

ATCP 48 - DRAINAGE DISTRICTS
98-081

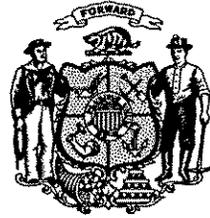
WISCONSIN LEGISLATIVE COUNCIL STAFF

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 98-081

AN ORDER to repeal ATCP 48.01 (5), 48.08 (1) (g) and 48.46 (3); to renumber ATCP 48.08 (1) (h) and 48.44; to amend ATCP 48.01 (21), 48.02 (3) Note, 48.08 (1) (a) and (b), 48.14 (1) (e), 48.22 (3) Note and (6), 48.32 (2) and Note, 48.40 (2) Note and 48.46 (1) (b); to repeal and recreate chapter ATCP 48 Note, 48.01 (9) to (11) and (13), subchapter IV (title) of chapter ATCP 48, 48.20, 48.24 (5), 48.26 (3), subchapter V (title) of chapter ATCP 48, 48.34, 48.36, 48.38, subchapter VI (title) of chapter ATCP 48 and 48.46 (2); and to create ATCP 48.01 (6m), (13m), (13r), (14m) and (26), 48.08 (1) (b) Note and (3) to (5), 48.21, 48.22 (2m) and (2r), 48.24 (2) Note, 48.26 (5) and Note, 48.33, 48.44, 48.45 and 48.46 (1) (d), relating to drainage districts.

Submitted by **DEPARTMENT OF AGRICULTURE, TRADE AND CONSUMER PROTECTION**

06-04-98 RECEIVED BY LEGISLATIVE COUNCIL.
07-02-98 REPORT SENT TO AGENCY.

RS:DLL:jt;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)]

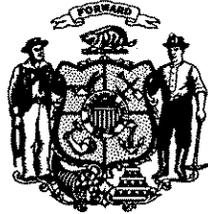
Comment Attached YES NO

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CLEARINGHOUSE RULE 98-081

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 October 1994.]

2. Form, Style and Placement in Administrative Code

a. The second sentence of the definition of "cross-section" in s. ATCP 48.01 (6m) contains substantive material which should be placed in the text of the rule and omitted from the definition. Note that this material is also contained in s. ATCP 48.20 (1) (b). The same comment applies to the second sentence of the definition of "grade profile" in s. ATCP 48.01 (13m). [Although the terms "cross-section" and "grade profile" are defined, the equally important, companion term "alignment" is not defined. Is this an intentional omission?]

b. The term "specifications" is used often in the rule but it is not always clear whether it refers to cross-sections, grade profiles and alignments only or also to district boundaries and other specifications. If there is a consistent meaning of this term, a definition of it would be appropriate. If there is not, its use should be reviewed for clarity and consistency.

c. Section ATCP 48.01 (13r) (intro.) should be rewritten as follows: "Formally established" means established or reestablished by any of the following:"

d. The second sentence of s. ATCP 48.02 (3) Note appears to be creating authority for drainage district boards relative to the treatment of in-kind services. If this is the case, it should be placed in the text of the rule. The same appears to be true of s. ATCP 48.06 (4) Note, although that Note is not affected by this rule-making order.

e. On page 19, line 24, the notation "(1)" should be omitted.

f. To be more precise, the cross-reference in s. ATCP 48.08 (3) (a) should be “s. ATCP 48.24 (5) (b).” Similarly, s. ATCP 48.20 (1) (a) 3. should refer to s. ATCP 48.24 (1).

g. Section ATCP 48.20 (4) (b) Note should cite the rule or statute under which a challenge may be made. If this provision is attempting to create a new challenge or appeal process, it should be done in a substantive provision of the rule.

h. Section ATCP 48.20 (6) (a) and (b) should be combined in a single subunit. The second sentence should state that the drainage board *shall* reconstruct that documentation. The last sentence (the material now in par. (b)) should state that, if a county drainage board is unable to reconstruct all of the missing drainage district specifications required under sub. (1), the county drainage board shall establish missing specifications according to s. ATCP 48.21.

i. Section ATCP 48.21 (2) (a) (intro.) should read as follows: “A county drainage board may designate a private drain as a district drain if the county drainage board does any of the following:”. As written, the provision is not a true statement. [See s. ATCP 48.20 (5).]

j. In s. ATCP 48.21 (2) (a), it appears that subd. 2. should begin with the phrase “Purchases or.”

k. There are multiple review processes in ch. ATCP 48, and the relationship among them is not always clear. In particular, s. ATCP 48.20 describes the process for establishing drainage district specifications and includes a review process for those specifications. Sections ATCP 48.34 to 48.38 address the development of construction plans and include a departmental review process as well. However, s. ATCP 48.21, which addresses changing drainage district specifications, applies the review process for construction projects rather than the review process for establishment of drainage district specifications. See s. ATCP 48.21 (3). Is there a reason for this apparent discrepancy?

l. To avoid duplication of language, s. ATCP 48.21 (1) (b), (2) (b), (3) (b), (4) (b) and (5) (b) could be collapsed into a single new subsection to address the filing of new drainage district specifications.

m. In s. ATCP 48.21 (4) (a), the introductory material should end with the phrase “unless all of the following apply:”. The first subdivision should read: “The district has obtained the written consent . . . or bought the newly included land.” The second subdivision should read: “The department has approved”

n. Section ATCP 48.32 (2) Note should include addresses of the agencies from which the referenced document can be obtained.

o. The second paragraph of s. ATCP 48.33 (2) (c) Note appears to be substantive and should be placed in the text of the rule. Also, since this Note is identical to the Note following par. (d), it may be appropriate to combine the two Notes at the end of the subsection.

p. Section ATCP 48.38 should begin with a general statement that the department may approve, conditionally approve or deny an application, or else with a statement of criteria by which the department will decide whether to approve an application. Also, are the reasons for

disapproval listed in sub. (4) the only reasons the department may use for denying an approval? If so, this needs to be more clearly stated.

q. The second sentence of s. ATCP 48.44 (2) (d) Note is substantive and should be placed in the text of the rule.

r. In s. ATCP 48.44 (2) (e) (intro.), the word "all" should be replaced by the word "any."

s. In s. ATCP 48.45 (1) (d), the phrase "in its discretion" is unnecessary and should be deleted.

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

a. In the analysis, the first sentence of the first paragraph on page 6 should be written in the singular tense.

b. In s. ATCP 48.01 (6m), should references to drain be replaced by references to the defined term "district drain"?

c. In s. ATCP 48.01 (13), the word "and" should be inserted before the word "any."

d. In s. ATCP 48.01 (21), there is a stray underscoring mark below the hyphen in the word "cross-section." The same occurs in s. ATCP 48.14 (1) (e).

e. In s. ATCP 48.08 (1) (b), the commas at the beginning and end of the inserted material should be omitted.

f. In s. ATCP 48.20 (1) (b), the rule refers to the "design depth" of a ditch, which presumably may be different from the actual depth of a ditch. The rule does not use the word "design" to modify references to the width of the ditch or the side slope angle of the ditch, suggesting that this refers to the actual rather than design width and side slope angle of the ditch. Is this distinction intentional?

g. Section ATCP 48.20 (2) (a) requires the noticing of a meeting, but does not explicitly require that the meeting itself be held. The same is true of s. ATCP 48.22 (2m) (a) 1. Compare these provisions to s. ATCP 48.36 (2) (a). Also, with respect to all three of these rule provisions, would it not be more useful if the plans to be heard were made available in advance of the meeting, giving members of the public time to prepare informed testimony to present at that meeting?

h. The procedures outlined in s. ATCP 48.20 are unclear. Upon close reading, it appears that a county drainage board is required to first develop draft district specifications, then to receive public comments on the draft specifications, then to submit the specifications to the department for approval and then finally to adopt the specifications. The rule does not follow this order; in fact it starts with a requirement that each county drainage board adopt specifications, and it makes no explicit reference to draft specifications. This process should be clarified.

i. Section ATCP 48.21 (5) (a) 2. requires that a county drainage board resolve to the satisfaction of the objecting landowner every timely objection filed with the county drainage board by a landowner to a change to a formally established grade profile. In contrast, when establishing a grade profile or any other specification, s. ATCP 48.20 (3) (e) requires only that the county drainage board identify its position on every unresolved objection. Is there a reason for this substantial difference in the treatment of objections to the creation versus the modification of a grade profile?

j. Section ATCP 48.22 (2m) (a) 1., requires a county drainage board to provide notice of public meetings to "every known landowner in the drainage district." This requirement is vague. In particular, what constitutes "every known landowner"? What efforts is a county drainage board required to undertake to "know" all of the current landowners in the drainage district? Could the word "known" be deleted?

k. In s. ATCP 48.24 (5) (b), the words "under par. (a)" should be replaced by a phrase such as "to engage in an activity identified in par. (a)."

l. Should s. ATCP 48.24 (5) authorize a county drainage board to order the removal of unauthorized obstructions in a district corridor?

m. The statutory sections referenced in s. ATCP 48.38 (2) Note appear unrelated to the material that precedes that Note. The Note should either be elaborated further or deleted.

Hearing Draft
5/26/98

**PROPOSED ORDER OF THE STATE OF WISCONSIN
DEPARTMENT OF AGRICULTURE, TRADE AND
CONSUMER PROTECTION
ADOPTING, AMENDING AND REPEALING RULES**

1 The state of Wisconsin department of agriculture, trade and consumer protection
2 proposes the following order to repeal ATCP 48.01(5), 48.08(1)(g) and 48.46(3); to
3 renumber ATCP 48.08(1)(h) and 48.44; to amend ATCP 48.01(21), 48.02(3)(note),
4 48.08(1)(a) and (b), 48.14(1)(e), 48.22(3)(note) and (6), 48.32(2) and (note),
5 48.40(2)(note), and 48.46(1)(b); to repeal and recreate ch. ATCP 48(note), 48.01(9)
6 to (11) and (13), subch. IV (title), 48.20, 48.24(5), 48.26(3), subch. V (title), 48.34,
7 48.36, 48.38, subch. VI (title) and 48.46(2); and to create ATCP 48.01(6m), (13m),
8 (13r), (14m) and (26), 48.08(1)(b)(note) and (3) to (5), 48.21, 48.22(2m) and (2r),
9 48.24(2)(note), 48.26(5) and (5)(note), 48.33, 48.44, 48.45 and 48.46(1)(d); relating
10 to drainage districts.

**Analysis Prepared by the Department of
Agriculture, Trade and Consumer Protection**

Statutory authority: ss. 88.11 and 93.07(1), Stats.

Statutes interpreted: ch. 88, Stats.

The department of agriculture, trade and consumer protection (DATCP) supervises the operation of drainage districts under ch. 88, Stats. This rule modifies the department's current rules, under ch. ATCP 48, Wis. Adm. Code, related to drainage districts.

Drainage districts are special purpose districts formed to drain land for agricultural or other purposes. Lands within a drainage district are drained by means of common

drains that cross individual property boundaries. Ch. 88, Stats., spells out procedures for creating, modifying and dissolving drainage districts.

All drainage districts within a county are operated by the county drainage board, which is appointed by the circuit court. The county drainage board must operate drainage districts in compliance with ch. 88, Stats., and DATCP rules. The county drainage board may levy assessments against landowners in a drainage district to pay for the design, construction and maintenance of district drains, and to pay other district operating costs. The county drainage board is primarily responsible for resolving drainage disputes within and between drainage districts.

DATCP monitors county drainage board compliance with ch. 88, Stats., and DATCP rules, and approves construction projects in drainage districts. The state of Wisconsin department of natural resources must also approve certain construction projects in drainage districts.

RULE CONTENTS

Drainage District Specifications

Under current rules, a county drainage board must file drainage district specifications for every drainage district under the drainage board's jurisdiction. The county drainage board must file the specifications with DATCP and the county zoning administrator. The specifications must include all of the following:

- The boundaries of the drainage district, as last confirmed by the circuit court or the county drainage board.
- The location and extent of every district drain.
- The location and width of every district corridor. The district corridor is an access corridor and buffer strip established around each district ditch according to current rules.

County drainage boards were required to file specifications for all existing drainage districts by December 31, 1995. However, many county drainage boards have not yet filed them. This rule expands and clarifies the current requirements, and extends the filing deadline to December 31, 2000. Under this rule:

- The county drainage board must file a map showing all of the following:
 - * Drainage district boundaries.
 - * The alignment and extent of every district drain.
 - * The location and width of every district corridor.

- The county drainage board must document the “cross-section” and “grade profile” of every district drain. This rule defines what is meant by a “cross-section” and “grade profile.”
- The county drainage board must give landowners notice and an opportunity to object to its proposed drainage district specifications.
- The county drainage board must obtain DATCP approval of drainage district specifications. DATCP approval does not preclude a landowner from challenging a specification that violates ch. 88, Stats., or this rule.
- After the county drainage board adopts the approved specifications, the county drainage board must file them with DATCP, the county zoning administrator and the county register of deeds.

Drainage District Boundaries

The initial boundaries of a drainage district are specified by the circuit court. A county drainage board may modify drainage district boundaries according to statutory procedures prescribed under ss. 88.77 to 88.80, Stats.

This rule prohibits a county drainage board from changing drainage district boundaries except by the procedures prescribed under ss. 88.77 to 88.80, Stats. If court records documenting current boundaries are not available or are unclear, a county drainage board may clarify the boundaries using the same statutory procedures. If a county drainage board changes a drainage district boundary, it must file a record of the change with DATCP, the county zoning administrator and the county register of deeds.

Designating District Drains

In many cases, lands within a drainage district are drained by “private drains” that empty into “district drains” constructed and operated by the county drainage board. In some cases, it is unclear whether an existing drain is a “private drain” or a “district drain.” This rule prohibits a county drainage board from designating a drain as a “district drain,” over the objection of a landowner who owns or holds an easement to the land on which the drain is located, unless the county drainage board does one of the following:

- Documents that a circuit court has designated the drain as a district drain.
- Documents that the drain has historically been operated and maintained as a district drain.
- Condemns the land required for the district drain and district corridor, if any, using statutory condemnation procedures.

- 1 • Properly designates the drain as a district drain in a proceeding under s. 88.73 or
2 88.77 to 88.80, Stats.

Under this rule, if a county drainage board redesignates a private drain as a “district drain,” the county drainage board must file a record of the change with DATCP, the county zoning administrator and the county register of deeds.

Drain “Cross-Section” and “Grade Profile”

The circuit court initially establishes the “cross-section” and “grade profile” of each district drain. The “cross-section” and “grade profile” are important, because they determine drainage access and efficacy. Subsequent construction activity or neglect may cause a deviation from the “cross-section” or “grade profile” established by the circuit court. Over time, additional runoff from upstream development may also cause a deviation from the established “grade profile.” These deviations may deprive landowners of drainage to which they are entitled, and may seriously affect land use and land values. In extreme cases, they may cause disastrous flooding.

Under this rule, a county drainage board must:

- Document the formally established “cross-section” and “grade profile” of each district drain.
- Restore and maintain each district drain to prevent deviations from the formally established “cross-section” or “grade profile.”

This rule defines “cross-section” and “grade profile” more clearly. Under this rule:

- A “cross-section” is a series of vertical sections of a drain, taken at periodic intervals along the length of a drain at right angles to the center line of the alignment of the drain. Each vertical section in the formally established “cross-section” of a district ditch must include all of the following:
 - * The top and bottom width of the ditch.
 - * The design depth of the ditch.
 - * The side slope angle of the ditch.
- A “grade profile” is a vertical section along the alignment of a drain. The formally established “grade profile” of a district ditch must include all of the following:
 - * The grade elevations at the top and bottom of the ditch.
 - * The estimated water surface elevations in the ditch at base flow.
 - * The estimated water surface elevations in the ditch in the event of a 10-year peak discharge.

In some cases, court records establishing the “cross-section” or “grade profile” of a district drain may be unavailable or incomplete. In those cases, a county drainage board may reconstruct the documentation based on physical evidence in the drainage district. (For example, a county drainage board may be able to reconstruct a historical grade profile based on soil conditions and the historical elevation of structures in a district drain.)

If a county drainage board cannot document a formally established “cross-section” or “grade profile” based on court records or physical evidence, it must establish an appropriate cross-section or grade profile with department approval. If a currently established “cross-section” or “grade profile” lacks some of the elements required by this rule (e.g., water surface elevations in a “grade profile”), the county drainage board must also establish those missing elements.

This rule spells out a procedure by which a county drainage board may establish missing or poorly documented elements of a “cross-section” or “grade profile.” The procedure is designed to protect landowners whose drainage rights may be affected. The county drainage board may use the same procedure to change a formally established “cross-section” or “grade profile,” should that become necessary.

A county drainage board may not establish or change a “cross-section” or “grade profile” without specific DATCP approval. A county drainage board may not change an established “grade profile” over the objection of any landowner whose access to drainage is affected. Whenever a county drainage board changes an established “cross-section” or “grade profile” with DATCP approval, the county drainage board must file that new “cross-section” or “grade profile” with DATCP, the county zoning administrator and the county register of deeds.

Drain Alignment

The circuit court initially approves the “alignment” of a district drain. This rule requires a county drainage board to restore and maintain district drains so they conform to their formally established “alignments.”

This rule prohibits a county drainage board from changing the formally established “alignment” of a district drain without specific DATCP approval. A county drainage board may not take new land for a drain realignment unless the landowner consents or the county drainage board formally condemns that land. The county drainage board must file the new “alignment” with DATCP, the county zoning administrator and the county register of deeds.

County Drainage Boards; Compliance Plans

Under current rules, a county drainage board must develop a plan for bringing drainage districts into compliance with DATCP rules. Among other things, the plan must explain how the county drainage board will correct and prevent deviations from established "cross-sections" and "grade profiles."

County drainage boards were originally required to file compliance plans by December 31, 1996, and bring all drainage districts into compliance by December 31, 1999. In districts where drains have been neglected for many years, extensive restoration may be needed to comply with DATCP rules.

For various reasons, few county drainage boards have filed compliance plans with DATCP. Few, if any, drainage boards will bring all of their drainage districts into compliance with DATCP rules by December 31, 1999. This rule extends the plan filing deadline to December 31, 2001, and extends the actual compliance deadline to December 31, 2004.

This rule also spells out minimum requirements for compliance plans. A county drainage board must file a separate plan for each drainage district in the county. The plan must include all of the following:

- A professionally drawn map of the drainage district.
- A restoration plan that identifies:
 - * Drain segments, if any, that do not conform to established "cross-sections," "grade profiles" or "alignments."
 - * A priority sequence and schedule for restoring noncomplying drains to their established "cross-sections," "grade profiles" and "alignments."
 - * An estimate of the amount of material to be dredged from drains scheduled for restoration.
 - * The intended disposition of dredged materials, including the locations at which the materials will be deposited.
 - * The projected costs of restoration, and a plan for financing those costs.
- A repair and maintenance plan that includes:
 - * A plan for routine maintenance of drainage structures.
 - * A plan for maintaining district corridors and controlling woody vegetation in those corridors.
 - * A plan for special maintenance projects, if any.
 - * The projected costs of maintenance, and a plan for financing those costs.

- A plan for controlling soil erosion and runoff in the drainage district. The plan must include the estimated cost to implement the plan.

Persons Obstructing or Altering District Drains

This rule prohibits any person from obstructing or altering a district drain (e.g., by installing or changing the height of a dam) without prior written approval from the county drainage board. However, an owner of land adjacent to a district drain may, without prior drainage board approval, withdraw water from a district drain and place an obstruction in the district drain for that purpose if all of the following apply:

- The landowner notifies the county drainage board before withdrawing the water.
- The landowner obtains a DNR permit if required under s. 30.18(2)(a)2., Stats. (No DNR permit is currently required for cranberry growers.)
- The obstruction does not elevate the water level in the district drain above the base flow elevation specified as part of the formally established “grade profile” for that district drain.
- The withdrawal does not reduce the base flow, in a district drain that has a navigable stream history, below the minimum base flow level which the Wisconsin department of natural resources has established for that district drain under s. 88.31, Stats.
- The withdrawal does not injure a district drain.

A county drainage board may require a landowner to provide information showing that the landowner’s withdrawal of water complies with this rule. A county drainage board may prohibit a landowner from withdrawing water if the drainage board reasonably concludes that the withdrawal violates this rule.

Structures Impeding Drainage

This rule prohibits a county drainage board from installing or modifying any structure in a district drain, or approving the installation or modification of any structure in a district drain, if the installation or modification causes or aggravates a deviation from the formally established “grade profile.” This prohibition does not apply to any of the following:

- A temporary structure or modification that is reasonably necessary to protect the public health, safety or welfare in an emergency.
- A temporary structure or modification that is necessary for other lawful construction or maintenance operations under this rule.

- A temporary structure or modification to provide essential crop irrigation during a drought if all of the following apply:
 - * The county drainage board gives notice to upstream landowners whose access to drainage may be affected.
 - * The county drainage board resolves any objections from affected landowners to the satisfaction of those landowners.
 - * The county drainage board imposes written conditions to protect the public interest and the interests of all landowners in the drainage district.

- A temporary structure or modification to provide water for cranberry harvest, or for cranberry winter ice cover, if all of the following apply:
 - * The structure or modification is installed for no more than 14 days for cranberry harvest, and no more than 14 days for cranberry winter ice cover.
 - * The county drainage board gives notice to upstream landowners whose access to drainage may be affected.
 - * The county drainage board resolves any objections from affected landowners to the satisfaction of those landowners.
 - * The county drainage board imposes written conditions to protect the public interest and the interest of all landowners in the drainage district.

Restoration Projects; Notice to DATCP

Under current rules, a county drainage board must obtain DATCP approval before undertaking or approving a drainage district “restoration project” involving the dredging or excavation of more than 3,000 cubic yards of material. A “restoration project” means dredging or other operations to bring a district drain into closer conformity with the formally established “cross-section,” “grade profile” or “alignment” of that drain.

This rule eliminates the requirement for DATCP approval of “restoration projects.” However, a county drainage board must notify DATCP in writing before it initiates a “restoration project” that involves the dredging or excavation of more than 3,000 cubic yards of material. A county drainage board may need to obtain a dredging permit from DNR before undertaking a “restoration project.”

Construction Projects and Drainage Alterations: DATCP Approval Required

Under current rules, DATCP must approve a “construction project” before a county drainage board undertakes or approves that “construction project.” This rule expands and clarifies the current rules.

With certain exceptions (described below), this rule prohibits a county drainage board from doing any of the following without written approval from DATCP:

- Constructing or modifying any district drain, or authorizing any person to construct or modify a district drain.
- Installing or modifying any structure in a district drain, or authorizing any person to install or modify any structure in a district drain.
- Authorizing any person (including any municipality or government entity) to connect that person’s “private” drain to a district drain.
- Changing the formally established “cross-section,” “grade profile” or “alignment” of a district drain, regardless of whether that change involves any physical alteration to a district drain or structure.

Under this rule, a county drainage board is **not** required to obtain DATCP approval for any of the following:

- Actions, such as routine maintenance or repair projects, that do not cause or aggravate any deviation from the formally established “cross-section,” “grade profile” or “alignment” of a district drain.
- Restoration projects that merely restore district drains to their formally established “cross-sections,” “grade profiles” or “alignments.”
- Temporary structures or modifications that a county drainage board installs or approves according to this rule (see above).

Applying for DATCP Approval

A county drainage board seeking DATCP approval for a construction project or drainage alteration must file an application that includes all of the following:

- A complete description of the proposed action, including design specifications prepared by a qualified engineer.

- The objectives of the proposed action.
- A construction plan (if applicable) prepared by a qualified engineer.
- A hydrology analysis prepared by a qualified engineer.
- The cost, method of financing and effect on landowner assessments.
- A map of the lands and waters affected.
- A statement showing that the county drainage board has published a public notice, held a public hearing, and allowed for public comment on the proposed action.
- A description of any proposed change to the formally established “cross-section,” “grade profile” or “alignment” of a district drain.
- A statement showing that the county drainage board has done both of the following:
 - * Notified upstream landowners of any proposed “grade profile” change that may affect their access to drainage.
 - * Resolved any objections by those upstream landowners (to the landowner’s satisfaction).
- A discussion of significant environmental effects, if any.
- Additional information requested by the department.

DATCP Approval or Disapproval

DATCP may not approve any construction project or drainage alteration that causes or aggravates a deviation from the formally established “cross-section,” “grade profile” or “alignment” of a district drain. However, DATCP may do any of the following:

- Approve a change to the formally established “cross-section.” Whenever a county drainage board changes an established “cross-section” with DATCP approval, it must file the new “cross-section” with DATCP, the county zoning administrator and the county register of deeds.
- Approve a change to the formally established “grade profile.” Neither DATCP nor the county drainage board may approve a change to an established “grade profile” over the objection of an upstream landowner whose drainage access may be impaired, unless the county drainage board resolves the landowner’s objection to the satisfaction of the landowner. Whenever a county drainage board changes an established “grade profile” with DATCP approval, it must file the new “grade

profile" with DATCP, the county zoning administrator and the county register of deeds.

- Approve a change to the formally established "alignment." A county drainage board may not take new land for a realigned drain unless the landowner consents or the county drainage board formally condemns the new land for that purpose. Whenever a county drainage board changes an established "alignment" with DATCP approval, it must file the new "alignment" with DATCP, the county zoning administrator and the county register of deeds.

DATCP must issue a written notice approving or disapproving a county drainage board application within 45 days after a county drainage board files a complete application. DATCP may approve an application subject to conditions specified by DATCP. If DATCP disapproves, it must state its reasons. DATCP may disapprove an application for any of the following reasons:

- The county drainage board has failed to provide required information.
- The proposed action or approval would violate DATCP rules or ch. 88, Stats.
- The proposed action is not technically feasible, is not technically sound, or is not adequately designed to achieve the county drainage board's stated objectives.
- The proposed action will have a substantial adverse effect on water quality, or on the human or natural environment.

DATCP must prepare a brief environmental assessment before approving a proposed action if any of the following apply:

- The proposed action will drain more than 200 acres of land not previously drained, or will substantially alter drainage from more than 200 acres of land.
- The proposed action will drain more than 5 acres of wetlands.
- The proposed action involves the construction or modification of a dam in a drain with a navigable stream history.
- The proposed action involves a cold water fishery in a district drain with a navigable stream history.
- The proposed action will substantially affect the base flow in surface waters of the state.

Landowner Petition

Under this rule, an owner of land in a drainage district may file a written petition with the county drainage board asking the county drainage board to do any of the following:

- Restore, repair, maintain and, if necessary, modify a district drain in order to conform the drain to the “cross-section,” “grade profile” or “alignment” formally established for that drain.
- Remove an obstruction placed in a district drain in violation of this chapter or ch. 88, Stats.
- Correct a violation of this chapter or ch. 88, Stats.

A landowner petition must identify the grounds for the petition and the action requested of the county drainage board. A county drainage board may require the petitioner to provide further information which is reasonably necessary in order for the board to properly evaluate the petition.

Within 60 days after a landowner files a complete petition with the county drainage board, the county drainage board must provide the landowner with a written response that does all of the following:

- Describes and explains the action, if any, which the county drainage board will take in response to the petition.
- Explains the county drainage board’s refusal to take action on the petition, if the county drainage board refuses to take action.

If a petitioner is not satisfied with the county drainage board’s response, and believes that the county drainage board has violated this rule or ch. 88, Stats., the petitioner may file a written petition with DATCP alleging that violation. DATCP may, in its discretion, conduct an investigation to determine whether the county drainage board has violated this rule or ch. 88, Stats. If DATCP finds that a county drainage board has violated this rule or ch. 88, Stats., DATCP must issue an order which directs the county drainage board to correct the violation.

Land Ownership Change

This rule confirms that a change of land ownership does not relieve or deprive a succeeding landowner of rights or responsibilities that run with the land under ch. 88, Stats., or this rule.

Row Cropping and Obstructions in District Corridors

Under current rules, a county drainage board must establish a district corridor extending for 20 feet on each side of a district ditch. The drainage board must maintain the corridor according to current rules for the following purposes:

- To provide effective access to the district ditch, for inspection and maintenance.
- To provide a buffer against land uses that may adversely affect water quality in the district ditch.

Current rules completely prohibit “row cropping” in district corridors. This rule prohibits a landowner from doing either of the following without written permission from the county drainage board:

- “Row cropping” in a district corridor.
- Placing in a district corridor any building or other obstruction that interferes with the county drainage board’s ability to inspect and maintain the district drain and corridor.

Under this rule, a county drainage board may authorize row cropping or obstructions in a district corridor, subject to conditions or limitations which the drainage board specifies in writing. A person who engages in row cropping or places any obstruction in a district corridor waives any claim for damages to that crop or obstruction that may result from lawful county drainage board activities in the corridor.

In deciding whether to permit row cropping in a district corridor, a county drainage board may consider, for example, whether row cropping will result in increased maintenance, soil erosion, or movement of suspended solids to district drains. A county drainage board may also consider, for example, the type of row cropping and tillage proposed, the topography of the district corridor, and the nature of the soils and subsoils in the district corridor.

This rule does not require a landowner to remove any building or fixture constructed or installed in a district corridor prior to the effective date of this rule. However, the owner waives any claim for damages to that building or fixture that may be caused by lawful county drainage board activities in the corridor.

} notice to go.

Under current rules, a county drainage board must control the growth of “woody vegetation” in a district corridor, to ensure effective drainage and effective access for inspection, maintenance and repair. A county drainage board may allow the growth of woody vegetation in portions of a district corridor if it does not interfere with effective access. This rule defines “woody vegetation” but makes no other change.

Assessing Benefits to Landowners in Drainage Districts

Under current law, a county drainage board may levy assessments against landowners in a drainage district to pay for drainage district costs, including costs of construction, maintenance, restoration, district operation, and compensation to landowners. Costs must be apportioned among landowners according to the benefits which they derive from the drainage district. Benefits must be assessed according to a procedure specified in ch. 88, Stats., and current rules.

When assessing benefits to agricultural lands in a drainage district, a county drainage board is currently required to consider a number of factors including:

- The estimated increase in land value resulting from drainage.
- The amount of drainage required by, or provided to the assessed land.
- The thoroughness and reliability of drainage provided.
- The amount and frequency of flooding on the assessed land.
- The difficulty of draining the assessed land.
- Any loss of acreage resulting from the construction of district drains and corridors, or from the deposition of materials excavated during construction.
- Other factors which the drainage board considers relevant.

Under this rule, a county drainage board must exclude the following acreage from any assessment of benefits:

- Acreage in a district corridor unless the drainage board authorizes row cropping on that acreage.
- Acreage permanently lost to the landowner as a result of the construction, restoration or maintenance of district corridors, or as a result of the deposition of materials from that construction, restoration or maintenance.

Under current rules, a county drainage board may consider potential land uses when it estimates the increase in land value resulting from drainage. This rule clarifies that the drainage board may also consider current uses.

Under current rules, a county drainage board assessing benefits to agricultural lands must consider the type, depth, quality and character of soils and subsoils on the assessed land. Under this rule, the drainage board must also consider the depth of the water table.

Under this rule, a county drainage board assessing benefits to agricultural lands may consider any of the following potential uses of that land (or other potential uses which the board considers appropriate):

- Residential
- Commercial.
- Cropland, including dryland cropland, pasture, irrigated cropland or cranberry cropland.
- Abandoned cropland (not used for agricultural, residential or commercial purposes).
- Woodlands.
- Wetlands, including soils with standing water that have no significant agricultural value.

excessive & repetitive use of notes

1 **SECTION 1.** Ch. ATCP 48(note) is repealed and recreated to read:

2 **NOTE:** This chapter establishes legal obligations related to drainage districts~~x~~

3
4 • Drainage districts are special purpose districts formed for the
5 purpose of draining land, primarily for agricultural purposes. Lands
6 within a drainage district are drained by means of common drains
7 that cross individual property boundaries. Chapter 88, Stats., spells
8 out procedures for creating, modifying and dissolving drainage
9 districts.

10
11 • County drainage boards are responsible for operating drainage
12 districts in compliance with ch. 88, Stats., and this chapter. A
13 county drainage board may levy assessments against landowners in a
14 drainage district to pay for the design, construction and maintenance
15 of district drains, and to pay other district operating costs. The
16 county drainage board must allocate cost assessments between

*paragraphs
not be deleted
Don't follow
from intro.*

1 landowners based on a drainage district benefit assessment that
2 complies with this chapter.

- 3
- 4 • The state of Wisconsin department of agriculture, trade and
5 consumer protection monitors county drainage board compliance
6 with ch. 88, Stats., and this chapter. Drainage district specifications
7 and construction projects must be approved by the department.
8 Within the limits of available resources, the department also provides
9 technical assistance to county drainage boards.
- 10
- 11 • County drainage boards are primarily responsible for resolving
12 drainage disputes within and between drainage districts. A
13 landowner may petition a county drainage board to comply with
14 applicable requirements under ch. 88, Stats., and this chapter. A
15 landowner may also ask the department to order a county drainage
16 board to comply.
- 17
- 18 • A county drainage board may prevent municipalities and other
19 persons from connecting their drains to district drains, except under
20 terms prescribed by the county drainage board. A county drainage
21 board may also require a person to disconnect a drain. If a proposed
22 connection will increase costs to the drainage district, the county
23 drainage board may assess costs to the person wishing to connect.
- 24
- 25 • Landowners in a drainage district have certain rights and
26 responsibilities prescribed by ch. 88, Stats., and this chapter.
27 Drainage rights are based on drain specifications formally established
28 by the circuit court (or by a county drainage board under this
29 chapter). A county drainage board may not change established drain
30 specifications without department approval. The county drainage
31 board must comply with procedures designed to protect landowner
32 rights.
- 33
- 34 • A change of land ownership does not relieve or deprive a succeeding
35 landowner of rights or responsibilities that run with the land under
36 ch. 88, Stats., or this chapter.
- 37
- 38 • A county drainage board must comply with public records and open
39 meeting laws under ch. 19, Stats. A county drainage board must
40 also comply with specific procedures required by ch. 88, Stats., and
41 this chapter.
- 42
- 43 • This chapter is adopted under authority of ss. 88.11 and 93.07(1),
44 Stats.
- 45

1 Questions related to drainage districts and this chapter may be referred
2 to the county drainage board or to the department at the following
3 address:

4
5 Wisconsin department of agriculture, trade and consumer
6 protection
7 Division of agricultural resource management
8 Bureau of land and water resources
9 P.O. Box 8911
10 Madison, WI 53708-8911
11

12 SECTION 2. ATCP 48.01(5) is repealed.

13 SECTION 3. ATCP 48.01(6m) is created to read:

14 ^{dist.} ATCP 48.01(6m) "Cross-section" means a series of vertical sections of a
15 ^{dist.?} drain, taken at periodic intervals along the length of the drain at right angles to the
16 center line of the alignment of the drain. Each vertical section in the ^Xcross-section^X of
17 a district ditch includes the top and bottom ^{design?} width of the ditch, the design depth of the
18 ditch, and the side slope angle of the ditch. ^{design?} which term? ?

substance
also redlined
w. 48.01(1) & (2)
1.22
3

19 SECTION 4. ATCP 48.01(9) to (11) and (13) are repealed and recreated to
20 read:

21 (9) "District ditch" means a district drain which is in the form of a ditch.

22
23 (10) "District drain" means a drain, including a main or lateral drain and all

24 points of inlet to that drain, that is located within a drainage district and is designated
25 as a district drain by ^{at least} one of the following:

26 (a) A court order.

27 (b) A county drainage board action that complies with s. ATCP 48.20(5) or

28 48.21(2).

~~Specifications = cross-sections, grade profiles and alignments~~ (2)

1 NOTE: A drain is not necessarily a "district drain" merely because it is
2 located on land within a drainage district, or merely because it provides
3 drainage for more than one landowner. In some cases, lands within a
4 drainage district are drained by a private drains that empty into district
5 drains. Private drains are not operated or maintained by the county
6 drainage board; nor is there any district corridor surrounding a private
7 drain.
8

9 (11) "Drain" means any facility, including a ditch, tile, pipe or other facility,
10 for draining water from land. "Drain" includes structures and facilities, such as dams,
11 culverts, pumps, inlet facilities, dikes, dams and levees, that are appurtenant to a drain.

12 (13) "Drainage ditch" or "ditch" means a drain which is in the form of an open
13 surface channel. "Ditch" includes the ditch bed, ditch banks, ^{and} any structures and
14 facilities that are appurtenant to the ditch.

15 SECTION 5. ATCP 48.01(13m), (13r) and (14m) are created to read:

16 ATCP 48.01(13m) "Grade profile" means a vertical section along the
17 alignment of a drain. "Grade profile" includes the grade elevations of the top and
18 bottom of the drain, and the water surface elevations for the base flow and ten year
19 peak discharge.

20 (13r) "Formally established" ~~cross-sections, grade profiles or alignments~~ mean:
21 ~~those~~ established or reestablished by any of the following:

- 22 (a) Circuit court order.
- 23 (b) County drainage board action that complies with s. ATCP 48.20 or 48.21.

24 (14m) "Navigable waters" has the meaning given in s. 30.01(4m), Stats.

25 SECTION 6. ATCP 48.01(21) is amended to read:

5

Substance -
at 48.20(1)(2)
p. 25

2

1 ATCP 48.01(21) "Restoration" or "restoration project" means dredging or
2 other operations designed to bring the cross-section, grade profile or alignment of a
3 district drain into closer conformity with the original, or most recently improved,
4 formally established cross-section, grade profile or alignment of that district drain.

see also p. 21
5

5 SECTION 7. ATCP 48.01(26) is created to read:

6 ATCP 48.01(26) "Woody vegetation" means plants that contain substantial
7 amounts of secondary xylem. "Woody vegetation" includes shrubs and trees but does
8 not include herbs.

vague - adds nothing to dictionary definition

9 SECTION 8. ATCP 48.02(3)(note) is amended to read:

10 NOTE: A county drainage board assesses benefits to land parcels in a drainage
11 district according to s. ATCP 48.06, and allocates cost assessments on
12 the basis of those benefit assessments. A county drainage board, when
13 levying cost assessments, may allow a credit to a landowner who has
14 provided maintenance or other "in kind" services to the drainage
15 district.

creating authority? if so, put in main text

16 SECTION 9. ATCP 48.08(1)(a) and (b) are amended to read:

17 ATCP 48.08(1)(a) The estimated increase in land value resulting from
18 drainage. When estimating an increase in land value, a county drainage board may
19 consider the current and potential uses of the land, taking into account any deed
20 restrictions, easements, restrictive covenants, or other use limitations recorded with the
21 county register of deeds. A potential use does not include a use that is prohibited by
22 law.

see other notes eg. existing ATCP 48.06(4)(not

23
24 ~~(b)~~ (b) The type, depth, quality and character of surface soils and subsoils, and
25 the depth of the water table, on the assessed land.

7

5

1 SECTION 10. ATCP 48.08(1)(b)(note) is created to read:

2 NOTE: Soils with high water tables normally receive the greatest benefit from
3 drainage.

4
5 SECTION 11. ATCP 48.08(1)(g) is repealed.

6 SECTION 12. ATCP 48.08(1)(h) is renumbered (g).

7 SECTION 13. ATCP 48.08(3) to (5) are created to read:

8 ATCP 48.08(3) ACREAGE EXCLUDED FROM ASSESSMENT. A county
9 drainage board shall exclude the following acreage from any assessment of benefits

10 under this subchapter:

11 (a) Acreage in a district corridor unless the county drainage board authorizes
12 the landowner, under s. ATCP 48.24^(b)₁(5), to engage in row cropping in the district
13 corridor.



14 (b) Acreage permanently lost to the landowner because of the construction,
15 restoration or maintenance of district drains or corridors, or the deposition of materials
16 excavated in connection with that construction, restoration or maintenance.

17 (4) LAND USE CATEGORIES. When estimating land values under sub.
18 (1)(a), a county drainage board may consider any of the following land use categories
19 or other categories which the county drainage board considers appropriate:

20 (a) Residential uses.

21 (b) Commercial uses.

22 (c) Cropland, including dryland cropland, pasture, irrigated cropland or
23 cranberry cropland.

1 (d) Abandoned cropland, including former agricultural land not currently used
2 for agricultural, residential or commercial purposes.

3 (e) Woodland, including managed and unmanaged woodlands.

4 (f) Wetlands, including soils with standing water that have no significant
5 agricultural value.

6 (5) DRAINAGE ASSUMPTIONS. When estimating land values associated,
7 with a potential use, a county drainage board may assume that the drained lands have
8 access to an outlet at the formally established grade profile and cross-section, and that
9 the necessary on-site drainage facilities are installed to permit the potential use.

10 SECTION 14. ATCP 48.14(1)(e) is amended to read:

11 ATCP 48.14(1)(e) Whether the cross-sections or grade profiles of district
12 drains have changed significantly from the ~~original, or most recently improved,~~
13 formally established cross-sections or grade profiles.

14 SECTION 15. Chapter ATCP 48, subch. IV (title) is repealed and recreated to
15 read:

16 SUBCHAPTER IV

17 DISTRICT MAP, DRAINS AND CORRIDORS

18 SECTION 16. ATCP 48.20 is repealed and recreated to read:

19 ATCP 48.20 DRAINAGE DISTRICT SPECIFICATIONS. (1)

20 SPECIFICATIONS REQUIRED. By December 31, 2000, every county drainage
21 board shall adopt, for each drainage district under that board's jurisdiction, a complete

1 set of specifications approved by the department. The specifications shall include all of
2 the following:

3 (a) A map which clearly and accurately shows all of the following:

4 1. The boundaries of the drainage district, as last confirmed by the circuit court
5 or as last revised by the county drainage board under ss. 88.77 to 88.80, Stats.

6 NOTE: If the existing boundary of a drainage district is not clearly documented
7 by a circuit court order, or by a county drainage board order under ss.
8 88.77 to 88.80, Stats., the county drainage board should clarify that
9 boundary by appropriate procedures under ss. 88.77 to 88.80, Stats.
10 See s. ATCP 48.21(1).
11

12 2. The alignment and extent of every district drain. If private drains are
13 connected to district drains, the map shall clearly identify which drains, or portions of
14 drains, are district drains.

15 3. The location and width of every district corridor required under s. ATCP
16 48.24.⁽¹⁾

17 (b) The cross-section of every district drain. Each vertical section in the cross-
18 section of a district ditch shall include all of the following elements:

19 1. The top and bottom ^{design?} width of the ditch.

20 2. The design [?] depth of the ditch. (5) ✓

21 3. The ^{design?} side slope angle of the ditch.

} see definition (2)

22 NOTE: The vertical sections comprising the cross-section of a district drain
23 should normally be taken at intervals of not more than 1/3 mile along
24 the entire length of the drain, and at points where structures or changes
25 in drain slope occur.
26

1 (c) The grade profile of every district drain. The grade profile of a district
2 ditch shall include all of the following elements:

- 3 1. The grade elevations of the top and bottom of the ditch.
- 4 2. The estimated water surface elevations in the ditch at base flow.
- 5 3. The estimated water surface elevations in the ditch in the event of a 10-year
6 peak discharge.

see def.

7 NOTE: The formally established "grade profile" effectively determines
8 drainage access and the depth of drainage provided to landowners.
9 When a county drainage board documents the "grade profile" of a
10 district drain, the county drainage board may also wish to determine the
11 elevations of known points at which private drains empty into that
12 district drain.
13

14 (2) NOTICE TO LANDOWNERS; OPPORTUNITY TO OBJECT. Before a
15 county drainage board files drainage district specifications with the department under
16 sub. (1), the county drainage board shall do all of the following:

17 (a) Provide every known landowner in the drainage district with notice by mail
18 announcing a public meeting at which copies of the specifications will be available for
19 inspection. The county drainage board shall also publish a class 2 notice of the
20 meeting under ch. 985, Stats.

21 (b) Give landowners at least 30 days after the public meeting to file, with the
22 county drainage board, written objections to the specifications.

23 (3) APPLYING FOR APPROVAL. To obtain the department's approval under
24 sub. (1), a county drainage board shall file all of the following with the department:

*⑤ requires notice of meeting but doesn't the meeting is why not make copies available but meeting?
P. 31 also
C.P. 93*

1 (a) The drainage district specifications for which the county drainage board
2 seeks approval.

3 (b) A description of how the county drainage board established the
4 specifications.

5 (c) Documentation showing that the county drainage board has complied with
6 sub. (2).

7 (d) Notice of every landowner objection filed under sub. (2)(b).

8 (e) The county drainage board's position on every unresolved objection under
9 sub. (2)(b). *response to all objections?*

10 (f) Other relevant information required by the department.

11 (4) APPROVAL AND FILING. (a) Within 90 days after a county drainage
12 board files a complete application under sub. (3), the department shall approve or
13 disapprove the specifications proposed by the county drainage board.

14 (b) Within 30 days after the department approves and the county drainage
15 board adopts drainage district specifications under this section, the county drainage
16 board shall file the specifications with the department, the county zoning administrator
17 and the county register of deeds. Specifications are not formally established until they
18 are approved, adopted and filed. *under part (a) and in this part.*

19 NOTE: A landowner may challenge formally established drain specifications
20 that violate this chapter or ch. 88, Stats., even if the department has
21 approved those specifications. (In some cases, the department may not
22 be aware of a violation when it approves the specifications.)

cite rule or statute authorizing this challenge

1 (5) DESIGNATING DISTRICT DRAINS. A county drainage board may not,
2 over the objection of any landowner who owns or holds an easement to the land on
3 which a drain is located, designate that drain as a district drain under sub. (1)(a)2.
4 unless the drainage board does at least one of the following:

5 (a) Documents that a circuit court has, by order, designated that drain as a
6 district drain. (?) (5)

7 (b) Documents that the drain has, historically, been operated and maintained as
8 a district drain.

9 (c) Complies with s. ATCP 48.21(2).

10 NOTE: A drain is not necessarily a "district drain" merely because it is
11 located on land within a drainage district, or merely because it provides
12 drainage for more than one landowner. In some cases, lands within a
13 drainage district are drained by private drains that empty into district
14 drains. Private drains are not operated or maintained by the county
15 drainage board; nor is there any district corridor surrounding a private
16 drain.
17

18 (6) DRAIN CROSS-SECTION, GRADE PROFILE AND ALIGNMENT. (a)
19 Except as provided in par. (b), the district drain cross-sections, grade profiles and
20 alignments filed under sub. (1) shall be those last confirmed by the circuit court. If a
21 county drainage board is unable to locate court records documenting those
22 specifications, the drainage board may reconstruct that documentation based on
23 physical evidence of historical conditions in the drainage district. hall

24 NOTE: For example, a county drainage board may be able to document a
25 historical grade profile by physical evidence including soil conditions
26 and invert elevations of historical structures along the alignment of the
27 district drain.
28

1 ~~(b)~~ If a county drainage board is unable to ^{reconstruct} document all of the ^{missing} drainage district
2 specifications required under sub. (1), the county drainage board may establish missing ^{shall}
3 specifications according to s. ATCP 48.21.

4 SECTION 17. ATCP 48.21 is created to read:

5 ATCP 48.21 CHANGING DRAINAGE DISTRICT SPECIFICATIONS.

6 (1) CHANGING A DRAINAGE DISTRICT BOUNDARY. (a) A county drainage
7 board may not change any drainage district boundary except by applicable procedures
8 specified under ss. 88.77 to 88.80, Stats.

9 NOTE: If the existing boundary of a drainage district is not clearly documented
10 by a circuit court order, or by a county drainage board order under ss.
11 88.77 to 88.80, Stats., the county drainage board should clarify that
12 boundary by appropriate procedures under ss. 88.77 to 88.80, Stats.
13

14 (b) Whenever a county drainage board changes any drainage district boundary
15 pursuant to ss. 88.77 to 88.80, Stats., the county drainage board shall file a record of
16 the change with the department, the county zoning administrator and the county register
17 of deeds. The record shall include all of the following:

- 18 1. A revised map of the drainage district, showing the new boundary.
- 19 2. Proof of compliance with par. (a).

20 (2) DESIGNATING PRIVATE DRAIN AS DISTRICT DRAIN. (a) A county
21 drainage board may ~~not~~ designate a private drain as a district drain unless ^{it} the county
22 drainage board does ~~at least one~~ ^{any} of the following:

- 23 1. Obtains the written consent of every landowner who owns or holds an
24 easement to land on which the drain is located.

Purchases or

(5)

1 2. Condemns, pursuant to s. 88.21(6), Stats., and ch. 32, Stats., all of the land
2 newly required for that district drain and for any district corridor required for that
3 drain under s. ATCP 48.24.

4 3. Properly designates the drain as a district drain in a proceeding under s.
5 88.73 or 88.77 to 88.80, Stats.

6 (b) Whenever a county drainage board designates a private drain as a district
7 drain, the county drainage board shall file a record of that designation with the
8 department, the county zoning administrator and the county register of deeds. The
9 record shall include all of the following:

10 1. A revised map of the drainage district, showing the designated drain and any
11 district corridor required under s. ATCP 48.24 for that designated drain.

12 2. Proof of compliance with par. (a).

13 NOTE: A drain is not necessarily a "district drain" merely because it is
14 located on land within a drainage district, or merely because it provides
15 drainage for more than one landowner. In some cases, lands within a
16 drainage district are drained by private drains that empty into district
17 drains. Private drains are not operated or maintained by the county
18 drainage board; nor is there any district corridor surrounding a private
19 drain. Under s. ATCP 48.24, a district corridor is required for a
20 "district ditch" but not for other district drains.
21

No petard

22 (3) CHANGING A FORMALLY ESTABLISHED CROSS-SECTION. (a) A
23 county drainage board may not change the formally established cross-section of a
24 district drain without the department's approval under s. ATCP 48.34.

(2)

7-177
process for changing formally established cross-section is in this + preceding s. is for constr not design
See def. of "formally established"

25 NOTE: A "formally established" cross-section is one established by
26 circuit court order, or by county drainage board action under s. ATCP
27 48.20 or this section. See s. ATCP 48.01(13r).
28

combine w/
(4)(h) + (5)(c)
?

1 (b) Whenever a county drainage board changes the formally established cross-
2 section of a district drain with department approval, the county drainage board shall
3 file a clear record and description of the change with the department, the county zoning
4 administrator and the county register of deeds.

2

5 (4) CHANGING A FORMALLY ESTABLISHED ALIGNMENT. (a) A
6 county drainage board may not change the formally established alignment of a district
7 drain unless the county drainage board does all of the following: ^{apply}

8 ^{The district has} 1. Obtains the written consent of each owner of land that is newly included in
9 the district corridor because of the realignment, or ^{bought the} ~~condemns~~ that newly included land
10 pursuant to s. 88.21(6), Stats., and ch. 32, Stats. This subdivision does not apply if
11 the realignment brings no new land into the district corridor, or if no district corridor is
12 required under s. ATCP 48.24.

2

13 2. The department ^{has} ~~approves~~ ^d the proposed change pursuant to s. ATCP 48.34.

14 NOTE: A "formally established" alignment is one established by
15 circuit court order, or by county drainage board action under s. ATCP
16 48.20 or this section. See s. ATCP 48.01(13r). Under s. ATCP 48.24,
17 a district corridor is required for a "district ditch" but not for other
18 district drains.

19
20 (b) Whenever a county drainage board changes the formally established
21 alignment of a district drain, the county drainage board shall file a record of the change
22 with the department, the county zoning administrator and the county register of deeds.
23 The record shall specifically describe the change, and shall include a new map of the
24 drainage district if the change affects a map previously filed under s. ATCP 48.20 or
25 this section.

?

1 (5) CHANGING A FORMALLY ESTABLISHED GRADE PROFILE. (a) A
2 county drainage board may not change the formally established grade profile of a
3 district drain unless the county drainage board does all of the following:

4 1. Gives individual written notice to every landowner in the drainage district
5 whose access to drainage may be affected by the proposed change. The notice shall
6 clearly describe the proposed change, and shall give the landowner at least 30 days to
7 object to the proposed change.

8 2. Resolves, to the satisfaction of the objecting landowner, every timely
9 objection filed with the county drainage board by a landowner who is entitled to notice
10 under subd. 1.

11 3. Obtains the department's approval for the proposed change under s. ATCP
12 48.34.

13 NOTE: A "formally established" grade profile is a grade profile established by
14 circuit court order, or by county drainage board action under s. ATCP
15 48.20 or this section. See s. ATCP 48.01(13r).
16

17 In determining whether a landowner's "access to drainage may be
18 affected" for purposes of par. (a)1., a county drainage board should
19 assume that the landowner has access to an outlet at the formally
20 established grade profile and cross-section and has installed the
21 necessary on-site drainage facilities to permit access to that outlet by
22 gravity flow, regardless of whether that outlet or those facilities
23 currently exist. A landowner may be adversely affected if the proposed
24 change would impede gravity flow from the drained lands to the real or
25 assumed outlet.
26

27 The department may not approve a change to a formally established
28 grade profile if any objection by an affected landowner under par. (a)1.
29 remains unresolved. See ss. ATCP 48.34, 48.36 and 48.38.
30
31

5 ✓
not required in
original established
- sep 24



substance

1 (b) Whenever a county drainage board changes the formally established grade
2 profile of a district drain with the department's approval, the county drainage board
3 shall file a record of the change with the department, the county zoning administrator
4 and the county register of deeds. The record shall clearly describe the change, if any,
5 to each element of the grade profile under s. ATCP 48.20(1)(c).

6 SECTION 18. ATCP 48.22(2) is repealed and recreated to read:

7 ATCP 48.22(2) COMPLIANCE PLAN. A county drainage board shall file
8 with the department, by December 31, 2001, a plan showing how the county drainage
9 board intends to bring district drains and corridors under its jurisdiction into
10 compliance with this subchapter. The county drainage board shall file a separate plan
11 for each drainage district in the county. The plan shall include all of the following:

12 (a) A professionally drawn map of the drainage district, showing all district
13 drains. The map shall clearly identify the relevant features of the drainage district,
14 including municipal and other connections to district drains, significant structures such
15 as dams, and the location of existing spoil deposits.

16 (b) A restoration plan that identifies all of the following:

17 1. Drain segments that no longer conform to formally established cross-
18 sections, grade profiles or alignments.

19 2. A priority sequence and schedule for restoring noncomplying drains to their
20 formally established cross-sections, grade profiles and alignments.

21 3. An estimate of the amount of material to be dredged from each drain
22 scheduled for restoration.

1 4. The intended disposition of dredged materials, including the locations at
2 which the materials will be deposited.

3 5. The projected costs of restoration, and a plan for financing those costs.

4 (c) A repair and maintenance plan that includes all of the following:

5 1. A plan for routine maintenance of drainage structures.

6 2. A plan for maintaining district corridors and controlling woody vegetation in
7 those corridors.

8 3. A plan for special repair and maintenance projects, if any.

9 4. The projected costs of repair and maintenance, and a plan for financing
10 those costs.

11 (d) A plan for controlling soil erosion and runoff in the drainage district. The
12 plan shall include the estimated cost to implement the plan.

13 SECTION 19. ATCP 48.22(2m) and (2r) are created to read:

14 ATCP 48.22(2m) HEARING ON COMPLIANCE PLAN. (a) Before a

15 county drainage board files a compliance plan with the department under sub. (2), the
16 county drainage board shall do all of the following:

17 1. Provide every known landowner in the drainage district with notice by mail
18 announcing a public meeting at which a copy of the plan shall be available for
19 inspection. The county drainage board shall also publish a class 2 notice of the
20 meeting under ch. 985, Stats.

21 2. Give landowners at least 30 days after the public meeting to file, with the
22 county drainage board, written objections to the compliance plan.

not a hearing

vague
requires notice
but not the actual meeting

1 (b) Whenever a county drainage board files a compliance plan with the
2 department under sub. (2), the county drainage board shall also file all of the
3 following:

4 1. Documentation showing that the county drainage board has complied with
5 par. (a).

6 2. Notice of any unresolved objections filed under par. (a)2., and the county
7 drainage board's position on those unresolved objections.

8 (2r) COMPLIANCE DEADLINE. A county drainage board shall bring every
9 drainage district into compliance with this subchapter by December 31, 2004 unless the
10 department, in response to unusual or unavoidable circumstances, extends the
11 compliance deadline in writing.

12 SECTION 20. ATCP 48.22(3)(note) and (6) are amended to read:

13 NOTE: Under s. ATCP 48.34 48.36(1)(f), a construction project
14 requiring department approval under s. ATCP 48.34 must be designed
15 by a qualified engineer. Sections 88.20 and 946.13, Stats., prohibit
16 conflicts of interest by members of a drainage board. Under s. 88.145,
17 Stats., a county drainage board may authorize any owner of land in a
18 drainage district to undertake work approved by the drainage board.
19 The liability of a landowner who does work with the approval of the
20 county drainage board is limited by ss. 88.145, 893.80 and 895.46(8),
21 Stats.

22
23 (6)(title) CONSTRUCTION PLANS. No county drainage board or its agent
24 may proceed with a construction or restoration project for which department approval
25 is required under s. ATCP 48.34 unless the county drainage board has obtained the
26 department's written approval for that construction or restoration project under s.
27 ATCP 48.38 , without the department's written approval, proceed with any

- redundant w/ 48.34 (2)

1 construction project or other action under s. ATCP 48.34 for which that approval is - *deGt*
2 required. No county drainage board or its agent may, without the department's written
3 approval, deviate from the project plan and specifications approved by the department. } *find better placement for this?*

4 SECTION 21. ATCP 48.24(2)(note) is created to read:

5 NOTE: Under s. ATCP 48.28, a county drainage board is required to
6 control the growth of woody vegetation in a district corridor, except that
7 a county drainage board may allow the growth of woody vegetation in
8 portions of a district corridor if it does not interfere with effective access
9 to district drains.

10
11 SECTION 22. ATCP 48.24(5) is repealed and recreated to read:

12 ATCP 48.24(5) ROW CROPPING AND OBSTRUCTIONS IN DISTRICT

13 CORRIDOR. (a) No person may do any of the following without written permission
14 from the county drainage board:

- 15 1. Engage in row cropping in a district corridor.
- 16 2. Place in a district corridor any building or other obstruction that interferes
17 with the county drainage board's ability to inspect, restore and maintain the district
18 ditch and corridor.

19 *At the request of a landowner?*
(b) ^{to...} A county drainage board may give written permission under par. (a),
20 *A.C.D. may impose written on...* ~~subject to conditions or limitations which the drainage board specifies in writing.~~

21 NOTE: In deciding whether to authorize row cropping in a district corridor, a
22 county drainage board should consider whether that row cropping will
23 increase maintenance requirements, soil erosion, or movement of
24 suspended solids to district drains. It may consider relevant factors such
25 as the type of row cropping and tillage proposed, the topography of the
26 district corridor, and the type, quality and character of the soils and
27 subsoils in the district corridor.
28

1 (c) A person who engages in row cropping or places any obstruction in a
2 district corridor under par. (a), with or without drainage board permission, waives any
3 claim for damages to those crops or obstructions that may be caused by county
4 drainage board activities authorized under ch. 88, Stats., or this chapter.

5 (d) This subsection does not require a landowner to remove any building or
6 fixture constructed or installed in a district corridor prior to the effective date of this
7 subsection [revisor inserts effective date]. The owner of the preexisting building or
8 fixture waives any claim for damages to that building or fixture that may be caused by
9 county drainage board activities authorized under ch. 88, Stats., or this chapter.

authorize board
to order
removal of
unauthorized
obstruction

10 SECTION 23. ATCP 48.26(3) is repealed and recreated to read:

11 ATCP 48.26(3) DISTRICT DRAINS MUST CONFORM TO

12 SPECIFICATIONS. A county drainage board shall restore, repair, maintain and, if
13 necessary, modify district drains so that each district drain conforms to ~~the its~~
14 specifications formally established for that drain by court order, or by county drainage
15 board action under s. ATCP 48.20 or 48.21. If the county drainage board levies any
16 cost assessment for work needed to conform a drain to formally established
17 specifications, it shall levy the assessment according to subchapter II.

2

18 SECTION 24. ATCP 48.26(5) and (5)(note) are created to read:

19 ATCP 48.26(5) RESTORATION PROJECTS; NOTICE TO DEPARTMENT.

20 A county drainage board shall notify the department in writing before the county
21 drainage board initiates any restoration project in a drainage district which involves the
22 dredging or excavation of more than 3,000 cubic yards of material.

1 NOTE: A county drainage board does not need department approval
2 for a restoration project, but may need a dredging permit from the
3 Wisconsin department of natural resources under s. 30.20 or s. 88.31,
4 Stats. A county drainage board may not, under the guise of a
5 "restoration project," dredge below the bottom elevation specified as
6 part of the formally established grade profile. See definition of
7 "restoration project" under s. ATCP 48.01(21).
8

9 SECTION 25. ATCP 48.32(2) and (note) are amended to read:

10
11 ATCP 48.32(2) The deposition of excavated materials, whether by land
12 spreading or piling, shall conform as nearly as practicable to the american society of
13 agricultural engineers engineering practice number ~~407.01~~ 407.1, section 5, 1993
14 edition as reconfirmed in December, 1996.

15 NOTE: Copies of ASAE EP ~~407.01~~ 407.1, section 5 are on file with the
16 department, the secretary of state and the revisor of statutes. Copies
17 may be obtained from the department. A county drainage board may
18 also contact the United States department of agriculture natural resources
19 conservation service or the army corps of engineers for technical
20 assistance related to the deposition of dredged or excavated materials.
21

22 SECTION 26. ATCP 48.33 is created to read:

23 **ATCP 48.33 STRUCTURES IMPEDING DRAINAGE.** (1)

24 PROHIBITION. Except as provided in sub. (2), no county drainage board may install
25 or modify any structure in a district drain, or approve the installation or modification
26 of any structure in a district drain, if the installation or modification causes or
27 aggravates a deviation from the formally established grade profile of that district drain.
28 An installation or modification is rebuttably presumed to cause or aggravate a deviation
29 from the formally established grade profile if it raises the water level in a district drain,
30 or slows the runoff of water from upstream lands in the drainage district.

*include
addition* (2) ✓

1 NOTE: A "formally established" grade profile is a grade profile established by
2 court order, or by the county drainage board under s. ATCP 48.20 or
3 48.21. (2)

4
5 (2) TEMPORARY MODIFICATIONS. Subsection (1) does not apply to any
6 of the following which the county drainage board undertakes or approves:

7 (a) A temporary structure or modification that is reasonably necessary to
8 protect the public health, safety or welfare in an emergency.

9 (b) A temporary structure or modification that is necessary for other lawful
10 construction or maintenance operations under this chapter.

11 (c) A temporary structure or modification to provide essential crop irrigation
12 during a drought if all of the following apply:

13 1. The county drainage board gives individual notice of the proposed structure
14 or modification to upstream landowners whose access to drainage may be affected.

15 2. The county drainage board resolves, to the satisfaction of the objecting
16 landowner, every objection by an upstream landowner whose access to drainage is
17 affected by the proposed structure or modification.

18 NOTE: For example, a county drainage board may resolve a landowner's
19 objection, to the satisfaction of a landowner, by imposing conditions
20 under subd. 3 which protect the interests of that landowner.

21
22 In determining whether a landowner's "access to drainage may be
23 affected" for purposes of par. (c)1. and 2., a county drainage board
24 should assume that the landowner has access to an outlet at the formally
25 established grade profile and cross-section and has installed the
26 necessary on-site drainage facilities to permit access to that outlet by
27 gravity flow, regardless of whether that outlet or those facilities
28 currently exist. A landowner may be adversely affected if the proposed
29 change would impede gravity flow from the drained lands to the real or
30 assumed outlet.

Substance?
(2)

1 3. The county drainage board approves the structure or modification subject to
2 written conditions that reasonably protect the public interest and the interests of all
3 landowners in the drainage district.

4 NOTE: A landowner withdrawing water for irrigation may need to obtain
5 a permit from the state of Wisconsin department of natural resources
6 under s. 30.18(2)(a)2., Stats.

7
8 (d) A temporary structure or modification to provide water for cranberry
9 harvest, or for cranberry winter ice cover, if all of the following apply:

10 1. The structure or modification is installed for not more than 14 days for
11 cranberry harvest, and not more than 14 days for cranberry winter ice cover.

12 2. The county drainage board gives individual notice of the proposed structure
13 or modification to upstream landowners whose access to drainage may be affected.

14 3. The county drainage board resolves, to the satisfaction of the objecting
15 landowner, every objection by an upstream landowner whose access to drainage is
16 affected by the proposed structure or modification.

17 NOTE: For example, a county drainage board may resolve a landowner's
18 objection, to the satisfaction of a landowner, by imposing conditions
19 under subd. 4 which protect the interests of that landowner.

20
21 In determining whether a landowner's "access to drainage may be
22 affected" for purposes of par. (d)2. and 3., a county drainage board
23 should assume that the landowner has access to an outlet at the formally
24 established grade profile and cross-section and has installed the
25 necessary on-site drainage facilities to permit access to that outlet by
26 gravity flow, regardless of whether that outlet or those facilities
27 currently exist. A landowner may be adversely affected if the proposed
28 change would impede gravity flow from the drained lands to the real or
29 assumed outlet.
30
31
32

*Copied to
Access to
note -
put both
end of
section?
(FL)*

1 (d) Take any action under s. ATCP 48.20 or 48.21 that changes the formally
2 established cross-section, grade profile or alignment of a district drain, regardless of
3 whether that action involves any physical alteration to a district drain or structure.

4 (2) EXEMPTIONS. Subsection (1) does not apply to any of the following:

5 (a) Actions, such as routine maintenance or repair projects, that do not cause or
6 aggravate any deviation from the formally established cross-section, grade profile or
7 alignment of a district drain. An action is rebuttably presumed to cause or aggravate a
8 deviation from a formally established grade profile if it raises the water level in a
9 district drain or slows the runoff of water from lands in the drainage district.

10 (b) Restoration projects.

11 NOTE: A restoration project is exempt under par. (b) only to the extent that it
12 is confined within the formally established cross-section, grade profile
13 and alignment of a district drain, and does not go beyond those formally
14 established specifications. See definition of "restoration project" under
15 s. ATCP 48.01(21).
16

17 (c) Temporary structures or modifications that a county drainage board installs
18 or approves in compliance with s. ATCP 48.33(2).

19 NOTE: A county drainage board should consult with the department to
20 determine whether a particular county drainage board action requires
21 department approval under this section. A county drainage board may
22 seek the department's advice or assistance regarding any proposed
23 construction, repair, restoration or maintenance action, regardless of
24 whether the action requires the department's approval under this
25 section. A county drainage board should consult with the department at
26 the early planning stage to facilitate timely assistance and, if
27 necessary, timely approval. A county drainage board may not deviate
28 from approved project specifications without the department's approval.
29 Before installing or modifying a dam or other structure in a district
30 drain, a county drainage board may need to obtain a permit from the
31 Wisconsin department of natural resources under ch. 31, Stats.

substantive?
(2)

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ATCP 48.36 APPLYING FOR APPROVAL. (1) APPLICATION

REQUIRED. A county drainage board shall apply in writing for department approval of a proposed action under s. ATCP 48.34. The application shall include all of the following information, in detail commensurate with the proposed action:

(a) District name or number. The name or number, or proposed name or number, of the drainage district.

(b) Proposed action. A statement describing the proposed action.

(c) Objectives. The objectives which the county drainage board expects to achieve by taking the proposed action. If the county drainage board expects to improve drainage, the county drainage board shall express its drainage objectives in terms of drainage volume, thoroughness of drainage, geographic scope of drainage, or other pertinent drainage measures.

(d) Persons requesting action. The persons, if any, who are asking the county drainage board to take the proposed action.

(e) Estimated cost. The estimated cost of the proposed action, including any damage awards to landowners who will be adversely affected.

(f) Design specifications. Design specifications for the proposed action, prepared by an engineer who is qualified under s. 88.21(5), Stats. The design specifications shall comply with applicable standards under subch. IV. The engineer preparing the design specifications shall state whether, in the engineer's judgment, the

1 proposed action as designed will be effective in achieving the county drainage board's
2 stated objectives.

3 (g) Lands and waters affected. A map showing the location of the proposed
4 action, and the location of the lands and waters affected by the proposed action. The
5 map shall indicate all of the following if relevant:

- 6 1. The current and proposed use of the affected lands.
- 7 2. The topography of the affected lands.
- 8 3. The location of any affected wetlands.
- 9 4. The identity and location of any affected navigable waterway, stormwater
10 management district, lake district, priority watershed or lake under s. 144.25, Stats., or
11 wellhead protection area under ch. NR 811.
- 12 5. The identity and location of any affected building, transportation corridor or
13 utility easement.

14 (h) Hydrologic analysis. A hydrology analysis, prepared by an engineer who is
15 qualified under s. 88.21(5), Stats. The hydrology analysis shall analyze the effect of
16 the proposed action, if any, on all of the following:

- 17 1. Water surface elevations in district drains at base flow.
- 18 2. Water surface elevations in district drains in the event of a 10-year peak
19 discharge.
- 20 3. Water surface elevations in district drains in the event of a 25-year peak
21 discharge.

1 (i) Construction plan. A construction plan, if applicable, including all of the
2 following:

- 3 1. A plan for controlling construction site erosion.
- 4 2. The estimated amount of material, if any, that will be dredged or excavated.
- 5 3. A plan for depositing dredged or excavated material, if any, including the
6 location and configuration of any deposits.

7 (j) Notice and public hearing. A statement that the county drainage board has
8 complied with the notice and public hearing requirement under sub. (2).

9 (k) Formal changes to cross-section, grade profile or alignment. All of the
10 following information if the county drainage board proposes to change the formally
11 established cross-section, grade profile or alignment of a district drain:

12 1. The cross-section, grade profile or alignment which the county drainage
13 board proposes to change.

14 2. The new cross-section, grade profile or alignment proposed by the county
15 drainage board. The new specifications shall be prepared by an engineer who is
16 qualified under s. 88.21(5), Stats.

17 3. If the county drainage board proposes to change a formally established
18 alignment, a statement that the county drainage board has complied with s. ATCP
19 48.21(4)(a)1.

20 4. If the county drainage board proposes to change a formally established grade
21 profile, a statement that the county drainage board has complied with s. ATCP
22 48.21(5)(a)1. and 2.

1 (L) Assessment of benefits to landowners. A statement explaining how the
2 proposed action will affect the assessment of benefits to landowners under s. ATCP
3 48.06, if at all.

4 NOTE: See s. ATCP 48.06(2)(a) and s. 88.46, Stats.

5 (m) Financing plan. The drainage board's plan for financing the proposed
6 action, including any proposed cost assessments to lands in the drainage district.

7 NOTE: See s. ATCP 48.02.

8 (n) Environmental effects. An assessment of how the proposed action may
9 affect the human and natural environment, including effects on all of the following:

- 10 1. Lands and land uses identified under par. (g).
- 11 2. Surface water levels, quality and temperature.
- 12 3. Groundwater levels and quality.

13 (o) Alternatives. An assessment of alternatives to the proposed action,
14 including the alternative of doing nothing. The assessment shall discuss the relative
15 benefits, costs and environmental effects of the alternatives.

16 (2) COUNTY DRAINAGE BOARD; NOTICE AND HEARING ON
17 PROPOSED ACTION. Before a county drainage board submits an application to the
18 department under sub. (1), it shall do all of the following:

19 (a) Publish a hearing notice and hold a public hearing on the proposed action.
20 The notice and hearing shall comply with applicable requirements under s. 88.05 and
21 88.065, Stats. The hearing notice shall clearly describe the proposed action.

1 (b) Give members of the public at least 30 days, following the public hearing
2 under par. (a), to comment on the proposed action.

3 (3) COPIES FILED WITH OTHER AGENCIES. Whenever a county drainage
4 board files an application with the department under sub. (1), the county drainage
5 board shall simultaneously file copies of the application with all of the following:

6 (a) The Wisconsin department of natural resources.

7 (b) The United States army corps of engineers.

8 (c) The county zoning administrator.

9 (d) The county land conservation committee.

10 (e) Every municipality affected by the proposed action.

11 (f) The county highway committee if the proposed action may affect a public
12 highway.

13 (4) ADDITIONAL INFORMATION. The department may require a county
14 drainage board to file additional information, as necessary, before approving or
15 disapproving an application under sub. (1).

16 **ATCP 48.38 DEPARTMENT APPROVAL OR DISAPPROVAL.** (1)

17 **APPROVING DRAINAGE ALTERATIONS.** The department may not approve any
18 action under s. ATCP 48.34 that causes the cross-section, grade profile or alignment of
19 a district drain to deviate from the cross-section, grade profile or alignment formally
20 established for that drain, but may do any of the following based on the county
21 drainage board's application under s. ATCP 48.36:

*Start of
general -
criteria for
approval etc.*
2

(a) Approve, conditionally approve or deny an action

(B)

1 (a) Approve an action that formally reestablishes the cross-section of a district
2 drain.

3 (b) Approve an action that formally reestablishes the alignment of a district
4 drain if the department finds that the county drainage board has complied with
5 applicable requirements under s. ATCP 48.21(4)(a)1.

6 (c) Approve an action that formally reestablishes the grade profile of a district
7 drain if the department finds that the county drainage board has complied with s. ATCP
8 48.21(5)(a)1. and 2.

(A) Deny

9 (2) DEADLINE FOR APPROVAL OR DISAPPROVAL. Within 45 days after
10 a county drainage board files a complete application under s. ATCP 48.36, including
11 any additional information which the department requests under s. ATCP 48.36(4), the
12 department shall issue a written notice approving or disapproving the county drainage
13 board's proposed action under s. ATCP 48.34. The department may extend the
14 deadline to a date specified by the department if an environmental impact statement is
15 required under sub. (6).

16 NOTE: See ss. 88.32(3m) and 88.35(7), Stats.

← ? (5) ✓

17 (3) CONDITIONAL APPROVAL. The department may approve a proposed
18 action under s. ATCP 48.34 subject to conditions specified by the department.

19 (4) REASONS FOR DISAPPROVAL. If the department disapproves a
20 proposed action under s. ATCP 48.34, the department shall give the county drainage
21 board written notice of the reasons. The department may disapprove a proposed action
22 for any of the following reasons:

*then and no others
if not, then this
isn't needed
(2)*

1 (a) The county drainage board has failed to provide information required under
2 s. ATCP 48.36.

3 (b) The proposed action would violate this chapter or ch. 88, Stats.

4 (c) The requested approval would violate this chapter or ch. 88, Stats.

5 (d) The proposed action is not technically feasible, is not technically sound, or
6 is not adequately designed to achieve the county drainage board's stated objectives.

7 (e) The proposed action will have a substantial adverse effect on water quality,
8 or on the human or natural environment.

9 (5) ENVIRONMENTAL ASSESSMENT. (a) The department shall prepare
10 an environmental assessment under s. ATCP 3.02 before it approves a proposed action
11 under s. ATCP 48.34 if any of the following apply:

12 1. The proposed action will drain more than 200 acres of land not previously
13 drained, or will substantially alter drainage from more than 200 acres of land.

14 2. The proposed action will drain more than 5 acres of wetlands.

15 3. The proposed action involves the construction or modification of a dam in a
16 drain with a navigable stream history.

17 4. The proposed action involves a cold water fishery in a district drain with a
18 navigable stream history.

19 5. The proposed action will substantially affect the base flow in surface waters
20 of the state.

21 6. The department determines that an environmental assessment is needed to
22 determine whether an environmental impact statement is required under s. ATCP 3.03.

1 (6) ENVIRONMENTAL IMPACT STATEMENT. The department shall
2 prepare an environmental impact statement under s. ATCP 3.03 before approving a
3 proposed action under s. ATCP 48.34 ~~only~~ if the department determines that an
4 environmental impact statement is required under s. ATCP 3.03.

2

5 SECTION 29. Ch. ATCP 48, subch. VI (title) is repealed and recreated to
6 read:

7 SUBCHAPTER VI

8 LANDOWNER RIGHTS AND RESPONSIBILITIES

9
10 SECTION 30. ATCP 48.40(2)(note) is amended to read:

11 NOTE: A county drainage board may take various actions in response to
12 landowner actions that adversely affect a drainage district. For example,
13 see ss. ATCP 48.02(5), 48.04, 48.06(2) and 48.30 and 48.44(3). See
14 also ss. 88.89 to 88.92, Stats.
15

16 SECTION 31. ATCP 48.44 is renumbered 48.43.

17 SECTION 32. ATCP 48.44 and 48.45 are created to read:

18 ATCP 48.44 OBSTRUCTING OR ALTERING DISTRICT DRAINS. (1)

19 PROHIBITION. Except as provided under sub. (2), no person may obstruct or alter a
20 district drain without prior written approval from the county drainage board.

21 (2) WITHDRAWING WATER; EXEMPTION. An owner of land adjacent to
22 a district drain may, without prior approval from the county drainage board, withdraw
23 water from a district drain and place an obstruction in the district drain for that purpose
24 while withdrawing that water if all of the following apply:

1 (a) The landowner notifies the county drainage board under s. ATCP 48.40
2 before withdrawing the water or placing the obstruction in the district drain.

3 (b) The landowner obtains a permit from the department of natural resources
4 authorizing the withdrawal, if a permit is required under s. 30.18(2)(a)2., Stats.

5 (c) The obstruction does not elevate the base flow in the district drain, at the
6 point of the obstruction, above the base flow elevation specified as part of the formally
7 established grade profile for that district drain.

8 (d) Neither the obstruction nor the withdrawal of water reduces the base flow,
9 in a district drain that has a navigable stream history, below the minimum base flow
10 which the state of Wisconsin department of natural resources has established for that
11 district drain under s. 88.31, Stats..

12 NOTE: A "formally established" grade profile is a grade profile established by
13 court order, or by the county drainage board under s. ATCP 48.20 or
14 48.21. A violation of par. (c) "materially defeats the purposes of } substance
15 drainage" within the meaning of s. 88.93, Stats.
16

17 (e) The withdrawal does not injure any district drain, or make any district drain
18 more susceptible to injury. Injury to a district drain includes, for purposes of this
19 paragraph, ^{any} ~~all~~ of the following:

- 20 1. Damage to any structure in a district drain.
- 21 2. The deposition of excavated materials in a district drain.
- 22 3. The weakening, undercutting or accelerated erosion of any side bank in a
23 district drain.

1 (3) DRAINAGE BOARD MAY REVIEW. A county drainage board may do
2 any of the following:

3 (a) Require a landowner to provide information showing that the landowner's
4 withdrawal of water complies with sub. (2).

5 (b) Prohibit a landowner from withdrawing water under sub. (2) if the drainage
6 board reasonably concludes that the withdrawal violates this chapter. The drainage
7 board shall document, in writing, the basis for its conclusion.

8 **ATCP 48.45 LANDOWNER RIGHTS.** (1) ACTION TO ENFORCE

9 COMPLIANCE. (a) An owner of land in a drainage district may file a written
10 petition with the county drainage board asking the county drainage board to do any of
11 the following:

12 1. Restore, repair, maintain or, if necessary, modify a district drain in order to
13 conform the drain to the cross-section, alignment or grade profile formally established
14 for that drain.

15 NOTE: Drain specifications are formally established by court order, or by
16 drainage board action under s. ATCP 48.20 or 48.21. Deviations from
17 formally established specifications may effectively deprive landowners of
18 drainage to which they are legally entitled.

19
20 2. Remove an obstruction placed in a district drain in violation of this chapter
21 or ch. 88, Stats.

22 3. Correct a violation of this chapter or ch. 88, Stats.

23 (b) A petition under par. (a) shall identify the grounds for the petition and the
24 action requested of the county drainage board. A county drainage board may require

1 the petitioner to provide further information which is reasonably necessary in order for
2 the board to properly evaluate the petition.

3 (c) Within 60 days after a landowner files a complete petition with the county
4 drainage board, the county drainage board shall provide the landowner with a written
5 response that does all of the following:

6 1. Describes and explains the action, if any, which the county drainage board
7 will take in response to the petition.

8 2. Explains the county drainage board's refusal to take action on the petition, if
9 the county drainage board refuses to take action.

10 (d) A petitioner under par. (a) may, after receiving a county drainage board's
11 response under par. (c), file a written petition with the department alleging that a
12 county drainage board has violated this chapter or ch. 88, Stats. The department may,
13 in its discretion, conduct an investigation to determine whether the county drainage
14 board has violated this chapter or ch. 88, Stats. If the department finds that a county
15 drainage board has violated this chapter or ch. 88, Stats., the department shall issue an
16 order under s. ATCP 48.52 which directs the county drainage board to correct the
17 violation.

18 NOTE: The remedies provided to a landowner under sub. (1) are in addition to
19 any other legal remedies which may be available to the landowner. A
20 landowner is not required to pursue any of the remedies under sub. (1)
21 before pursuing other legal remedies.

22
23 A landowner may challenge a county drainage board action that violates
24 this chapter or ch. 88, Stats., even if the department has approved that
25 action. (In some cases, the department may not be aware of facts
26 constituting a violation when it approves a county drainage board
27 action.)
28

1
2 (2) LAND OWNERSHIP CHANGE. A change of ownership does not relieve
3 or deprive a succeeding landowner of rights or responsibilities that run with the land
4 under ch. 88, Stats., or this chapter.

5 SECTION 33. ATCP 48.46(1)(b) is amended to read:

6 ATCP 48.46(1)(b) Approves the construction, enlargement, extension or
7 modification of a district drain. The record shall include any information describing
8 ~~profiles and cross-sections~~ cross-sections, grade profiles and alignments of drains
9 affected by the order.

10 SECTION 34. ATCP 48.46(1)(d) is created to read:

11 ATCP 48.46(1)(d) Formally establishes any drainage district specifications
12 under s. ATCP 48.20 or 48.21.

13 SECTION 35. ATCP 48.46(2) is repealed and recreated to read:

14 ATCP 48.46(2) DRAINAGE DISTRICT SPECIFICATIONS. A county
15 drainage board shall have on file, at all times, drainage district specifications
16 established by court order, or by the county drainage board under s. ATCP 48.20 or
17 48.21. Specifications shall include all existing specifications designating any of the
18 following:

19 (a) Drainage district boundaries, district drains and district corridors.

20 (b) Cross-sections, alignments and grade profiles of district drains.

21 SECTION 36. ATCP 48.46(3) is repealed.

1 **EFFECTIVE DATE.** The rules contained in this order shall take effect upon
2 the first day of the month following publication in the Wisconsin administrative
3 register, as provided in s. 227.22(2)(intro.), Stats.

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Dated this _____ day of _____, 19_____.

STATE OF WISCONSIN
DEPARTMENT OF AGRICULTURE,
TRADE AND CONSUMER PROTECTION

By _____
Ben Brancel, Secretary

JUL 02 1998

STATE OF WISCONSIN
DEPARTMENT OF AGRICULTURE, TRADE AND CONSUMER PROTECTION

NOTICE OF PUBLIC HEARING

RULES RELATED TO DRAINAGE DISTRICT PROGRAM

The State of Wisconsin Department of Agriculture, Trade and Consumer Protection announces that it will hold hearings on proposed rule revisions relating to the department's drainage district program (ch. ATCP 48, Wis. Adm. Code). Four hearings will be held at the times and places shown below. The public is invited to attend the hearings and make comments on the proposed rule revisions.

A copy of the proposed rule revisions may be obtained, free of charge, by calling (608)224-4620 or by writing to:

Drainage District Program
Land & Water Resources Bureau
Department of Agriculture, Trade and Consumer Protection
PO Box 8911
Madison, Wisconsin 53708-8911

Copies of the proposed rule revisions will also be available at the public hearings.

The hearing record will remain open for one week beyond the last public hearing. All written comments received by 4:30 p.m. on Friday, August 7, 1998, will become part of the official hearing record. All written comments should be sent to the address listed above.

Each public hearing listed below will have two sessions: 2:30-4:30 p.m. and 6:30-8:30 p.m.

- | | |
|---------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------|
| <p>☐ Monday, July 27, 1998
Mead Inn
451 E. Grand Ave.
Wisconsin Rapids, Wisconsin</p> | <p>☐ Wednesday, July 29
Jefferson County Courthouse
Room 202
Jefferson, Wisconsin</p> |
| <p>☐ Tuesday, July 28, 1998
Liberty Hall
800 Eisenhower Drive
Kimberly, Wisconsin</p> | <p>☐ Thursday, July 30, 1998
Green Lake County Courthouse
Safety Building Room
Green Lake, Wisconsin</p> |

Persons requiring an interpreter may request one prior to July 10, 1998, by contacting Sheila Vanney at (608) 224-4620 or by contacting the message relay system (TTY) at (608) 266-4399 which will forward your call to the department. Handicap access is available at the hearings. Requests may also be made by writing to: Sheila Vanney, PO Box 8911, Madison, WI 53708-8911.

Analysis Prepared by the Department of
Agriculture, Trade and Consumer Protection

Statutory authority: ss. 88.11 and 93.07(1), Stats.

Statutes interpreted: ch. 88, Stats.

The department of agriculture, trade and consumer protection (DATCP) supervises the operation of drainage districts under ch. 88, Stats. This rule modifies the department's current rules, under ch. ATCP 48, Wis. Adm. Code, related to drainage districts.

Drainage districts are special purpose districts formed to drain land for agricultural or other purposes. Lands within a drainage district are drained by means of common drains that cross individual property boundaries. Ch. 88, Stats., spells out procedures for creating, modifying and dissolving drainage districts.

All drainage districts within a county are operated by the county drainage board, which is appointed by the circuit court. The county drainage board must operate drainage districts in compliance with ch. 88, Stats., and DATCP rules. The county drainage board may levy assessments against landowners in a drainage district to pay for the design, construction and maintenance of district drains, and to pay other district operating costs. The county drainage board is primarily responsible for resolving drainage disputes within and between drainage districts.

DATCP monitors county drainage board compliance with ch. 88, Stats., and DATCP rules, and approves construction projects in drainage districts. The state of Wisconsin department of natural resources must also approve certain construction projects in drainage districts.

Drainage District Specifications

Under current rules, a county drainage board must file drainage district specifications for every drainage district under the drainage board's jurisdiction. The county drainage board must file the specifications with DATCP and the county zoning administrator. The specifications must include all of the following:

- The boundaries of the drainage district, as last confirmed by the circuit court or the county drainage board.
- The location and extent of every district drain.
- The location and width of every district corridor. The district corridor is an access corridor and buffer strip established around each district ditch according to current rules.

County drainage boards were required to file specifications for all existing drainage districts by December 31, 1995. However, many county drainage boards have not yet filed them.

This rule expands and clarifies the current requirements, and extends the filing deadline to December 31, 2000. Under this rule:

- The county drainage board must file a map showing all of the following:
 - * Drainage district boundaries.
 - * The alignment and extent of every district drain.
 - * The location and width of every district corridor.
- The county drainage board must document the “cross-section” and “grade profile” of every district drain. This rule defines what is meant by a “cross-section” and “grade profile.”
- The county drainage board must give landowners notice and an opportunity to object to its proposed drainage district specifications.
- The county drainage board must obtain DATCP approval of drainage district specifications. DATCP approval does not preclude a landowner from challenging a specification that violates ch. 88, Stats., or this rule.
- After the county drainage board adopts the approved specifications, the county drainage board must file them with DATCP, the county zoning administrator and the county register of deeds.

Drainage District Boundaries

The initial boundaries of a drainage district are specified by the circuit court. A county drainage board may modify drainage district boundaries according to statutory procedures prescribed under ss. 88.77 to 88.80, Stats.

This rule prohibits a county drainage board from changing drainage district boundaries except by the procedures prescribed under ss. 88.77 to 88.80, Stats. If court records documenting current boundaries are not available or are unclear, a county drainage board may clarify the boundaries using the same statutory procedures. If a county drainage board changes a drainage district boundary, it must file a record of the change with DATCP, the county zoning administrator and the county register of deeds.

Designating District Drains

In many cases, lands within a drainage district are drained by “private drains” that empty into “district drains” constructed and operated by the county drainage board. In some cases, it is unclear whether an existing drain is a “private drain” or a “district drain.” This rule prohibits a county drainage board from designating a drain as a “district drain,” over the objection of a landowner who owns or holds an easement to the land on which the drain is located, unless the county drainage board does one of the following:

- Documents that a circuit court has designated the drain as a district drain.
- Documents that the drain has historically been operated and maintained as a district drain.
- Condemns the land required for the district drain and district corridor, if any, using statutory condemnation procedures.
- Properly designates the drain as a district drain in a proceeding under s. 88.73 or 88.77 to 88.80, Stats.

Under this rule, if a county drainage board redesignates a private drain as a “district drain,” the county drainage board must file a record of the change with DATCP, the county zoning administrator and the county register of deeds.

Drain “Cross-Section” and “Grade Profile”

The circuit court initially establishes the “cross-section” and “grade profile” of each district drain. The “cross-section” and “grade profile” are important, because they determine drainage access and efficacy. Subsequent construction activity or neglect may cause a deviation from the “cross-section” or “grade profile” established by the circuit court. Over time, additional runoff from upstream development may also cause a deviation from the established “grade profile.” These deviations may deprive landowners of drainage to which they are entitled, and may seriously affect land use and land values. In extreme cases, they may cause disastrous flooding.

Under this rule, a county drainage board must:

- Document the formally established “cross-section” and “grade profile” of each district drain.
- Restore and maintain each district drain to prevent deviations from the formally established “cross-section” or “grade profile.”

This rule defines “cross-section” and “grade profile” more clearly. Under this rule:

- A “cross-section” is a series of vertical sections of a drain, taken at periodic intervals along the length of a drain at right angles to the center line of the alignment of the drain. Each vertical section in the formally established “cross-section” of a district ditch must include all of the following:
 - * The top and bottom width of the ditch.
 - * The design depth of the ditch.
 - * The side slope angle of the ditch.

- A “grade profile” is a vertical section along the alignment of a drain. The formally established “grade profile” of a district ditch must include all of the following:
 - * The grade elevations at the top and bottom of the ditch.
 - * The estimated water surface elevations in the ditch at base flow.
 - * The estimated water surface elevations in the ditch in the event of a 10-year peak discharge.

In some cases, court records establishing the “cross-section” or “grade profile” of a district drain may be unavailable or incomplete. In those cases, a county drainage board may reconstruct the documentation based on physical evidence in the drainage district. (For example, a county drainage board may be able to reconstruct a historical grade profile based on soil conditions and the historical elevation of structures in a district drain.)

If a county drainage board cannot document a formally established “cross-section” or “grade profile” based on court records or physical evidence, it must establish an appropriate cross-section or grade profile with department approval. If a currently established “cross-section” or “grade profile” lacks some of the elements required by this rule (e.g., water surface elevations in a “grade profile”), the county drainage board must also establish those missing elements.

This rule spells out a procedure by which a county drainage board may establish missing or poorly documented elements of a “cross-section” or “grade profile.” The procedure is designed to protect landowners whose drainage rights may be affected. The county drainage board may use the same procedure to change a formally established “cross-section” or “grade profile,” should that become necessary.

A county drainage board may not establish or change a “cross-section” or “grade profile” without specific DATCP approval. A county drainage board may not change an established “grade profile” over the objection of any landowner whose access to drainage is affected. Whenever a county drainage board changes an established “cross-section” or “grade profile” with DATCP approval, the county drainage board must file that new “cross-section” or “grade profile” with DATCP, the county zoning administrator and the county register of deeds.

Drain Alignment

The circuit court initially approves the “alignment” of a district drain. This rule requires a county drainage board to restore and maintain district drains so they conform to their formally established “alignments.”

This rule prohibits a county drainage board from changing the formally established “alignment” of a district drain without specific DATCP approval. A county drainage board may not take new land for a drain realignment unless the landowner consents or the county drainage board formally condemns that land. The county drainage board must file the new “alignment” with DATCP, the county zoning administrator and the county register of deeds.

County Drainage Boards; Compliance Plans

Under current rules, a county drainage boards must develop a plan for bringing drainage districts into compliance with DATCP rules. Among other things, the plan must explain how the county drainage board will correct and prevent deviations from established “cross-sections” and “grade profiles.”

County drainage boards were originally required to file compliance plans by December 31, 1996, and bring all drainage districts into compliance by December 31, 1999. In districts where drains have been neglected for many years, extensive restoration may be needed to comply with DATCP rules.

For various reasons, few county drainage boards have filed compliance plans with DATCP. Few, if any, drainage boards will bring all of their drainage districts into compliance with DATCP rules by December 31, 1999. This rule extends the plan filing deadline to December 31, 2001, and extends the actual compliance deadline to December 31, 2004.

This rule also spells out minimum requirements for compliance plans. A county drainage board must file a separate plan for each drainage district in the county. The plan must include all of the following:

- A professionally drawn map of the drainage district.
- A restoration plan that identifies:
 - * Drain segments, if any, that do not conform to established “cross-sections,” “grade profiles” or “alignments.”
 - * A priority sequence and schedule for restoring non-complying drains to their established “cross-sections,” “grade profiles” and “alignments.”
 - * An estimate of the amount of material to be dredged from drains scheduled for restoration.
 - * The intended disposition of dredged materials, including the locations at which the materials will be deposited.
 - * The projected costs of restoration, and a plan for financing those costs.
- A repair and maintenance plan that includes:
 - * A plan for routine maintenance of drainage structures.
 - * A plan for maintaining district corridors and controlling woody vegetation in those corridors.
 - * A plan for special maintenance projects, if any.
 - * The projected costs of maintenance, and a plan for financing those costs.
- A plan for controlling soil erosion and runoff in the drainage district. The plan must include the estimated cost to implement the plan.

Persons Obstructing or Altering District Drains

This rule prohibits any person from obstructing or altering a district drain (e.g., by installing or changing the height of a dam) without prior written approval from the county drainage board. However, an owner of land adjacent to a district drain may, without prior drainage board approval, withdraw water from a district drain and place an obstruction in the district drain for that purpose if all of the following apply:

- The landowner notifies the county drainage board before withdrawing the water.
- The landowner obtains a DNR permit if required under s. 30.18(2)(a)2., Stats. (No DNR permit is currently required for cranberry growers.)
- The obstruction does not elevate the water level in the district drain above the base flow elevation specified as part of the formally established “grade profile” for that district drain.
- The withdrawal does not reduce the base flow, in a district drain that has a navigable stream history, below the minimum base flow level which the Wisconsin department of natural resources has established for that district drain under s. 88.31, Stats.
- The withdrawal does not injure a district drain.

A county drainage board may require a landowner to provide information showing that the landowner’s withdrawal of water complies with this rule. A county drainage board may prohibit a landowner from withdrawing water if the drainage board reasonably concludes that the withdrawal violates this rule.

Structures Impeding Drainage

This rule prohibits a county drainage board from installing or modifying any structure in a district drain, or approving the installation or modification of any structure in a district drain, if the installation or modification causes or aggravates a deviation from the formally established “grade profile.” This prohibition does not apply to any of the following:

- A temporary structure or modification that is reasonably necessary to protect the public health, safety or welfare in an emergency.
- A temporary structure or modification that is necessary for other lawful construction or maintenance operations under this rule.
- A temporary structure or modification to provide essential crop irrigation during a drought if all of the following apply:

- * The county drainage board gives notice to upstream landowners whose access to drainage may be affected.
 - * The county drainage board resolves any objections from affected landowners to the satisfaction of those landowners.
 - * The county drainage board imposes written conditions to protect the public interest and the interests of all landowners in the drainage district.
- A temporary structure or modification to provide water for cranberry harvest, or for cranberry winter ice cover, if all of the following apply:
 - * The structure or modification is installed for no more than 14 days for cranberry harvest, and no more than 14 days for cranberry winter ice cover.
 - * The county drainage board gives notice to upstream landowners whose access to drainage may be affected.
 - * The county drainage board resolves any objections from affected landowners to the satisfaction of those landowners.
 - * The county drainage board imposes written conditions to protect the public interest and the interest of all landowners in the drainage district.

Restoration Projects; Notice to DATCP

Under current rules, a county drainage board must obtain DATCP approval before undertaking or approving a drainage district “restoration project” involving the dredging or excavation of more than 3,000 cubic yards of material. A “restoration project” means dredging or other operations to bring a district drain into closer conformity with the formally established “cross-section,” “grade profile” or “alignment” of that drain.

This rule eliminates the requirement for DATCP approval of “restoration projects.” However, a county drainage board must notify DATCP in writing before it initiates a “restoration project” that involves the dredging or excavation of more than 3,000 cubic yards of material. A county drainage board may need to obtain a dredging permit from DNR before undertaking a “restoration project.”

Construction Projects and Drainage Alterations; DATCP Approval Required

Under current rules, DATCP must approve a “construction project” before a county drainage board undertakes or approves that “construction project.” This rule expands and clarifies the current rules.

With certain exceptions (described below), this rule prohibits a county drainage board from doing any of the following without written approval from DATCP:

- Constructing or modifying any district drain, or authorizing any person to construct or modify a district drain.
- Installing or modifying any structure in a district drain, or authorizing any person to install or modify any structure in a district drain.
- Authorizing any person (including any municipality or government entity) to connect that person's "private" drain to a district drain.
- Changing the formally established "cross-section," "grade profile" or "alignment" of a district drain, regardless of whether that change involves any physical alteration to a district drain or structure.

Under this rule, a county drainage board is **not** required to obtain DATCP approval for any of the following:

- Actions, such as routine maintenance or repair projects, that do not cause or aggravate any deviation from the formally established "cross-section," "grade profile" or "alignment" of a district drain.
- Restoration projects that merely restore district drains to their formally established "cross-sections," "grade profiles" or "alignments."
- Temporary structures or modifications that a county drainage board installs or approves according to this rule (see above).

Applying for DATCP Approval

A county drainage board seeking DATCP approval for a construction project or drainage alteration must file an application that includes all of the following:

- A complete description of the proposed action, including design specifications prepared by a qualified engineer.
- The objectives of the proposed action.
- A construction plan (if applicable) prepared by a qualified engineer.
- A hydrology analysis prepared by a qualified engineer.
- The cost, method of financing and effect on landowner assessments.

- A map of the lands and waters affected.
- A statement showing that the county drainage board has published a public notice, held a public hearing, and allowed for public comment on the proposed action.
- A description of any proposed change to the formally established “cross-section,” “grade profile” or “alignment” of a district drain.
- A statement showing that the county drainage board has done both of the following:
 - * Notified upstream landowners of any proposed “grade profile” change that may affect their access to drainage.
 - * Resolved any objections by those upstream landowners (to the landowner’s satisfaction).
- A discussion of significant environmental effects, if any.
- Additional information requested by the department.

DATCP Approval or Disapproval

DATCP may not approve any construction project or drainage alteration that causes or aggravates a deviation from the formally established “cross-section,” “grade profile” or “alignment” of a district drain. However, DATCP may do any of the following:

- Approve a change to the formally established “cross-section.” Whenever a county drainage board changes an established “cross-section” with DATCP approval, it must file the new “cross-section” with DATCP, the county zoning administrator and the county register of deeds.
- Approve a change to the formally established “grade profile.” Neither DATCP nor the county drainage board may approve a change to an established “grade profile” over the objection of an upstream landowner whose drainage access may be impaired, unless the county drainage board resolves the landowner’s objection to the satisfaction of the landowner. Whenever a county drainage board changes an established “grade profile” with DATCP approval, it must file the new “grade profile” with DATCP, the county zoning administrator and the county register of deeds.
- Approve a change to the formally established “alignment.” A county drainage board may not take new land for a realigned drain unless the landowner consents or the county drainage board formally condemns the new land for that purpose. Whenever a county drainage board changes an established “alignment” with DATCP approval, it must file the

new "alignment" with DATCP, the county zoning administrator and the county register of deeds.

DATCP must issue a written notice approving or disapproving a county drainage board application within 45 days after a county drainage board files a complete application. DATCP may approve an application subject to conditions specified by DATCP. If DATCP disapproves, it must state its reasons. DATCP may disapprove an application for any of the following reasons:

- The county drainage board has failed to provide required information.
- The proposed action or approval would violate DATCP rules or ch. 88, Stats.
- The proposed action is not technically feasible, is not technically sound, or is not adequately designed to achieve the county drainage board's stated objectives.
- The proposed action will have a substantial adverse effect on water quality, or on the human or natural environment.

DATCP must prepare a brief environmental assessment before approving a proposed action if any of the following apply:

- The proposed action will drain more than 200 acres of land not previously drained, or will substantially alter drainage from more than 200 acres of land.
- The proposed action will drain more than 5 acres of wetlands.
- The proposed action involves the construction or modification of a dam in a drain with a navigable stream history.
- The proposed action involves a cold water fishery in a district drain with a navigable stream history.
- The proposed action will substantially affect the base flow in surface waters of the state.

Landowner Petition

Under this rule, an owner of land in a drainage district may file a written petition with the county drainage board asking the county drainage board to do any of the following:

- Restore, repair, maintain and, if necessary, modify a district drain in order to conform the drain to the "cross-section," "grade profile" or "alignment" formally established for that drain.

- Remove an obstruction placed in a district drain in violation of this chapter or ch. 88, Stats.
- Correct a violation of this chapter or ch. 88, Stats.

A landowner petition must identify the grounds for the petition and the action requested of the county drainage board. A county drainage board may require the petitioner to provide further information which is reasonably necessary in order for the board to properly evaluate the petition.

Within 60 days after a landowner files a complete petition with the county drainage board, the county drainage board must provide the landowner with a written response that does all of the following:

- Describes and explains the action, if any, which the county drainage board will take in response to the petition.
- Explains the county drainage board's refusal to take action on the petition, if the county drainage board refuses to take action.

If a petitioner is not satisfied with the county drainage board's response, and believes that the county drainage board has violated this rule or ch. 88, Stats., the petitioner may file a written petition with DATCP alleging that violation. DATCP may, in its discretion, conduct an investigation to determine whether the county drainage board has violated this rule or ch. 88, Stats. If DATCP finds that a county drainage board has violated this rule or ch. 88, Stats., DATCP must issue an order which directs the county drainage board to correct the violation.

Land Ownership Change

This rule confirms that a change of land ownership does not relieve or deprive a succeeding landowner of rights or responsibilities that run with the land under ch. 88, Stats., or this rule.

Row Cropping and Obstructions in District Corridors

Under current rules, a county drainage board must establish a district corridor extending for 20 feet on each side of a district ditch. The drainage board must maintain the corridor according to current rules for the following purposes:

- To provide effective access to the district ditch, for inspection and maintenance.
- To provide a buffer against land uses that may adversely affect water quality in the district ditch.

Current rules completely prohibit “row cropping” in district corridors. This rule prohibits a landowner from doing either of the following without written permission from the county drainage board:

- “Row cropping” in a district corridor.
- Placing in a district corridor any building or other obstruction that interferes with the county drainage board’s ability to inspect and maintain the district drain and corridor.

Under this rule, a county drainage board may authorize row cropping or obstructions in a district corridor, subject to conditions or limitations which the drainage board specifies in writing. A person who engages in row cropping or places any obstruction in a district corridor waives any claim for damages to that crop or obstruction that may result from lawful county drainage board activities in the corridor.

In deciding whether to permit row cropping in a district corridor, a county drainage board may consider, for example, whether row cropping will result in increased maintenance, soil erosion, or movement of suspended solids to district drains. A county drainage board may also consider, for example, the type of row cropping and tillage proposed, the topography of the district corridor, and the nature of the soils and subsoils in the district corridor.

This rule does not require a landowner to remove any building or fixture constructed or installed in a district corridor prior to the effective date of this rule. However, the owner waives any claim for damages to that building or fixture that may be caused by lawful county drainage board activities in the corridor.

Under current rules, a county drainage board must control the growth of “woody vegetation” in a district corridor, to ensure effective drainage and effective access for inspection, maintenance and repair. A county drainage board may allow the growth of woody vegetation in portions of a district corridor if it does not interfere with effective access. This rule defines “woody vegetation” but makes no other change.

Assessing Benefits to Landowners in Drainage Districts

Under current law, a county drainage board may levy assessments against landowners in a drainage district to pay for drainage district costs, including costs of construction, maintenance, restoration, district operation, and compensation to landowners. Costs must be apportioned among landowners according to the benefits which they derive from the drainage district. Benefits must be assessed according to a procedure specified in ch. 88, Stats., and current rules.

When assessing benefits to agricultural lands in a drainage district, a county drainage board is currently required to consider a number of factors including:

- The estimated increase in land value resulting from drainage.

- The amount of drainage required by, or provided to the assessed land.
- The thoroughness and reliability of drainage provided.
- The amount and frequency of flooding on the assessed land.
- The difficulty of draining the assessed land.
- Any loss of acreage resulting from the construction of district drains and corridors, or from the deposition of materials excavated during construction.
- Other factors which the drainage board considers relevant.

Under this rule, a county drainage board must exclude the following acreage from any assessment of benefits:

- Acreage in a district corridor unless the drainage board authorizes row cropping on that acreage.
- Acreage permanently lost to the landowner as a result of the construction, restoration or maintenance of district corridors, or as a result of the deposition of materials from that construction, restoration or maintenance.

Under current rules, a county drainage board may consider potential land uses when it estimates the increase in land value resulting from drainage. This rule clarifies that the drainage board may also consider current uses.

Under current rules, a county drainage board assessing benefits to agricultural lands must consider the type, depth, quality and character of soils and subsoils on the assessed land. Under this rule, the drainage board must also consider the depth of the water table.

Under this rule, a county drainage board assessing benefits to agricultural lands may consider any of the following potential uses of that land (or other potential uses which the board considers appropriate):

- Residential.
- Commercial.
- Cropland, including dryland cropland, pasture, irrigated cropland or cranberry cropland.
- Abandoned cropland (not used for agricultural, residential or commercial purposes).
- Woodlands.

- Wetlands, including soils with standing water that have no significant agricultural value.

FISCAL ESTIMATE

NOTE: This fiscal estimate assumes that there are about 200 drainage districts in 30 Wisconsin counties which are required to comply with this rule. The proposed revisions to the rule further interpret ch. 88, Wis. Stats., and if adopted, will clarify the standards and procedures for the operation of drainage districts.

Impact of Rule Revision to State Government

Chapter ATPC 48 is administered by the Department of Agriculture, Trade and Consumer Protection. The proposed rule revisions clarify and, in some cases, add to the department's role in the implementation of drainage district statutory requirements. The department retains its responsibilities for review of drainage district annual reports and maintenance plans, for inspections and issuance of compliance orders, for managing and maintaining county drainage district records, and for training county drainage board members and their advisors in the requirements of the statutes and the rule. The proposed revisions give the department new responsibilities for the review and approval of technical specifications for each drainage district.

Existing staffing is insufficient to meet all requests and needs of the drainage boards. The department is not providing adequate support to the drainage boards. Adoption of the proposed revisions to ch. ATPC 48 is expected to result in increased costs to the department for administration and enforcement of the rule. The department estimates that two additional staff positions will be needed in the field, and a project position in the central office, if the department is to meet its responsibilities under the statute and the rule. All three positions will be engineering specialists; two would be located in field offices in the eastern part of Wisconsin where the largest concentration of counties with drainage districts are found.

The engineering specialists assigned to field offices would be the primary source of contact regarding implementation of the rule. These positions would assist county drainage boards in developing district maps (with cross-sections and profiles) and would assist in the development of compliance plans. In addition, these positions would perform preliminary reviews of engineering plans submitted by drainage boards for district projects.

The third engineering specialist position will complement the activities of the existing drainage engineer position, but will predominantly be responsible for collecting drainage district data, and developing a statewide drainage district database. Accurate information about the boundaries and locations of each drainage district is essential to the department's ability to quickly and truthfully address questions from other conservation partners, realtors, developers, and drainage district landowners.

Our estimate of the cost for these three additional positions – including salary, fringe benefits, support costs and one time costs – is as follows:

Field engineering specialist - journey – Two (2) permanent positions

Fiscal Year	1999-00	2000-01
Costs	\$115,600	\$106,600
Fund type	GPR	GPR
Staffing (FTE)	2.0	2.0

Central Office engineering specialist - journey – One (1) project position

Fiscal Year	1999-00	2000-01
Cost	\$53,400	\$51,700
Fund type	GPR	GPR
Staffing (FTE)	1.0	1.0

Impact of Rule Revisions to County Drainage Boards and Drainage District Landowners

The proposed revisions to ch. ATCP 48 are expected to result in increased annual costs to county drainage boards and the district landowners they serve. In particular, the cost of administering all districts will increase, as will the cost for technical specifications to implement the rule. Drainage boards collect assessments from landowners in drainage districts to pay for drainage district operations, based on the degree of drainage benefits the land receives. Costs related to drainage district specifications, district facilities inspections, reporting, and district maintenance requirements are more clearly defined in the proposed revisions to ch. ATCP 48.

The department estimates the costs to drainage boards (and, therefore, district landowners) as follows:

Increased Administrative Costs

30 county drainage boards x 6 (estimated) meetings/year =
180 meetings statewide/year (estimated)

Costs of holding one meeting = **\$430**, calculated as follows:

Written notices to landowners (letters, envelopes, postage, processing time) = **\$150**
Publishing legal notices in the designated county newspaper =
\$250/publication (non-urban estimate)
Someone to take meeting minutes =
\$10/hour x 8 hours (4 hour meeting + 4 hour minutes preparation) = \$80/mtg.

Cost of holding 180 meetings statewide/year = \$430 x 180 meetings/year = **\$77,400**

Increased Technical Costs

A. Mapping Drainage District Cross-sections and Grade Profiles

Cross sections and profiles are the basis for the entire drainage district program. The “cross-section” and “grade profile” are important, because they determine drainage access and efficacy. Subsequent construction activity or neglect may cause a deviation from the “cross-section” or “grade profile” established by the circuit court. Over time, additional runoff from upstream development may also cause a deviation from the established “grade profile.” These deviations may deprive landowners of drainage to which they are entitled, and may seriously affect land use and land values. In extreme cases, they may cause disastrous flooding.

Estimated cost for producing maps which show cross-sections and profiles for each drainage district:

Estimated district drain length = 10 miles
Estimated number of districts in Wisconsin = 200
Total number of district miles in Wisconsin = $200 \times 10 = 2,000$ drain miles

Estimated cost per mile to prepare adequate maps = \$2,500/mile
Total cost to prepare maps for all drainage district miles in Wisconsin =
 $2,000 \text{ miles} \times \$2,500/\text{mile} = \underline{\$5,000,000}$.

Average annual cost assuming three (3) year implementation cycle = \$1,666,667

B. Soil Core Sample Costs

In some cases, historical evidence would be needed to recreate the cross-section and grade profile of a district drain. This can be accomplished with soil core sampling. In addition, the DNR may require evidence provided by soil core samples before approving a permit for dredging. The cost of soil core samples would be in addition to the cost of creating maps with proper cross-sections and grade profiles.

Estimated cost for collecting and analyzing soil core samples necessary to prepare drainage district maps:

Total number of district miles in Wisconsin = 2,000 miles (see calculation above)
Number of samples needed per mile = 3
Total number of soil core samples needed in Wisconsin = $3 \times 2,000 = 6,000$ samples

Estimated cost per soil core sample = \$400/each
Total estimated cost for all soil core samples needed in Wisconsin =
 $\$400 \times 6,000 = \underline{\$2,400,000}$.

Average annual cost assuming three (3) year implementation cycle = \$800,000

Note: While it has not yet determined whether any of the increased technical costs would be cost-shared by the state, the department may need an additional administrative position to process grants if a cost-share program is put into place.

ENVIRONMENTAL ASSESSMENT

The department has prepared an environmental assessment on this rule. The public may comment on the environmental assessment, which will be available at the hearings. The assessment concludes that this rule will have no adverse impact on the environment. Alternatives to this rule will not meet program goals and responsibilities as effectively as the proposed rule. No environmental impact statement is necessary under s. 1.11(2), Stats.

INITIAL REGULATORY FLEXIBILITY ANALYSIS

Scope of the Rule

The proposed revision of Chapter ATCP 48, Wis. Adm. Code, does not present a significant change or impact to small businesses. The revisions mainly codify existing statutory procedures or requirements and accepted practices that have already been in use in drainage districts. The revisions also clarify and expand existing rule requirements.

Businesses Affected

The small businesses affected by the rule revisions include farms and agricultural food processors whose lands lie within the boundaries of drainage districts. In Wisconsin, there are an estimated 200 drainage districts located in 30 counties. Currently, 25 counties have drainage boards in place.

Fiscal Impact

Small businesses in drainage districts will experience a minor fiscal impact from the rule revisions as drainage districts will have some additional costs as a result of the new rule. The new rule requires a higher level of detail on the drainage district maps (cross-section, grade profile and alignment) that was not specifically required by the old rule. Likewise, the new rule requires more information in the drainage district compliance plans than the old rule did. The cost for generating this additional information will be borne by the drainage district landowners, including small businesses (farms). Under current law, each small business will be assessed a portion of the anticipated cost of providing this additional information.

Landowner Petitions to the County Drainage Board

This procedure will be beneficial to small businesses. The proposed rule establishes a procedure for landowners to file written petitions with the county drainage board asking the board to do any of the following:

- a) To restore, repair, maintain and, if necessary, modify a district drain in order to conform the drain to the cross-section, grade profile or alignment formally established for that drain.
- b) To remove an obstruction placed in a district drain in violation of this chapter or ch. 88, Stats.
- c) To correct a violation of this chapter or ch. 88, Stats.

This procedure provides small businesses (farms) with a means to receive adequate drainage for their land which may be crucial to maximum crop production.

Assessing Benefits to Landowners in Drainage District

The proposed rule revisions regarding the assessment of benefits will be beneficial to small business (farmers) for three reasons. First, the farmer's land that is in district corridors and not being cropped will not be assessed. Second, the farmer may be assessed at a lower rate if the county drainage board decides to base their assessment on current use instead of potential use. Third, the assessment of benefits will be more equitable for all landowners since the county drainage board must also consider the depth of the water table for future assessments.

Recordkeeping

The proposed rule revision will not impose any new recordkeeping requirements on small businesses.

Professional Skills Required to Comply

Small businesses will not need to acquire or retain additional professional skills or services to comply with the rule revisions.

Dated this 30th day of June, 1998.

STATE OF WISCONSIN
Department of Agriculture, Trade and Consumer Protection

By Ben Brancel
Ben Brancel, Secretary