NORTH DAKOTA'S

WATER USE PERMITTING PROCESS

OCTOBER 2021

BACKGROUND

North Dakota uses the prior appropriation doctrine as the foundation for establishing water rights. Under this doctrine, the first user of water acquires a priority for the use of that water, typically referred to as "first in time is first in right." The location of a landowner's property with respect to the water source is not a factor in determining water rights.

Furthermore, the North Dakota Century Code (N.D.C.C. § 61-01-01) states, *"All waters within the limits of the state from the following sources of water supply belong to the public and are subject to appropriation for beneficial use and the right to the use of these waters for such use must be acquired pursuant to chapter 61-04"*:

1. Waters on the surface of the earth, excluding diffused surface waters but including surface waters whether flowing in well-defined channels or flowing through lakes, ponds, or marshes which constitute integral parts of a stream system, or waters in lakes;
2. Waters under the surface of the earth whether such waters flow in defined subterranean channels or are diffused percolating underground water;
3. All residual waters resulting from beneficial use, and all waters artificially drained; and
4. All waters, excluding privately owned waters, in areas determined by the Department of Water Resources to be noncontributing drainage areas. A noncontributing drainage area is any area that does not contribute natural flowing surface water to a natural stream or watercourse at an average frequency more often than once in three years over the latest thirty-year period.

CONTACT INFO
DWR@ND.GOV
(701) 328.2754

DO I NEED A WATER PERMIT?

A permit is required from the Department of Water Resources for all uses of water, except in cases when both the amount of water to be impounded, diverted, or withdrawn is less than 12.5 acre-feet (4,073,137 gallons), and the contemplated use is domestic, livestock, or fish, wildlife, and other recreational uses. If the water use does not require a permit, the Department of Water Resources must be notified of the location and the acre-feet capacity of such constructed works, dams, or dugouts. If a permit is required, and the need for water would exceed twelve months or the works of the project are permanent, a conditional water permit should be applied for. Or if the need for water is temporary and does not exceed twelve months, then a temporary water permit should be applied for. For information regarding temporary water permits, please contact the Department of Water Resources or http://www.dwr.nd.gov/pdfs/temp_water_permit_brochure.pdf.

Is the volume of water impounded, diverted, or withdrawn less than 12.5 acre-feet (4,073,137 gallons)?

Is water being used to irrigate less than 5 acres?

Is the contemplated use of water domestic, livestock, or fish, wildlife, or other recreational uses?

NO

Is the use of water temporary and the period of use will not exceed twelve months?

YES

No permit required, but the Department of Water Resources must be notified of the location and the acre-feet capacity of constructed works, dams, or dugouts.

YES

APPLY FOR A TEMPORARY WATER PERMIT

Contact the Department of Water Resources or visit http://www.dwr.nd.gov/pdfs/temp_water_permit_brochure.pdf

NO

APPLY FOR A CONDITIONAL WATER PERMIT

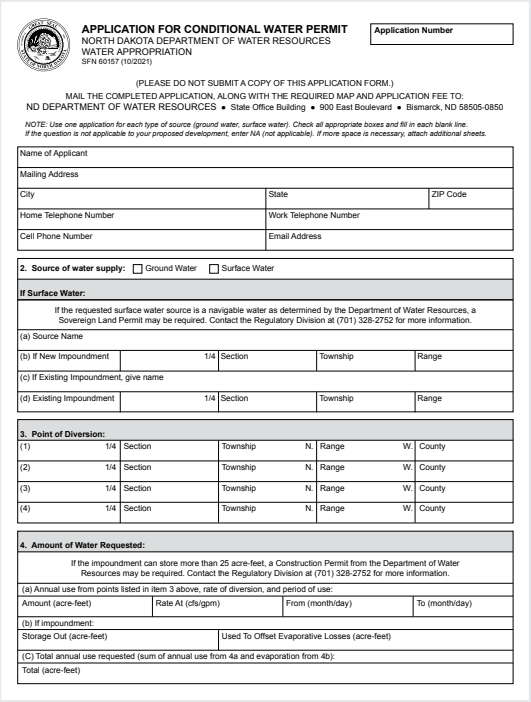
Contact the Department of Water Resources or visit http://www.dwr.nd.gov/pdfs/sfn_60157_conditional_water_permit.pdf

APPLICATION PROCESS

The first step is to complete the application form and submit it to the Department of Water Resources (DWR) with the required map and application fee. The fee varies from $100 for recreational, livestock, and fish and wildlife use, to $1,000 for an industrial use permit for volumes in excess 1 acre-foot annually. The priority date is established when the application is received by the DWR.

If the DWR receives applications for the same water source within 90 days of each other, and that source is insufficient to supply all applicants, the applications are considered competing applications. As a result the DWR shall adhere to the following order of priority:

1. Domestic
2. Municipal
3. Livestock
4. Irrigation
5. Industrial
6. Fish, wildlife, and other outdoor recreational uses



APPLICATION FOR CONDITIONAL WATER PERMIT
NORTH DAKOTA DEPARTMENT OF WATER RESOURCES
WATER APPROPRIATION
SFN 60157 (10/2021)

Application Number

(PLEASE DO NOT SUBMIT A COPY OF THIS APPLICATION FORM.)
MAIL THE COMPLETED APPLICATION, ALONG WITH THE REQUIRED MAP AND APPLICATION FEE TO:
ND DEPARTMENT OF WATER RESOURCES • State Office Building • 900 East Boulevard • Bismarck, ND 58505-0850

NOTE: Use one application for each type of source (ground water, surface water). Check all appropriate boxes and fill in each blank line. If the question is not applicable to your proposed development, enter NA (not applicable). If more space is necessary, attach additional sheets.

Name of Applicant		
Mailing Address		
City	State	ZIP Code
Home Telephone Number	Work Telephone Number	
Cell Phone Number	Email Address	

2. Source of water supply: ☐ Ground Water ☐ Surface Water

If Surface Water:

If the requested surface water source is a navigable water as determined by the Department of Water Resources, a Sovereign Land Permit may be required. Contact the Regulatory Division at (701) 328-2752 for more information.

(a) Source Name				
(b) If New Impoundment	1/4	Section	Township	Range
(c) If Existing Impoundment, give name				
(d) Existing Impoundment	1/4	Section	Township	Range

3. Point of Diversion:

(1)	1/4	Section	Township	N.	Range	W.	County
(2)	1/4	Section	Township	N.	Range	W.	County
(3)	1/4	Section	Township	N.	Range	W.	County
(4)	1/4	Section	Township	N.	Range	W.	County

4. Amount of Water Requested:

If the impoundment can store more than 25 acre-feet, a Construction Permit from the Department of Water Resources may be required. Contact the Regulatory Division at (701) 328-2752 for more information.

(a) Annual use from points listed in item 3 above, rate of diversion, and period of use:

Amount (acre-feet)	Rate At (cfs/gpm)	From (month/day)	To (month/day)

(b) If impoundment:

Storage Out (acre-feet)	Used To Offset Evaporative Losses (acre-feet)

(C) Total annual use requested (sum of annual use from 4a and evaporation from 4b):

Total (acre-feet)

NOTIFICATION AND PUBLIC COMMENT PROCESS

When the DWR receives a completed application, the applicant is instructed to send a "Notice of Application" by certified mail to all record title owners of real property and water permitholders within a one-mile radius of the point of diversion, as well as all municipal or public water use facilities within a 12-mile radius of the proposed point of diversion. Exceptions for the need to notify all real property owners are as follows:

1. If the one-mile radius extends within the geographical boundary of a city, the notice must be given to the governing body of the city and no further notice need be given to the record title owners of real estate within the geographical boundary of the city.
2. If the one-mile radius includes land within the geographical boundary of a rural subdivision where the lots are ten acres or less, the notice must be given to the governing body of the township or other governing authority for the rural subdivision and no further notice need be given to the record title owners of real estate within the geographical boundary of the rural subdivision.
3. If the one-mile radius includes a single tract of rural land which is owned by more than ten individuals, the notice must be given to the governing body of the township or other governing authority for that tract of land and no further notice need be given to the record title owners of that tract.

The notice includes essential facts about the application, the newspaper in which the notice of the water permit application will be published, and the date by which any person having an interest in the application may file written comments with the DWR regarding application.

After notice of application has been mailed to those required, the applicant completes an affidavit of notice and returns it to the DWR by certified mail. The affidavit of notice must state how the applicant determined the record title owners and must list the names and addresses of those who were sent notices by certified mail.

CONDITIONAL WATER PERMIT (CONTINUED)

Upon receipt of the completed affidavit, the DWR publishes the notice of application in the official newspaper of the county in which each proposed point of diversion is located. The notice is published once a week for two consecutive weeks. The notice will specify the date by which any person having an interest in the application may submit written comments to the DWR. A copy of the notice will be sent to the applicant. The applicant pays the cost of publication.

REVIEW OF APPLICATION

After the application and notification steps have been completed, the DWR will review the water permit application. For a water permit to be issued, it must meet the following criteria:

a. The rights of a prior appropriator will not be unduly affected.

b. The proposed means of diversion or construction are adequate.

c. The proposed use of water is beneficial.

d. The proposed appropriation is in the public interest. In determining the public interest, the DWR considers the following:

   1. The benefit to the applicant resulting from the proposed appropriation.

   2. The effect of the economic activity resulting from the proposed appropriation.

   3. The effect on fish and game resources and public recreational opportunities.

   4. The effect of loss of alternate uses of water that might be made within a reasonable time if not precluded or hindered by the proposed appropriation.

   5. Harm to other persons resulting from the proposed appropriation.

   6. The intent and ability of the applicant to complete the appropriation.

The DWR will then make a recommended decision on the application, and provide a copy of the recommended decision to the applicant and any person who filed written comments. Within 30 days of service of the recommended decision, the applicant and any person who would who filed written comments may file additional written comments with the DWR, request an adjudicative proceeding on the application, or both. A request for an adjudicative proceeding must be made in the prescribed manner. If a request for an adjudicative proceeding is granted, the DWR will designate a time and place for the adjudicative proceeding and serve a copy of the notice of the adjudicative proceeding to the applicant and any person who filed written comments.

CONDITIONAL WATER PERMIT (CONTINUED)

DEVELOPMENT OF WATER PROJECT

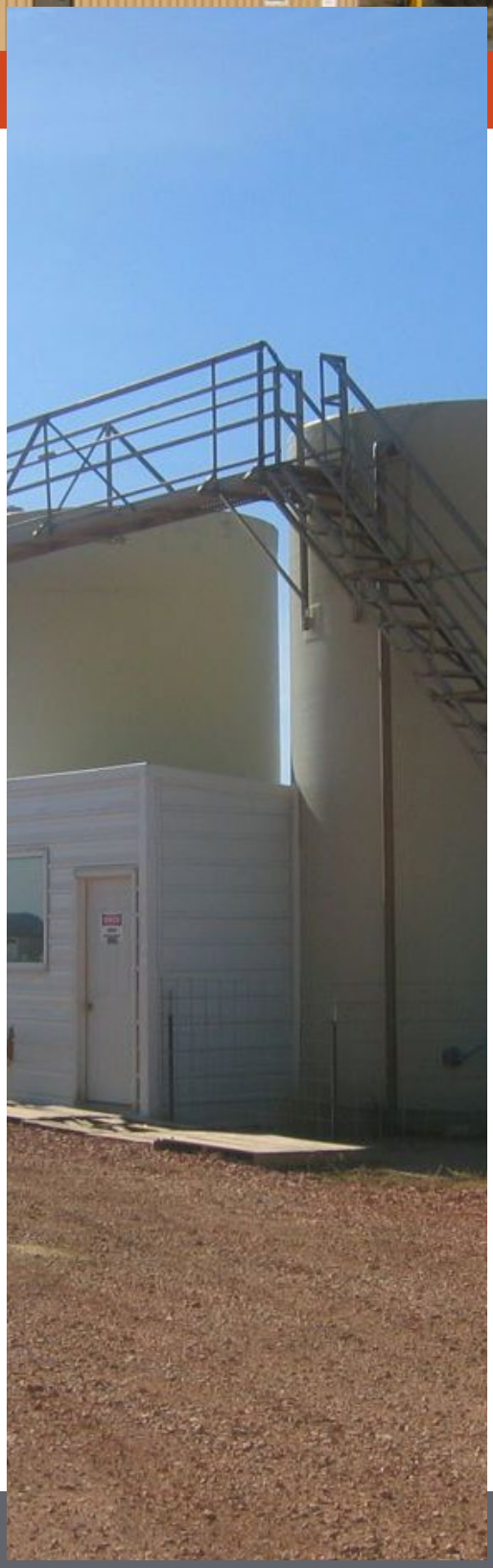
When a conditional water permit is granted, the permitholder is given a period of time to put the water to beneficial use according to the conditions of the permit. The period of time given for development is typically three years.

After the water is put to beneficial use and the facilities are inspected in order to determine their capacity, safety, and efficiency, a perfected water permit is issued. A water right is acquired when water is put to beneficial use in accordance with the terms of the permit. The perfected permit should be recorded with the county recorder's office, as a water right is a property right.

A permitholder may lose the right to use water if there is a failure to:

1. Comply with the terms of the permit
2. Put water to beneficial use
3. Carry out directives of the Department of Water Resources
4. Meet safety criteria for the facilities

In summary, a right to appropriate water can be acquired for beneficial use only as provided under N.D.C.C. chapter 61-04, which in part states that beneficial use shall be the basis, the measure, and the limit of the right to the use of water. It should also be noted that if water is not put to beneficial use for a period of three successive years without good and sufficient cause, the permit is subject to cancellation.



SO YOU NEED TO APPLY FOR A CONDITIONAL WATER PERMIT

NOW WHAT?

Submit application, map, and fee to the Department of Water Resources (DWR), which will establish the application's priority date.

Applicant is then required to send a "Notice of Application" to record title owners of real estate and water permitholders within one mile of the point of diversion(s), and public water facilites within 12 miles.

Applicant provides the DWR with an affidavit of notice listing the names and addresses of those sent the "Notice of Application".

DWR publishes notice for two weeks in official County newspaper. Any person has 30 days from date of first notice to submit written comments to DWR regarding the application.

DWR reviews application and makes a recommended decision on the application (i.e. approve, deny, defer). A copy of the recommended decision is mailed to applicant and those who commented on application (parties of record), and are given 30 days to comment on the recommended decision.

DWR addresses any additional comments from parties of record or the applicant, and makes final decision on application.

If the permit is issued, the permitholder is generally given one to three years to develop thier water project and put water to beneficial use.

After the water project is fully developed and water is being put to beneficial use, the DWR will conduct an inspection. A perfected water permit will be issued if water is being applied to beneficial use in accordance with the prescribed conditions of the permit.

A perfected water permit should be recorded with the County Recorder's office. A water right is a property right.

DEFINITIONS

Acre-foot - The volume of water that will cover one acre to a depth of one foot (325,851 gallons).

Beneficial use - A use of water for a purpose consistent with the best interests of the people of the state.

Beneficial use date – After a conditional water permit has been issued, the permitholder has until a specified future "beneficial use date" to develop the proposed project and put water to beneficial use. An extension of time can be requested if needed.

Canceled water permit – A conditional, perfected, or held in abeyance water permit that has been canceled by the Department of Water Resources because the permitholder failed to put water to use by the beneficial use date or ceased to use water for three successive years or more, without the failure or cessation of use having been due to the unavailability of water, a justifiable inability to complete the works, or other good and sufficient cause.

Conditional water permit - A conditional water permit application that has fulfilled all the administrative criteria, undergone hydrological review, and is approved to begin applying water to beneficial use. The holder of the conditional water permit has until a specified beneficial use date to develop the proposed project. An extension of time to put water to beneficial use can be requested.

Consumptive use - Water that is withdrawn and will not be available for immediate or future reuse.

Deferred water permit application– A conditional water permit application that has fulfilled all the administrative criteria. However, the application cannot be approved because either additional hydrologic data is needed or the water requested is not available for allocation due to a high level of local appropriation and concerns over the sustainability of the water source. Applications are placed in a deferred status and not denied because future changes in water use or additional hydrologic data may indicate requested water withdrawals can be considered.

Denied water permit application– A conditional water permit application that has fulfilled all the administrative criteria. However, hydrological analysis indicates the water permit application cannot be approved in accordance with North Dakota Century Code § 61-04-06 (Criteria for issuance of permit). Also, an application is denied if an applicant withdraws their application after Notice of Application has been made.

Domestic use - The use of water by at least one family unit or household obtaining water from the same system for personal needs and for household purposes, including heating, drinking, washing, sanitary, and culinary uses; irrigation of land not exceeding five acres [2.0 hectares] in area for each family unit or household for noncommercial gardens, orchards, lawns, trees, or shrubbery; and for household pets and domestic animals kept for household sustenance and not for sale or commercial use.

Fish, wildlife, and other recreational uses - The use of water for the purposes of propagating and sustaining fish and wildlife resources and for the development and maintenance of water areas necessary for outdoor recreation activities.

Held in abeyance water permit – A permit status used to refer to when only a portion of the requested conditional water permit application is conditionally approved by the Department of Water Resources. Unapproved portions are generally held in abeyance pending development of the approved portion of the permit, the collection of additional hydrologic data, or concerns over the sustainability of the water source.

Industrial use - The use of water for the furtherance of a commercial enterprise wherever located, including manufacturing, mining, and processing.

Irrigation use - The use of water for application to more than five acres [2.0 hectares] of land to stimulate the growth of agricultural crops, including gardens, orchards, lawns, trees, or shrubbery, or the maintenance of recreation areas such as athletic fields, golf courses, parks, and similar types of areas, except when the water for the facility is provided by a municipal water system.

Livestock use - The use of water for drinking purposes by herds, flocks, or bands of animals kept for commercial purposes.

Municipal or public use - The use of water by the state through its political subdivisions, institutions, facilities, and properties, and the inhabitants thereof, or by unincorporated communities, subdivision developments, rural water systems, and other entities, whether supplied by the government or by a privately owned public utility or other agency or entity, for primarily domestic purposes as defined herein.

Non-consumptive use - Water that is diverted and returned to the source. It is considered to be non-consumptive water if the composition has not been substantially altered and it is returned to the source from which it was withdrawn in a relatively short period of time.

Pending or under review water permit application – A conditional water permit application that has fulfilled all the administrative criteria and is waiting to be reviewed or is under review by staff of the Department of Water Resources.

Perfected water permit – A water permit where the water appropriated under a conditional water permit has been applied to a beneficial use and the Department of Water Resources has inspected the works to verify the conditions of the permit have been met.

Point of diversion - The geographical location from which water is appropriated for beneficial use. A point of diversion is usually described as a tract of land as described in the public land survey system (PLSS).

Priority date – The date assigned to an application or water right.

Temporary water permit – A permit that authorizes the beneficial use of water for up to a twelve-month period. A temporary water permit is not a water right.

Voided water permit application – A conditional water permit application that was submitted to the Department of Water Resources, however, the applicant did not complete the application process.

Water right - A legal right to use or store a specified amount of water.

INFORMATION

TEMPORARY & CONDITIONAL WATER PERMITS

http://www.dwr.nd.gov/reg_approp/waterpermits/

CONDITIONAL WATER PERMIT APPLICATION FORM

http://www.dwr.nd.gov/pdfs/sfn_60157_conditional_water_permit.pdf

CONDITIONAL WATER PERMIT APPLICATION INSTRUCTIONS

http://www.dwr.nd.gov/pdfs/conditional_water_permit_instructions.pdf

ADDITIONAL PERMITS MAY BE REQUIRED

SOVEREIGN LAND PERMIT | 701.328.4935

Sovereign Land Permit - may be required for access and withdrawals from navigable waters of the State.

http://www.dwr.nd.gov/reg_approp/sovereign_lands/

USACE PERMITS | 701.328.4935

USACE Permits - may be required for access and withdrawals from waters listed under Section 10 of the Rivers and Harbors Act of 1899.

https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/Obtain-a-Permit/

CONSTRUCTION PERMIT | 701.328.2752

Construction Permit - may be required for off-stream storage ponds capable of storing more than 25 acre-feet of water.

http://www.dwr.nd.gov/reg_approp/construction_permits/

CONTACT INFO

WATER APPROPRIATION DIVISION

APPROPINFO • WWW.DWR.ND.GOV

BISMARCK, ND • (701) 328.2754