5. Changed the required notice, prior to the Department hearing, from 10 days to 30 days.

Appearances at the Public Hearings and Their Position

June 19, 2000 – Pewaukee

In support:

Steven Williams, Wern Valley Sportsmen's Club, S36 W29657 Wern Way, Waukesha, WI 53189

In opposition:

Duane C. Luick, 28904 Reach Drive, Waterford, WI 53185

Robert E. Langmesser, Chairman, Town of Waterford, 6613 Willow Lane, Waterford, WI 53185

Karen J. Sohr, Co-Chair, Fox River C.A.U.S.E., 5523 Scenery Road, Waterford, WI 53185

As interest may appear:

Tom Struebing, New Berlin Police Dept., 16300 W. National Avenue, New Berlin, WI 53151
Mark Perlewitz, New Berlin Police Dept., 16300 W. National Avenue, New Berlin, WI 53151
Gregory Youngs, Milwaukee Co. Dept. of Parks, Recreation and Culture, 9480 W. Watertown
Plank Road, Wauwatosa, WI 53226

June 26, 2000 – Madison

In support:

Jim Merten, Jr., 1065 Cozy Lane, Oshkosh, WI 54901
Gary R. Goyke, Wis. Game Preserve Association, 130 Lakewood Blvd., Madison, WI 53704
George Phelan, 2618 Commercial Avenue, Madison, WI 53704

In opposition – none

As interest may appear:

Tom J. McHugh, Appleton, WI 54915
Norb Morack, Constable, Town of Liberty, W8796 County S, Hortonville, WI 54944
William P. Nagle, Attorney, City of Wausau, 406 Grant Street, Wausau, WI 54403

June 27, 2000 – Appleton

In support:

Ken Knaack, 2201 Woodlawn Lane, Appleton, WI 54914
Blake Barrett, 103 Brian Drive, Neenah, WI 54956
John Hoerning, 730 Higgins Avenue, Neenah, WI 54956
Matt Merten, 1054 Cozy Lane, Oshkosh, WI 54901
Bucky Kilisher, Wisconsin Wildlife Federation, 1212 Oneida Road, Menasha, WI 54952
Brad Hernke, 28 N. Creek Street, Hilbert, WI 54129
Glen Mattern, 1203 Bartlein Court, Menasha, WI
Michael Maas, 609 Broad, Menasha, WI 54952
Steve Kohel, 4544 Island View Drive, Oshkosh, WI 54901
Mack Baehr, N1751 County Highway J, Kaukauna, WI 54130
Ralph R. Fritsch, Wis. Wildlife Federation, 643 Sunset Avenue, Kaukauna, WI 54130
James Daun, N6482 Lakeshore Road, Hilbert, WI 54129
Dick Koerner, 540 Sunrise Bay Road, Neenah, WI 54956
Jim Buckenberg, 2199 Butte des Morts Beach Road, Neenah, WI 54956
Mack Steenis, 1413 B Miami Circle, Little Chute, WI 54140
Fred H. Steenis, 2175 W. Butte des Morts Road, Neenah, WI 54956
Dale Hernke, N6498 Lakeshore Drive, Hilbert, WI 54129

In opposition:

Eugene H. Bonnell, Village of Shiocton, P.O. Box 96, Shiocton, WI 54170

As interest may appear:

Charleen M. Steenis, 2175 W. Butte des Morts Beach Road, Neenah, WI 54956

Haze Diemel, Shadows on the Wolf, Inc., W7644 County Road F, Shiocton, WI 54170
Jean E. Gams, 1760 Alexandra Court, #B, Oshkosh, WI 54901
Richard Singler, Chairman, Town of Bovina, N4970 State Highway 76, Shiocton, WI 54170
Jay Ross, Supervisor, Town of Mukwonago, W303 S10490 Sandy Beach Road, Mukwonago, WI
Michael Ubl, Chairman, Town of Liberty, W9976 Allcan Road, New London, WI 54961
Jack Thiel, 1126 E. Mitchell Avenue, Appleton, WI 54915
Merv Farmer, 809 E. Fremont Street, Appleton, WI 54915

Response to Legislative Council Rules Clearinghouse Report

All editorial and format recommendations were incorporated. The report suggested that the Department did not go far enough in regulating local permit requirements, citing s. 66.092, Stats., which prohibits local permitting of firearm possession and use. The Department agrees that local permitting of firearms use does seem to be preempted by s. 66.092, Stats. However, it is also our position that the rule, as written (which does not question the permitting until the fee exceeds \$4.50), does not "legalize" these ordinances. It simply states the Department will not use its authority to void such ordinances under s. 29.038, Stats., until a certain threshold is reached. The Department was not given the responsibility to enforce s. 66.092, Stats., and will use its authority under s. 29.038, Stats., only when the ordinance has more than an incidental impact on hunting.

Final Regulatory Flexibility Analysis

This rule will primarily affect local units of government and will not directly impact small businesses. Therefore, a final regulatory flexibility analysis is not required.

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

The Wisconsin Natural Resources Board proposes a rule to create s. NR 19.40 to implement the department's authority to void local hunting, fishing, and trapping ordinances.

LE-14-00

Analysis Prepared by the Department of Natural Resources

Statutory Authority: s. 227.11(2)(a), Stats.

Statutes Interpreted: s. 29.038, Stats.

With the creation of s. 29.038, Stats., by 1997 Act 170, the Department of Natural Resources was given the authority to declare local ordinances void which have more than an incidental impact on hunting, fishing, or trapping, or do not have public health and safety as a primary purpose. This rule provides guidance to the department in determining which ordinances exceed the local governmental unit's authority. The standards for determination are not weighted and do not appear in order of importance. The rule also provides the procedures by which the department will hold the hearings and make the determinations required by s. 29.038(4), Stats.

SECTION 1. NR 19.40 is created to read:

NR 19.40 Department authority to void local hunting, fishing and trapping ordinances. (1) **PURPOSE.** These rules are developed, pursuant to s. 227.11, Stats., to establish procedures for determining when local ordinances should be voided under s. 29.038, Stats., because they have more than an incidental effect on hunting, fishing or trapping, or do not have public health and safety as a primary purpose.

(2) **DEFINITIONS.** In this section:

(a) "Building devoted to human occupancy" has the meaning used in s. 941.20(1)(d), Stats.

(b) "Undeveloped lands" has the meaning given in s. 943.13(1e)(f), Stats.

(3) DEPARTMENT DETERMINATIONS. Department determinations related to the legality of local ordinances regulating hunting, fishing or trapping shall consider the following factors when determining the validity of a local ordinance. The listed factors are not weighted and are factors which would favor a department decision to void the ordinance.

(a) The extent to which the ordinance affects undeveloped lands or lands which are zoned agricultural, forestry, lowland conservancy, upland conservancy or flood plain.

(b) The extent to which the department has received complaints about the ordinance.

(c) Whether the ordinance purports to directly regulate hunting.

(d) Whether the ordinance requires a permit to discharge a firearm or a bow, whether a fee is charged which exceeds 150% of the issuance fee established by s. NR 19.02(4)(b), creates a higher fee for non-residents or requires a background check.

Note: At the current time, the fee established by s. NR 19.02(4)(b) is \$3.00.

(e) Whether the ordinance restricts the discharge of fine shot while the shooter is in or on the water more than 100 yards from the nearest developed shoreline, and shooting away from or parallel to that shoreline.

(f) Whether the ordinance prohibits the discharge of fine shot when on undeveloped lands which are more than 100 yards from buildings devoted to human occupancy, and shooting away from the buildings.

(g) Whether the ordinance prohibits hunting, fishing or trapping on department property otherwise open to hunting, fishing or trapping or on property leased by or under easement to the department for the purpose of hunting fishing or trapping.

(h) Whether the ordinance prohibits the discharge of shotguns or bows within all areas of the municipality.

(i) Whether the ordinance prohibits the discharge of bows.

(j) Whether existing state laws adequately address the local safety concerns.

(k) Whether the ordinance prohibits fishing by individuals located on public waters.

(l) Whether less restrictive alternatives are available to address a municipality's safety concerns.

(m) Whether the ordinance prohibits live trapping.

(n) Whether the ordinance has no apparent health or safety purpose.

(4) EXCEPTION. This section does not apply to fishing rafts subject to regulation under s. 30.126, Stats.

(5) PROCEDURES. (a) Prior to holding a hearing to determine the validity of a local ordinance under s. 29.038, Stats., the department shall mail the affected municipality a notice of the time and location of the hearing. The department shall also publish a class I notice under ch. 985, Stats., of the hearing in the county in which the municipality is located. The notice shall be given at least 30 days prior to the date set for the hearing.

(b) Hearings shall be conducted to the extent possible in a manner consistent with s. 227.18(1) and (2), Stats.

(c) The final decision shall be made by the secretary or the secretary's designee.

(d) The decision shall be in writing and accompanied by findings of fact and conclusions of law.

(e) The department may void ordinances found to be in violation of s. 29.038, Stats., in whole or in part, or as applied to certain areas, certain classes of persons, certain times of the year, or certain circumstances.

The foregoing rules were approved and adopted by the State of Wisconsin Natural Resources Board on January 24, 2001.

The rules 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.

Dated at Madison, Wisconsin _____.

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

By _____

George E. Meyer, Secretary

(SEAL)

WISCONSIN LEGISLATIVE COUNCIL STAFF

LCRC
FORM 2

RULES CLEARINGHOUSE

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CLEARINGHOUSE REPORT TO AGENCY

[THIS REPORT HAS BEEN PREPARED PURSUANT TO S. 227.15, STATS. THIS IS A REPORT ON A RULE AS ORIGINALLY PROPOSED BY THE AGENCY; THE REPORT MAY NOT REFLECT THE FINAL CONTENT OF THE RULE IN FINAL DRAFT FORM AS IT WILL BE SUBMITTED TO THE LEGISLATURE. THIS REPORT CONSTITUTES A REVIEW OF, BUT NOT APPROVAL OR DISAPPROVAL OF, THE SUBSTANTIVE CONTENT AND TECHNICAL ACCURACY OF THE RULE.]

CLEARINGHOUSE RULE 00-088

AN ORDER to create NR 19.40, relating to implementing the department's authority to void local hunting, fishing and trapping ordinances.

Submitted by **DEPARTMENT OF NATURAL RESOURCES**

05-09-00 RECEIVED BY LEGISLATIVE COUNCIL.

06-06-00 REPORT SENT TO AGENCY.

RNS:GAA:jal;ksm

LEGISLATIVE COUNCIL RULES CLEARINGHOUSE REPORT

This rule has been reviewed by the Rules Clearinghouse. Based on that review, comments are reported as noted below:

1. STATUTORY AUTHORITY [s. 227.15 (2) (a)]

Comment Attached YES NO

2. FORM, STYLE AND PLACEMENT IN ADMINISTRATIVE CODE [s. 227.15 (2) (c)]

Comment Attached YES NO

3. CONFLICT WITH OR DUPLICATION OF EXISTING RULES [s. 227.15 (2) (d)]

Comment Attached YES NO

4. ADEQUACY OF REFERENCES TO RELATED STATUTES, RULES AND FORMS
[s. 227.15 (2) (e)]

Comment Attached YES NO

5. CLARITY, GRAMMAR, PUNCTUATION AND USE OF PLAIN LANGUAGE [s. 227.15 (2) (f)]

Comment Attached YES NO

6. POTENTIAL CONFLICTS WITH, AND COMPARABILITY TO, RELATED FEDERAL
REGULATIONS [s. 227.15 (2) (g)]

Comment Attached YES NO

7. COMPLIANCE WITH PERMIT ACTION DEADLINE REQUIREMENTS [s. 227.15 (2) (h)]

Comment Attached YES NO

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CLEARINGHOUSE RULE 00-088

Comments

[NOTE: All citations to "Manual" in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council Staff, dated September 1998.]

I. Statutory Authority

a. Section NR 19.40 (3) (d) requires the Department of Natural Resources (DNR) to consider whether the ordinance requires a permit to discharge a firearm or bow, whether a fee is charged that exceeds 150% of the issuance fee established by s. NR 19.02 (4) (b), creates a higher fee for nonresidents or requires a background check.

Section 66.092, Stats., relates to authorized local regulation of firearms. Section 66.092 (2), Stats., provides:

Except as provided in subs. (3) and (4), no political subdivision may enact an ordinance or adopt a resolution that regulates the sale, purchase, purchase delay, transfer, ownership, use, keeping, possession, bearing, transportation, licensing, permitting, registration or taxation of any firearm or part of a firearm, including ammunition and reloader components, unless the ordinance or resolution is the same as or similar to, and no more stringent than, a state statute.

Among the exceptions is: "Nothing in this section prohibits a city, village or town that is authorized to exercise village powers under s. 60.22 (3) from enacting an ordinance or adopting a resolution that restricts the discharge of a firearm."

It is questionable whether an ordinance that, for example, allows discharge of a firearm upon payment of a fee of less than 150% of the DNR's fee is authorized under s. 66.092, Stats. That is, although a local ordinance may *restrict* discharge of a firearm by, for example, prohibiting discharges, it is questionable whether requiring a permit, charging a fee or requiring a background check is authorized under s. 66.092, Stats. The provision of the rule should be examined for consistency with this statute.

b. Section NR 19.40 (4) (e) provides that the DNR may "rescind" ordinances found in violation of s. 29.038, Stats. However, s. 29.038, Stats., authorizes the DNR, if it determines that an ordinance, regulation, resolution or other restriction exceeds the authority granted to local governments, to issue a notice of the DNR's intent to issue an order. If it issues an order, that order may declare the ordinance, regulation, resolution or other restriction *void*. The DNR does not have authority to "rescind" ordinances that violate s. 29.038, Stats. The terminology of s. 29.038 (4), Stats., should be used.

2. Form, Style and Placement in Administrative Code

- a. In s. NR 19.40 (2), par. (a) should be preceded by "In this section:".
- b. In s. NR 19.40 (4) (e), "certain" should be inserted before "times."

5. Clarity, Grammar, Punctuation and Use of Plain Language

a. The analysis to the rule states that the standards in the rule are not weighted and do not appear in order of importance. However, the text of the rule does not state this. Is there a need to state this in the text?

- b. In s. NR 19.40 (4) (d), "The" should be inserted before "decision."