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OAG 3-00

Mr. George E. Meyer, Secretary
Department of Natural Resources
101 South Webster Street
Madison, WI 53707-7921

Dear Mr. Meyer:

You have asked for a formal opinion on whether the Wisconsin endangered and threatened species statute, Wis. Stat. § 29.604, applies to protect state-listed endangered and threatened plants growing on public property. In my opinion, by its plain language, Wis. Stat. § 29.604 applies to state-listed endangered and threatened plants growing on public property.

Under Wis. Stat. § 29.604(3)(a), the Department of Natural Resources (DNR) must establish a list of endangered and threatened plants. DNR has established such a state list. It is found in Wis. Admin. Code ch. NR 27. You ask whether that list applies to protect listed plants growing on public lands. In answering your question, I first note that the introductory subsection of Wis. Stat. § 29.604, which states the purpose of the statute, includes the legislative finding that activities both of individual persons *and* of "governmental agencies" are affecting the "few remaining whole plant-animal communities in the state." Wis. Stat. § 29.604(1). This legislative finding is consistent with interpreting Wis. Stat. § 29.604 to apply to listed plants growing on public property.

The central provision of the Wisconsin endangered and threatened species act is Wis. Stat. § 29.604(4). In most pertinent part, concerning your inquiry, it reads as follows:

> Except as provided in sub. (6r) or as permitted by departmental rule or permit:
>
> . . . .
>
> (c) No person may do any of the following to any wild plant of an endangered or threatened species that is on public property or on property that he or she does not own or lease, except in the course of forestry or agricultural practices or in the construction, operation or maintenance of a utility facility:
>
> 1. Remove, transport or carry away the wild plant from the place where it is growing.

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2. Cut, root up, sever, injure or destroy the wild plant.

Wisconsin Stat. § 29.604(4)(intro.) and (c). Interpreting this provision requires an understanding of, first, its general applicability to protect listed plants and, second, the limited exceptions to that general applicability.

In interpreting Wis. Stat. § 29.604(4) to determine its general applicability, one looks first at its plain language. *See Voss v. City of Middleton*, 162 Wis. 2d 737, 748, 470 N.W.2d 625 (1991). Interpreting its plain language, two questions arise. First, because sub. (4)(c) applies to "persons," are state agencies, counties, towns, and municipalities "persons" under the statute? Second, the words in sub. (4)(c) "on public property or on property that he or she does not own or lease" are disjunctive, so that if either of those circumstances exist, that is if a plant is either on public property or on property not owned or leased by the person in question, its removal or destruction is prohibited. Thus, in interpreting sub. (4) for purposes of answering your inquiry, the second question is whether property owned by the state, a county, a town, or another municipality is "public property."

First, who is a "person" under Wis. Stat. § 29.604(4)? Neither the state nor its agencies are a "person" as that term is defined for general use in the statutes by Wis. Stat. § 990.01(26). *See State ex rel. Dept. of Pub. Instruction v. ILHR*, 68 Wis. 2d 677, 683, 229 N.W.2d 591 (1975). That general statutory definition of "person" does not apply, however, if "such construction would produce a result inconsistent with the manifest intent of the legislature." Wis. Stat. § 990.01(intro.). An entire statute must be given effect, so that no portion of it is surplusage. *See Lake City Corp. v. City of Mequon*, 207 Wis. 2d 155, 162, 558 N.W.2d 100 (1997). Section 29.604(4), which by its terms in pars. (a), (b), and (c) applies to "persons," contains in its introduction an express exception that reads "[e]xcept as provided in sub. (6r)." That exception in sub. (6r) applies only to "state agencies." Under sub. (6r), DNR may allow "state agencies," as broadly defined in Wis. Stat. § 29.604(2)(am), to affect listed plants if certain stated conditions are met. If state agencies were not included within "person" in sub. (4), there would, of course, be no need to exclude them at all, as is done in sub. (4)(intro.), by referring to sub. (6r). The stated exception in sub. (4)(intro.) would be surplusage. Under the rules of statutory construction, an interpretation that renders a portion of the statute superfluous is to be avoided. *See Lake City Corp.*, 207 Wis. 2d at 162. Applying the rules of statutory construction, therefore, "state agencies" are "persons" under sub. (4)(c).

[=OAG 3-00, 2-3]

In addition, Wis. Stat. § 990.01(26) supports interpreting "person" to include other public entities. "Person" is defined in relevant part to include all "bodies politic or corporate." Wis. Stat. § 990.01(26). Counties, towns, cities, and villages are "'bodies politic or corporate' within the meaning of § 990.01(26)" and, thus, they are "persons." *See Madison v. Hyland, Hall & Co.*, 73 Wis. 2d 364, 371, 243 N.W.2d 422 (1976) (cities and counties are "persons"); *Blooming*

Grove v. Madison, 275 Wis. 328, 333, 335, 81 N.W.2d 713 (1957) (towns are "persons"). Thus, applying the rules of statutory construction and using the statutory definition of "person," which includes "bod[ies] politic or corporate," it is my opinion that not only state agencies but also counties, towns, cities, and villages are each included within the meaning of "person" as used in Wis. Stat. § 29.604(4).

Second, is property owned by the state, a county, a town, or another municipality, "public property" under the act? "Public property" is not defined by Wisconsin statute, case law, or administrative rule. The term "public property" appears, however, more than 20 times in the Wisconsin statutes. Although it is not defined, in each instance where it is used, "public property" simply distinguishes governmentally owned property from non-governmentally owned property. *See, e.g.*, Wis. Stat. §§ 66.073(16)(b) (municipal electric company property), 66.39(9) (veterans housing property), and 66.40(22) (housing authority property). *See also* Wis. Stat. § 66.527(3)(a) (recreational activities on public property or private property).

"Public property" is a nontechnical term. It is, therefore, construed according to its common and approved usage. *See* Wis. Stat. § 990.01(1). Its common and approved usage can be established by referring to a recognized dictionary. *See Hayne v. Progressive N. Ins. Co.*, 115 Wis. 2d 68, 73, 339 N.W.2d 588 (1983); *Ahlgren v. Pierce County*, 198 Wis. 2d 576, 580, 543 N.W.2d 812 (Ct. App. 1995). *Black's Law Dictionary* 1217 (6th ed. 1990) defines "public property" as follows:

> *Public property.* This term is commonly used as a designation of those things which are *publici juris (q.v.)*, and therefore considered as being owned by "the public," the entire state or community, and not restricted to the dominion of a private person. It may also apply to any subject of property owned by a state, nation, or municipal corporation as such.

Another similar generally-accepted definition for the term "public property" is as follows:

> Property may be classified as either public or private. Public property is that owned by the public as such in some governmental capacity. Private property is that which is owned by an individual or some other private owner, and ordinarily devoted to the private uses of that private owner . . . .

63C Am. Jur. 2d *Property*, § 10 (1997) (footnote omitted). Under these definitions, property owned by the state, a state agency, a county, a town, a city, or a village is "public property" and subject to Wis. Stat. § 29.604.

[=OAG 3-00, 3-4]

For some purposes, earlier Wisconsin case law distinguishes between a governmental unit's "governmental" activities and its "private or proprietary" activities. *See, e.g., Milwaukee*

E. R. & L. Co. v. Milwaukee, 209 Wis. 656, 667, 245 N.W. 856 (1932); *State Journal Printing Co. v. Madison*, 148 Wis. 396, 403, 134 N.W. 909 (1912). Although some may argue for a narrow definition of "public property," which distinguishes between property held for governmental purposes and property held for private or proprietary purposes, nothing supports applying that narrow definition here. No authority supports defining "public property" as used here in ch. 29 to include less than all governmentally owned property. *Cf.* Wis. Stat. § 24.01 (6) ("'Public lands' embraces all lands . . . owned by the state either as proprietor or as trustee . . . .").

After having determined, as explained above, that Wis. Stat. § 29.604(4) applies to all governmental units, one must then consider the several exceptions to its prohibitions. Two exceptions are stated in sub. (4). First, as already noted above, there is an exception "as provided in sub. (6r) or as permitted by departmental rule or permit." Wis. Stat. § 29.604(4)(intro.). Second, there is an exception for actions taken "in the course of forestry or agricultural practices or in the construction, operation or maintenance of a utility facility." Wis. Stat. § 29.604(4)(c).

First, there is the sub. (6r) and DNR rule or permit exception. The language as quoted above from Wis. Stat. § 29.604(4)(intro.) includes the following introductory exception: "Except as provided in sub. (6r) or as permitted by departmental rule or permit." Wis. Stat. § 29.604(4)(intro.). This language presents two questions: What is provided under sub. (6r)? What may DNR authorize by rule or permit?

Regarding the exception provided in sub. (6r), that subsection sets forth procedures for a state agency to follow when it conducts, approves, or funds an activity that may affect an endangered or threatened species. Taking a plant may be allowed by DNR under sub. (6r), but only if the conditions of that subsection are met. *See* Wis. Stat. § 29.604(6r). Thus, sub. (6r) does not exempt state agencies from the statute. Rather, it provides an alternative procedure that state agencies may be able to follow when their actions directly or indirectly affect listed plants. Responding here to your specific question, Wis. Stat. § 29.604 applies to state-listed endangered and threatened plants growing on public property. If a state agency is involved, the application of Wis. Stat. § 29.604 may be under sub. (6r), rather than under sub. (4) directly.

Regarding the exception stated in sub. (4)(intro.) for what is "permitted by departmental rule or permit," subs. (6) and (6m) give DNR authority to issue permits allowing listed plants to be adversely affected under certain specified circumstances. In my opinion, however, DNR may not by rule or permit allow what sub. (4) prohibits unless DNR is expressly authorized to do so under sub. (6) or (6m). Again, responding to your specific question, Wis. Stat. § 29.604 applies to state-listed endangered and threatened plants growing on public property. If a rule or permit is authorized under sub. (6) or (6m), the application of Wis. Stat. § 29.604 may be under sub. (6) or (6m), rather than under sub. (4) directly.

[=OAG 3-00, 4-5]

Wisconsin Statute § 29.604(6)(a) gives DNR authority to adopt rules setting the terms and conditions under which it may issue a permit authorizing the "taking, exportation, transportation or possession of any . . . wild plant on the list of endangered and threatened species for zoological, educational or scientific purposes, [or] for propagation . . . in captivity for preservation purposes." Beyond the rulemaking authority delegated to it, DNR lacks general rulemaking authority enabling it to carve out other exceptions to sub. (4). Subsection (4)(intro.) may not be read more broadly to delegate to DNR rulemaking or permit issuing authority without any accompanying standards governing its exercise. *See Niagara of Wis. Paper Corp. v. DNR*, 84 Wis. 2d 32, 48, 268 N.W.2d 153 (1978) ("agency charged with administering a law may not substitute its own policy for that of the legislature"); *Schmidt v. Local Affairs & Development Dept.*, 39 Wis. 2d 46, 59, 158 N.W.2d 306 (1968) ("power . . . to fix the limits within which the law shall operate—is a power which is vested by our constitutions in the legislature and may not be delegated"); *Clintonville Transfer Line v. Public Service Comm*., 248 Wis. 59, 68-69, 21 N.W.2d 5 (1945).

Second, there is the "in the course of forestry or agricultural practices or in the construction, operation or maintenance of a utility facility" exception provided in Wis. Stat. § 29.604(4)(c). The forestry and agricultural practices exceptions appear clear. Listed plants may be affected by forestry or agriculture. The "utility facility" exception may be less clear. "Utility facility" is not defined in Wis. Stat. § 29.604, but it is defined in two other sections of the Wisconsin statutes. In Wis. Stat. §§ 30.40(19) and 84.063(1)(b), "utility facility" is defined to mean a structure used for the transmission, distribution, or delivery of electrical power or light, heat, water, gas, sewer, telegraph, or telecommunications services. Thus, consistent with the use of the term "utility facility" elsewhere in the statutes, only property used for these activities is exempt from sub. (4). Most governmentally owned lands and most governmental activities do not fall within the forestry, agricultural, or utility facility exceptions stated in the final portion of sub. (4)(c)(intro.).

Finally, Wis. Stat. § 29.604 is not ambiguous, and so a review of its legislative history is unnecessary. *See State v. Badzmierowski*, 171 Wis. 2d 260, 263, 490 N.W.2d 784 (Ct. App. 1992). However, a review of that legislative history further supports a broad reading of the prohibitions in sub. (4)(c) and a narrow reading of the exceptions to those prohibitions.

For these reasons, I conclude that Wis. Stat. § 29.604, which is the Wisconsin endangered and threatened species statute, applies to protect state-listed endangered and threatened plants growing on public property.

Sincerely,

James E. Doyle
Attorney General

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[=OAG 3-00, 6]
CAPTION:

Wisconsin Stat. § 29.604, which is the Wisconsin endangered and threatened species statute, applies to protect state-listed endangered and threatened plants growing on public property.