

State of Wisconsin
Department of Natural Resources
Manual Code 1755.1 Self-Permitting Process for a Department Led Project



Mike Bruhn, Assistant Deputy Secretary Date

04/29/2015

Rescinds and Replaces: New
Division:Water Bureau:Watershed

Approved by OMT: 04/24/2015
Next Review Date: 2020

I. SCOPE

Unless otherwise directed by the Secretary, this manual code applies to all staff involved in any department led project that requires a permit issued by the Department of Natural Resources. This manual code does not apply to any department led project that was started before January 1, 2015, even if the project is not completed by that date.

This manual code applies to any department led project that includes an activity that may require a permit under ch. 26, 29.733, 30, 31, or 292, 280.11, 281.34, 281.346, 281.36, 281.41, 283.31, 285, 289, 291, 292.15, 295 Wis. Stats., or ch. NR 40, 101, 103, 135, 299, 300, 301, 302, 305, 310, 320, 323, 324, 325, 326, 328, 329, 333, 340, 341, 343, 345, 347, 350, 351, 352, 353, 410, 447, 502, 503, 600-679, 708, 718, 726, 738, 809, 810, 811, 812, 856, and 860 Wis. Adm. Code. This manual code does not apply where such compliance is expressly precluded by statute or administrative rule, or where there is an imminent threat to public health, safety or welfare.

II. POLICY

While generally not expressly required by statute or common law, but to promote transparency and consistency in applying state law under its jurisdiction the department shall, for any department led project, voluntarily apply for and meet the permit application and approval requirements to obtain any permits that a member of the general public would require to undertake the same type of project. This includes any and all public notice and public hearing requirements. Permit application fees for department led projects shall not be required unless a state statute, administrative code or federal law expressly requires the state or department to pay the fee. The department will continue to obtain permits where expressly required by statute or administrative code.

The department led project manager must receive a permit on behalf of the department before commencing the activity in the department led project that requires a permit unless otherwise provided for in statute or administrative code.

A permit decision regarding a department led project shall be based on the standards and requirements in the applicable statutes and administrative rules that apply if the department led project was undertaken by a member of the general public. The benefits that a department led project may provide to the general public shall be considered in evaluating whether the project is detrimental to the public interest.

III. DEFINITIONS

“**Agent**” a department or agency of this or another state, federal agency, county, town, corporation or individual that has been expressly delegated by statute, rule or written contract to act under full or partial authority of the department.

“**Cooperator**” includes departments and agencies of this or other states, federal agencies, counties, towns, corporations and individuals that may partner with the Department Led Project Manager or Agent on a Department Led Project.

“**Department**” means the Department of Natural Resources

“**Department Led Project**” means any activity initiated and primarily managed by the department or its agent would require an applicable permit if undertaken by a member of the general public.

“**Program Permit Lead**” means the staff member that is responsible for issuing a decision on a proposed activity.

“**Property Manager**” is the designated department staff person responsible for managing a state-owned property or easement for which a department led project is desired.

“**Department Led Project Manager**” is the department staff member that is initiating a project that may need a permit or permits.

“**Permit**” includes any approval, certification, permit or order issued by the department pursuant to its statutory or administrative rule authority and required before beginning any activity subject to that permit or order.

IV. PROCEDURE

Department Led Project
Manager

Step 1- Consult with the Policy/Permit Lead(s) and the regional Environmental Analysis staff or WEPA Coordinator to determine what permits may be needed and what measures in ch. NR 150 will be required to comply with WEPA. The project manager is also expected to integrate with the other programs that potentially could have roles in a project to ensure that all the necessary permitting will be addressed.

Step 2- Completes an Endangered Resources (ER) review through the NHI Portal as described by Manual Code 1753.1, unless the project is covered by the no/low broad incidental take permit/authorization and is therefore exempt from needing an ER Review. Consult with Department Archaeologist to identify and address any potential impacts to archaeological/historical resources that may result from the proposed department led project.

Step 3- Consults with local governments, as outlined in the attached

July 3, 2014 memo, other state and federal agencies to ensure compliance to the extent practicable with any applicable requirements

Step 4- Prepares and submits application(s) to the Program Permit Lead(s).

Program Permit Lead(s)

Step 1- Conducts initial screening of application packet to assure that all required items are submitted. Requests additional information from the Department Led Project Manager as needed.

Step 2- Reviews application packet and obtains any additional input or information needed from regional or bureau staff.

Step 3- Consults with regional Environmental Analysis staff or WEPA Coordinator regarding documentation requirements for compliance with ch. NR 150.

Step 4- Coordinates review with the appropriate staff and communicates results with Department Led Project Manager. Coordinates adjustments to the department led project scope and design with Department Led Project Manager.

Step 5- Determines if a public notice and informational hearing are required by statute or administrative code. Coordinates public notice and hearing with assistance from Department Led Project Manager. Publishes a WEPA compliance determination if required by s. NR 150.35.

Step 6- Responds to comments and feedback from the public. Adjusts project scope or design as necessary with Department Led Project Manager.

Step 7- Approves or denies permit for department led project in writing to the Department Led Project Manager or Agent and Cooperator if applicable. Signatures on permits should be consistent with the Department delegation Manual Code 1023.

Property
Manager/Department Led
Project Manager

Secures funding (if appropriate) and initiates department led project after receipt of all required state and federal approvals and after compliance with local requirements to the extent practicable.

V. BACKGROUND

Issue Resolution- The formal conflict resolution process consists of the following steps and can begin at any time in the self-permitting process:

1. The Department Led Project Manager and the Program Permit Lead will meet to resolve the issue(s).
2. If after the Department Led Project Manager and Program Permit Lead have met and there are unresolved issues, first-line supervisors shall meet to discuss and resolve any conflicts. They may appoint, at any time, a mutually acceptable mediator to assist in resolving the conflict. Supervisors will communicate with the Department Led Project Manager and Program Permit Lead the resolution and agreement items afterward.
3. If issues are remaining after the first-line supervisors have met, a meeting will be held with the Regional Managers, (i.e. Water Leader or Regional Fisheries Manager) and or Bureau Director, and the Secretaries Directors. They may appoint, at any time, a mutually acceptable mediator to assist in resolving the conflict. Regional Managers, Bureau Directors and Secretaries Directors commit to keeping all parties informed about the progress of the issue resolution.
4. Division Administrators will meet and decide on a resolution if an agreement is not reached in step 3. After meeting, Division Administrators will communicate the resolution and supporting details to staff previously involved with project.

CORRESPONDENCE/MEMORANDUM

DATE: July 3, 2014

TO: Dan Schuller, Bureau of Parks and Recreation
Tom Hauge, Bureau of Wildlife Management
Bob Mather, Bureau of Forest Management
Trent Marty, Bureau of Forest Protection
Wendy McCown, Bureau of Forestry Business Services
Erin Crane, Bureau of Natural Heritage Conservation
Ron Bruch, Bureau of Fisheries Management
Steve Miller, Bureau of Facilities and Land
Office of Business Support and Sustainability

FROM: Kurt Thiede, Division of Land Administrator 
Paul DeLong, Division of Forestry Administrator 
Russ Rasmussen, Division of Water Administrator 

SUBJECT: Zoning Permits and Fees for DNR Construction Projects

The purpose of this memo is to explain a change in how the Department (DNR) will interact with local zoning on DNR construction and facility development projects. The change that will occur, as of the date of this memo, is that DNR will follow the same procedures as the Department of Administration (DOA) for all state construction projects.

BACKGROUND

Over the last number of months, the issue of how DNR addresses building projects and local zoning, and how DOA addresses state building projects and local zoning issues was discussed with DOA and it became apparent there was inconsistency between the two agencies.

DOA has long taken the position that the State is exempt from local zoning permit processes and fees by virtue of Wis. Stat. s. 13.48(13)(a), which provides, in part:

(13) APPLICATION OF LAWS, RULES, CODES, ORDINANCES AND REGULATIONS.

(a) Except as provided in par. (b) or (c), every building, structure or facility that is constructed for the benefit of or use of the state, any state agency shall be in compliance with all applicable state laws, rules, codes and regulations but the construction is not subject to the ordinances or regulations of the municipality in which the construction takes place except zoning, including without limitation because of enumeration ordinances or regulations relating to materials used, permits, supervision of construction or installation, payment of permit fees, or other restrictions.

DOA's long standing position is reinforced by a Dane County Circuit Court decision in, *Eau Claire County v. Department of Transportation*, Case No. 93-CV-4294 (5/17/94), in which the court addressed the issue of whether the state was subject to paying local zoning permit fees. In that case the state constructed an addition to a WisDOT state patrol headquarters located in Eau

Claire County. The state did not obtain county land use and conditional use permits and did not pay the fees associated with those permits. The court ruled:

Plaintiff [Eau Claire County] contends that where s. 13.48(13), Stats., provides that local ordinances and regulations do not apply to the state, but then makes an exception for “zoning”, that in fact the statute does not relieve the state from paying zoning permit fees. This court does not agree. The statute provides that the state is not subject to ordinances and regulations of the municipality in which the building is located. It goes on to provide a non-exhaustive list of examples. Included in the list of examples are ordinances and regulations relating to materials used, *permits*, supervision of construction or installation, and *payment of fees*. The fact that there is an exception for “zoning”, in the light of the language excluding payment of permit fees, and the long standing common law rules of sovereign immunity, indicates that the exception *does not refer to zoning permits and fees*. The statutory language “except zoning”, is not a clear and unambiguous indication that the state consents to be sued for zoning permit fees. [emphasis added].

Based upon the statute and this case law, DOA does not apply for zoning permits, nor does DOA pay zoning permit fees for any state project whether or not the structure involves public use or not. However, DOA acknowledges to local units of government that the state accepts local interests in being fully informed of construction activities conducted by the state in their municipality and works hard to confirm that state land uses comply with local zoning designations (e.g. the state would not construct a DNR service center in an area zoned for single-family residential dwellings).

Based on past policy decisions, DNR was using an approach that if the project was for public benefit or use of the public then DNR would not apply for zoning permits or pay zoning permit fees. However, if the project was for use in the internal administrative operations of DNR (i.e., a cold storage building), then DNR would apply for zoning permits and pay zoning permit fees.

This approach was inconsistent with how DOA is managing all other state construction projects. After discussion with DOA, it was decided that to correct this inconsistency and from this point forward DNR will change its approach and follow the DOA approach. Also consistent with DOA policy, the DNR will still need to comply with local land use zoning designations and offer local zoning officials and local government officials an opportunity to comment and share concerns about proposed DNR projects.

REVISED POLICY

Thus, as of the date of this memo, July 3, 2014, DNR will not apply for zoning permits, nor pay zoning permit fees for any building, structure or facility that DNR constructs, whether for public or administrative use. (Note: that this also includes state trail development, bridges and driveway permits) However, as per DOA procedure, DNR will work with local zoning to accommodate their concerns and needs as best as possible.

A recent letter from DOA (April 30, 2014) regarding a state project in the City of Oak Creek is attached and illustrates the process that DNR will follow going forward. The key aspect of this change in policy is reflected in this verbiage in the attached DOA letter:

“The state recognizes local interests in being appraised of construction activities conducted by the state and in ensuring state land uses comport with local zoning designations. To that end I understand our staff has been working with your staff and has accommodated all of its concerns and requests regarding the project.”

Clear and early communication with local governments on proposed DNR projects is essential for allowing local governments to express any concerns that may have about a DNR project and to address any potential safety issues, such the best location for a driveway (if one is needed for a project), as well as the Department’s emphasis on maintaining good working relationships with local governments.

As DNR moves forward with this revised policy we will need to ensure we put processes in place that clearly guide DNR staff on how to work with local zoning staff and public officials on their concerns for DNR projects. Glen Clickner, Engineering and Construction Management Section Chief, will take the lead to work with the ECM staff and program staff on addressing the appropriate processes that will result in an updated Manual Code.

The Facilities and Land Program will also communicate this change in policy to DNR property managers and property managing programs, and will update the Property Manager’s Handbook and online guidance.

Also, it’s important to note that this change only pertains to zoning permits and fees for buildings, trail development, driveways, and other DNR facilities. DNR projects, as with any development project, will still need to comply with other applicable laws and rules.

Please inform your Bureau management teams and supervisors of this change.

If you have questions, please contact Glen Clickner or Steve Miller, Director, Bureau of Facilities and Land.

KAT/sm/kah

cc: Steve Miller
Glen Clickner
Sanjay Olson
Darrell Zastrow
Sue Bangert

Attachment



WISCONSIN DEPARTMENT OF
ADMINISTRATION

SCOTT WALKER
GOVERNOR

MIKE HUEBSCH
SECRETARY

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April 30, 2014

Melissa Karls, Assistant City Attorney
Haskin & Karls
7300 S. 13th St., Ste. 104
Oak Creek, WI 53154

RE: Oak Creek Armory
DOA Project No. 13I2U

Dear Ms. Karls:

I write regarding the attached email exchange in which your client, the City of Oak Creek, takes the position that the State of Wisconsin is subject to all local zoning ordinances, including the requirements that the state apply for a zoning permit and pay the associated permit fees.

The Department of Administration has long taken the position that the State is exempt from local zoning permit processes and fees by virtue of Wis. Stat. s. 13.48(13)(a), which provides:

(13) APPLICATION OF LAWS, RULES, CODES, ORDINANCES AND REGULATIONS. (a) Except as provided in par. (b) or (c), every building, structure or facility that is constructed for the benefit of or use of the state, any state agency, board, commission or department, the University of Wisconsin Hospitals and Clinics Authority, the Fox River Navigational System Authority, the Wisconsin Economic Development Corporation, or any local professional baseball park district created under subch. III of ch. 229 if the construction is undertaken by the department of administration on behalf of the district, shall be in compliance with all applicable state laws, rules, codes and regulations but the construction is not subject to the ordinances or regulations of the municipality in which the construction takes place except zoning, including without limitation because of enumeration ordinances or regulations relating to materials used, permits, supervision of construction or installation, payment of permit fees, and other restrictions.

The Dane County Circuit Court addressed the issue in the attached decision, *Eau Claire County v. Department of Transportation*, Case No. 93-CV-4294 (5/17/94). In that case the State constructed an addition to a state patrol headquarters located in Eau Claire County. The State did not obtain county land use and conditional use permits and did not pay the fees associated with those permits. The court ruled:

April 30, 2014

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Plaintiff contends that where s. 13.48(13), Stats., provides that local ordinances and regulations do not apply to the state, but then makes an exception for "zoning", that in fact the statute does not relieve the state from paying zoning permit fees. This court does not agree. The statute provides that the state is not subject to ordinances and regulations of the municipality in which the building is located. It goes on to provide a non-exhaustive list of examples. Included in the list of examples are ordinances and regulations relating to materials used, *permits*, supervision of construction or installation, and *payment of fees*. The fact that there is an exception for "zoning", in light of the language excluding payment of permit fees, and the long standing common law rules of sovereign immunity, indicates that the exception *does not refer to zoning permits and fees*. The statutory language "except zoning", is not a clear and unambiguous indication that the state consents to be sued for zoning permit fees. [emphasis added].

The state recognizes local interests in being apprised of construction activities conducted by the state and in ensuring state land uses comport with local zoning designations. To that end, I understand our staff has been working with your staff and has accommodated all of its concerns and requests regarding the project. However, as the judge in *Eau Claire County* noted, our position reflects the long-standing protection afforded the State by virtue of its sovereign immunity. Without that protection, hundreds of annual state construction projects, both large and small, would be subject to any type of fee or process a municipality could impose, driving the costs of those projects to state agencies and state taxpayers higher than necessary or contemplated by the legislature.

Thank you for your attention to this matter. If you would like to discuss this matter further, please do not hesitate to call.

Sincerely,



William H. Ramsey
Deputy Legal Counsel
Wisconsin Department of Administration
State Bar No. 1031922
(608) 261-5043

cc: Jake Ehmke
Terry Bay

Talking Points for policy change on Zoning Permits and Fees for DNR Construction Projects

What is happening?

DNR is changing its process for interacting with local zoning on DNR construction and development projects.

The change is that DNR will no longer pay zoning permit fees for any of its projects – whether for buildings, state trails, driveways or other facilities.

This change will result in DNR following the same processes and procedures as DOA uses for all other state development projects. It will correct an inconsistency between DOA and DNR processes.

Why is this happening now ?

Over the last number of months, it became apparent there was inconsistency between the two agencies on paying or not paying for local zoning permit fees.

The two agencies met and it was decided that DNR should conform to the DOA process to provide for statewide consistency among state agencies.

DNR is implementing the change effective June 2014

What is the background ?

This change is actually a somewhat minor change in DNR process, as follows:

DOA does not pay fees at all.

DNR was using a process of not paying fees if the project was for public use, but did pay fees if the project was just for DNR internal use (such as a storage building for DNR equipment). Most DNR development projects have some amount of public use – so in most cases DNR was not paying fees on its projects.

The rationale for DNR's approach goes back several DNR administrations and apparently was never correlated with DOA procedures. When DOA became aware of this inconsistency they asked DNR to reconsider and modify its process to conform with DOA process. In the interest of state agency consistency DNR agreed.

How will DNR work with Local Governments in the future on zoning/building permit issues for DNR development projects ?

DNR will continue to work closely with local governments on its development projects as we do now. The change is that DNR will not the pay zoning fee for its non-public use projects as it has in the past.

The expectation is DNR will still comply with local land use zoning designations and offer local zoning officials and local government officials an opportunity to comment and share concerns about proposed DNR projects. Local units of government have a strong interest in being fully informed of construction activities conducted by the state in their municipality and DNR will work hard to confirm that state land uses comply with local zoning designations (e.g. the state would not construct a DNR service center in an area zoned for single-family residential dwellings).

Clear and early communication with local governments on proposed DNR projects is essential for allowing local governments to express any concerns that may have about a DNR project and to address any potential safety issues, such the best location for a driveway (if one is needed for a project), as well as the Department's emphasis on maintaining good working relationships with local governments.

This is consistent with DOA policy which in essence is: "The state recognizes local interests in being appraised of construction activities conducted by the state and in ensuring state land uses comport with local zoning designations. To that end I understand our staff has been working with your staff and has accommodated all of its concerns and requests regarding the project." (see attached DOA memo dated 4-30-14)

What about other permits that may be needed for a project?

This change only applies to local zoning and building permit fees

DNR projects, as with any development project, will still need to comply with other applicable laws and rules: such a wetland impacts, stormwater, historical and archaeological, and so forth.