



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

2 **ATCP 48.44 OBSTRUCTING OR ALTERING DISTRICT DRAINS.** (1)

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

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

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

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

13 (c) The obstruction does not elevate the water surface elevation in the district  
14 drain, at the point of the obstruction, above the base flow elevation specified as part of  
15 the formally established grade profile for that district drain.

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

20 NOTE: A "formally established" grade profile is a grade profile established by  
21 court order, or by the county drainage board under s. ATCP 48.20 or  
22 48.21. A violation of par. (c) "materially defeats the purposes of  
23 drainage" within the meaning of s. 88.93, Stats.  
24

1 (e) The withdrawal does not injure any district drain, or make any district drain  
2 more susceptible to injury. Injury to a district drain includes, for purposes of this  
3 paragraph, any of the following:

- 4 1. Damage to any structure in a district drain.
- 5 2. The deposition of excavated materials in a district drain.
- 6 3. The weakening, undercutting or accelerated erosion of any side bank in a  
7 district drain.

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

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

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

15 **ATCP 48.45 LANDOWNER RIGHTS.** (1) ACTION TO ENFORCE  
16 COMPLIANCE. (a) An owner of land in a drainage district may file a written  
17 petition with the county drainage board asking the county drainage board to do any of  
18 the following:

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

22 NOTE: Drain specifications are formally established by court order, or by  
23 drainage board action under s. ATCP 48.20 or 48.21. Deviations from

1 formally established specifications may effectively deprive landowners of  
2 drainage to which they are legally entitled.

3  
4 2. Remove an obstruction placed in a district drain in violation of this chapter  
5 or ch. 88, Stats.

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

7 (b) A petition under par. (a) shall identify the grounds for the petition and the  
8 action requested of the county drainage board. A county drainage board may require  
9 the petitioner to provide further information which is reasonably necessary in order for  
10 the board to properly evaluate the petition.

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

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

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

18 (d) A petitioner under par. (a) may, after receiving a county drainage board's  
19 response under par. (c), file a written petition with the department alleging that a  
20 county drainage board has violated this chapter or ch. 88, Stats. The department may  
21 conduct an investigation to determine whether the county drainage board has violated  
22 this chapter or ch. 88, Stats. If the department finds that a county drainage board has  
23 violated this chapter or ch. 88, Stats., the department shall issue an order under s.  
24 ATCP 48.52 which directs the county drainage board to correct the violation.

1 NOTE: The remedies provided to a landowner under sub. (1) are in addition to  
2 any other legal remedies which may be available to the landowner. A  
3 landowner is not required to pursue any of the remedies under sub. (1)  
4 before pursuing other legal remedies.  
5

6 A landowner may challenge a county drainage board action that violates  
7 this chapter or ch. 88, Stats., even if the department has approved that  
8 action. (In some cases, the department may not be aware of facts  
9 constituting a violation when it approves a county drainage board  
10 action.)  
11

12  
13 (2) LAND OWNERSHIP CHANGE. A change of ownership does not relieve  
14 or deprive a succeeding landowner of rights or responsibilities that run with the land  
15 under ch. 88, Stats., or this chapter.

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

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

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

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

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

25 ATCP 48.46(2) DRAINAGE DISTRICT SPECIFICATIONS. A county  
26 drainage board shall have on file, at all times, drainage district specifications  
27 established by court order, or by the county drainage board under s. ATCP 48.20 or

1 48.21. Specifications shall include all existing specifications designating any of the  
2 following:

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

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

5 **SECTION 36.** ATCP 48.46(3) is repealed.

6 **SECTION 37.** Appendix A to ch. ATCP 48 is created to read:

## Appendix A

# Estimating Water Surface Elevations

### Water Surface Elevations; Base Flow

One may use any of the following methods to estimate the water surface elevation, at base flow, at any point along a district drain:

#### Base Flow Method 1

1. Identify the stream to which the district drain discharges. Select the data set from the corresponding drainage basin on pp. 25-401 of *Water Resources Data-Wisconsin Water Year 1997*.<sup>1</sup>

2. Calculate the base flow rate by dividing the "90 percent exceeds" value for the period of record by the drainage area of the relevant drainage basin. The resulting value will be expressed in cubic feet per second per square mile (cfs/m).

3. Multiply the cfs/m value by the area of land (expressed in square miles) which is drained by the district drain to the relevant point along the drain. The resulting value is the base flow rate for the district drain at that point.

4. Calculate base flow depth (at the relevant point along the drain) using the base flow rate, the drain cross-sectional dimensions (at the relevant point along the drain), and Manning's equation for open channel flow.

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<sup>1</sup> *Water Resources Data-Wisconsin Water Year 1997*, by B.K. Holmstrum, D.L. Olson, and B.R. Ellefson; U.S. Geological Survey; Water-Data Report WI-97-1; 1998.

1           5. Add the base flow depth to the bottom elevation of the district drain at the  
2 relevant point. The resulting value is the base flow elevation at that point.

3  
4     Base Flow Method 2

5     Conduct a field survey to measure the dominant discharge elevation in the district  
6 drain. The dominant discharge elevation is the lowest elevation at which vegetation is  
7 present. If vegetation has been disturbed, the dominant discharge elevation is the  
8 interface between unsaturated and saturated soils, as indicated by soil mottling.

9  
10    **Peak Water Surface Elevations; 10-Year 24-Hour Storm Event**

11    One may use the following method to estimate the peak water surface elevation, at any  
12 point along a district drain, in the event of a 10-year 24-hour storm event:

13           1. Determine, from *Flood Frequency Characteristics of Wisconsin Streams*,<sup>2</sup>  
14 page 7, the flood-frequency area in which the district drain is located.

15           2. Calculate the peak flow rate from a 10-year 24-hour storm event using, from  
16 *Flood Frequency Characteristics of Wisconsin Streams*, page 9, the  $Q_{10}$  equation for the  
17 relevant flood-frequency area.

18           3. Calculate the peak flow depth (at the relevant point along the drain) using  
19 this peak flow rate, the drain cross-sectional dimensions (at the relevant point along the  
20 drain), and Manning's equation for open channel flow.

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<sup>2</sup> *Flood Frequency Characteristics of Wisconsin Streams*, by William R. Krug, Duane H. Conger and Warren A. Gebert; U.S. Geological Survey; Water Resources Investigations Report 91-4128; Madison, Wisconsin, 1992.



1           4. Add this peak flow depth to the bottom elevation of the district drain at the  
2 relevant point. The resulting value is the peak water surface elevation, at that point, in  
3 the event of a 10-year 24-hour storm event.

#### 5 **Peak Water Surface Elevations; 25-Year 24-Hour Storm Event**

6 One may use the following method to estimate the peak water surface elevation, at any  
7 point along a district drain, in the event of a 25-year 24-hour storm event:

8           1. Determine, from *Flood Frequency Characteristics of Wisconsin Streams*,<sup>3</sup>  
9 page 7, the flood-frequency area in which the district drain is located.

10           2. Calculate the peak flow rate from a 25-year 24-hour storm event using, from  
11 *Flood Frequency Characteristics of Wisconsin Streams*, page 9, the  $Q_{25}$  equation for the  
12 relevant flood-frequency area.

13           3. Calculate the peak flow depth (at the relevant point along the drain) using  
14 this peak flow rate, the drain cross-sectional dimensions (at the relevant point along the  
15 drain), and Manning's equation for open channel flow.

16           4. Add this peak flow depth to the bottom elevation of the district drain at the  
17 relevant point. The resulting value is the peak water surface elevation, at that point, in  
18 the event of a 25-year 24-hour storm event.

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<sup>3</sup> *Flood Frequency Characteristics of Wisconsin Streams*, by William R. Krug, Duane H. Conger and Warren A. Gebert; U.S. Geological Survey; Water Resources Investigations Report 91-4128; Madison, Wisconsin, 1992.

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

**Attachment 2**

**Public Hearing Summary, Proposed Revisions to ch. ATCP 48**

# SUMMARY OF TESTIMONY PROPOSED AMENDMENTS TO CHAPTER ATCP 48

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## INTRODUCTION

The Wisconsin Department of Agriculture, Trade and Consumer Protection (DATCP) held public hearings in Wisconsin Rapids, Appleton, Jefferson and Green Lake to receive oral testimony on proposed changes to Chapter ATCP 48, Wis. Adm. Code. (Wisconsin's Drainage District Rule). The public hearings were held from July 27 - 30, 1998. DATCP also accepted written testimony until August 7, 1998.

Each hearing session started with a 20-minute presentation during which DATCP staff explained the proposed changes and answered questions. Other informational materials available at each hearing included: copies of the proposed rule revisions, preliminary fiscal estimate, preliminary environmental assessment, other general reference materials.

A total of 98 people attended the public hearings. Of this number, 27 provided oral testimony. Thirty-one people submitted written testimony as part of the hearing process.

A summary of testimony received is shown in Table 1. A summary of the primary concerns about the proposed revisions to the drainage rule is presented in Table 2. A summary of each participant's oral or written testimony is also attached.

## TESTIMONY SUMMARY

The majority of participants who provided testimony were opposed to some portion of the proposed changes to ch. ATCP 48. Most objected to costs associated with compliance with the rule.

The participants who supported the proposed changes to ch. ATCP 48 generally felt that the rule was fair and would adequately address problems with the current rule. Many individuals attended the hearings for informational purposes only.

**TABLE 1. TESTIMONY SUMMARY**

<b>POSITION</b>	<b>PUBLIC HEARINGS (# participants)</b>	<b>WRITTEN TESTIMONY (# participants)</b>	<b>ALL TESTIMONY (# participants)</b>
<b>Support</b>	15	12	26
<b>Oppose</b>	28	13	36
<b>Neither/Other</b>	55	6	60
<b>Totals</b>	<b>98</b>	<b>31</b>	<b>122</b>

**SUMMARY OF TESTIMONY  
PROPOSED AMENDMENTS TO CHAPTER ATCP 48**

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<b>IN SUPPORT OF CHANGES TO CH. ATCP 48</b>	<ul style="list-style-type: none"><li>• Activities should be allowed in the corridors.</li><li>• Projects which return the ditch to its original specifications should not require DATCP approval. Removal of the 3,000 cubic yard requirement for restoration projects is supported.</li><li>• It is right to allow temporary modifications.</li><li>• Landowners should have the ability to withdraw water.</li><li>• Statewide standards for calculating assessments are needed.</li><li>• Individuals should not be able to modify the district drain without approval of the drainage board.</li><li>• Specifications are worth the expense because they identify an individual's right to drainage.</li></ul>
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**SUGGESTED MODIFICATIONS TO PROPOSED CH. ATCP 48**

Several attendees made specific suggestions about how proposed ch. ATCP 48 language should be modified. These suggested modifications are listed below.

- Create a statewide standard for the issue of "materially defeating drainage."
- Insert language into subchapter IV explaining that maps should clearly and accurately show location, dimensions, and elevations of every district dam, bulkhead, or grade control structure.
- Give drainage boards flexibility to allow temporary structures to be installed for longer than fourteen days.
- Provide financial assistance to drainage boards so that they may comply with specifications requirements (maps, cross-sections, grade profiles).
- Structure DNR and DATCP permit/approval processes so they coincide with one another and no longer require duplicative efforts by the drainage boards.

**SUMMARY OF TESTIMONY  
PROPOSED AMENDMENTS TO CHAPTER ATCP 48**

**TABLE 3. PUBLIC HEARING ATTENDANCE**

POSITION	WISCONSIN RAPIDS 7/27/98		APPLETON 7/28/98		JEFFERSON 7/29/98		GREEN LAKE 7/30/98		ALL HEARINGS 1998	
	SPOKE	CARD ONLY	SPOKE	CARD ONLY	SPOKE	CARD ONLY	SPOKE	CARD ONLY	SPOKE	CARD ONLY
Support	7	1	0	3	0	1	3	0	10	5
Oppose	6	7	3	2	7	3	0	0	16	12
Neither/Other	1	9	0	21	0	15	0	9	1	54
Subtotal	14	17	3	26	7	19	3	9	27	71
	8 Support 13 Oppose 10 Neither/Other 31 Total Attendees	3 Support 5 Oppose 21 Neither/Other 29 Total Attendees	1 Support 10 Oppose 15 Neither/Other 26 Total Attendees	3 Support 0 Oppose 9 Neither/Other 12 Total Attendees	15 Support 28 Oppose 55 Neither/Other 98 Total Attendees					

**SUMMARY OF ORAL TESTIMONY  
PROPOSED AMENDMENTS TO CHAPTER ATCP 48**

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**Francis Podvin, Prairie Vista Cranberries, LLC** - Prairie Vista Cranberries has worked cooperatively with the Adams County Drainage Board to set up an agreement which allows the company to maintain structures in the district drain. Based on this agreement, the company has spent thousands of dollars on land improvements and structures. These existing operations should be grandfathered in or catastrophic hardship would be caused to the cranberry growers. In addition, the rule should allow for more than 14 days for temporary access to water for cranberry operations. The profiles to be established under the rule should be those which presently exist. Existing cranberry operations should not be affected.

**Dean Zuleger, Heartland Farms, Inc.** - He believes the proposal provides equity. It authorizes oversight by DATCP, while maintaining local control. Oversight is needed so the local drainage boards are not taken to court over emotional landowner issues. Based on meetings of the Adams and Portage County Drainage Boards, fiscal concerns have the drainage boards deeply troubled. The state needs to be cognizant to the fact that creative financing is necessary. Heartland Farms is in support of the proposed revisions.

**Mike Carter, Wisconsin Potato and Vegetable Grower's Association** - He approves of DATCP oversight and landowner appeal process. This will help keep issues out of the court system. The proposed rule clearly lays out the responsibilities of county drainage boards and landowners, likely resulting in fewer disputes.

**Bill Graumann, Wisconsin Association of Drainage Districts** - The proposed rule revisions will place a financial burden on the districts and will further delay the submission of required information. He strongly recommends that DATCP offer financial assistance to complete maps, cross-sections, grade profiles and alignment requirements.

**Edwin Wade, Portage County Drainage Board** - There were problems with the existing rule and it's good to see DATCP involvement. There is a concern over the requirement for cross-sections. Portage County has only one drainage district, but it is one of the largest in the state. Records of original specifications are either non-existent or lost. It would be extremely costly to bring the district into compliance with the proposed rule's specifications requirements, especially in the timeframe given. He supports waiving DATCP approval of restoration projects. He would like to see DNR and DATCP permit processes coincide so there is no duplication. In some instances, a ditch doesn't need maintenance work for ten years. Given that agriculture has been struggling, and expenses add up, we need to look at what is practical to keep expenses down. In regard to the hearing process, notice requirements are sometimes unnecessary and costly.

**SUMMARY OF ORAL TESTIMONY  
PROPOSED AMENDMENTS TO CHAPTER ATCP 48**

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**Appleton - July 28, 1998**

Twenty-nine people attended the hearing in Appleton on proposed changes to ch. ATCP 48. Three of the attendees presented oral testimony.

**Allison Blackmer, Town Chair, Town of Harrison, Calumet County** - She has been working with the Town of Buchanan and the Village of Combined Locks for the past year to develop a joint stormwater detention facility. These efforts have focused on compliance with the Clean Water Act, Phase 2, stormwater management provisions. She believes that their cooperative efforts may be hindered if the county drainage board has the authority to go over their heads. She is opposed to the proposed revisions and wishes to prevent the expansion of such an outdated form of non-elected government. She believes it is unconstitutional to give a non-elected form of government taxing authority and does not approve of such decision-making authority in the hands of people who are not engineers. She does not believe county drainage boards have the ability to address the complex issues that they are being faced with, especially when it comes to municipal/rural conflicts.

**John VerVoort, Outagamie County Drainage Board** - This proposed rule should not be in place for legal drains. There is no good reason to go to all the expense of developing a profile, measuring the top and bottom heights of the ditch, and calculating the elevation of the water level, when the job of drainage boards is simply to clean and maintain the ditch. The landowners should not be responsible for the cost of these requirements.

**Greg Baeten, landowner** - He is concerned about the costs to the landowners that will result from implementation of the proposed revisions. He is skeptical that any resulting benefits will outweigh the initial costs. Information and education efforts directed toward residents of drainage districts could go a long way toward avoiding future conflicts and problems.

**Eugene Anderson, Winnebago County Drainage Board** - He supports the new standards for assessment of benefits, public notice, temporary modification, withdrawing water and landowner rights to drainage. He opposes specifications and thinks they should only be done when needed to reconstruct the ditch so that adequate drainage can be achieved. He opposes the corridors provision. He thinks that restoration projects should again only be done when needed to handle water for the drainage district members. The same holds true for drain specification changes. Under the landowner rights section, he believes we need to make it very clear to all members of a drainage district that the drainage board is a government entity, and all landowners who receive benefits are responsible for that district.



**SUMMARY OF ORAL TESTIMONY  
PROPOSED AMENDMENTS TO CHAPTER ATCP 48**

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**Joe Grove, Jefferson County Drainage Board** - He agrees with the change in the corridor requirements. He doesn't see that the specifications are necessary. There have been no problems in the past due to the current maps. It seems like maps should only be updated when needed. It looks like specifications only benefit the state. If that's the case, the state should be funding it. He doesn't see that the landowners can afford the costs of the specifications. If the drainage boards are forced to tell the landowners their assessments will be increased to pay for these new requirements, there will be a mass exodus of people who will want to get out of the drainage districts. He also agrees with most of Goetsch's comments.

**Steve Querin-Schultz, Dane County Drainage Board** - Base flow and ten-year peak discharge figures are very costly to determine. They require engineering assistance and are unnecessary in most districts. If the rule revisions are adopted, the deadline should be later because costs are so enormous. Landowners will need more time to pay for it.

**Andrew Griggs, Jefferson County Drainage Board Attorney** - He has been working with the county drainage board for the last ten years and sees a number of problems with the proposals. Specifications create a bureaucratic nightmare. The cost for Jefferson County to comply with these requirements would exceed \$100,000. None of their maps are in compliance right now. These costs would come at a time when farmers are struggling. More small family farms are going out of business. The benefit of tax relief the state has provided will be lost if the state will be taking it back with the other hand to pay for specifications. The proposed requirements will entail considerable work for county drainage board members and their attorneys. Drainage board members may resign in light of these new requirements. They already have a difficult time recruiting interested members. The proposals make service on the county drainage board even less appealing. When chapter 88 was revised, it was well directed at reducing circuit court involvement and allowing the vast majority of decisions to be made by those most familiar with those drains. He agrees with much of Rep. Goetsch's testimony. There are some improvements, however, in the proposed revisions. The change in the corridor requirement is appropriate. He suggests that specifications only be required if an objection arises within a district or if the district is dealing with a project of substantial magnitude.

**Jeffrey Graber, Jefferson County Land and Water Conservation Department** - In regard to the corridor, he is concerned about the nutrient and sediment loading that may occur if farmers are allowed to row-crop within the corridor. Twenty feet back from the top of the ditch may be too far, but there should be some kind of a setback. This change is in direct opposition to the Natural Resource Conservation Service's Conservation Reserve Program buffer initiative and the DNR nonpoint source program. There needs to be a minimum setback.

**SUMMARY OF ORAL TESTIMONY  
PROPOSED AMENDMENTS TO CHAPTER ATCP 48**

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not exist. This poses a real challenge to the drainage boards. There is a problem with recreational lands. The owners of those lands don't care if the acreage is drained or if the ditches are maintained. However, inaction by these landowners may have a negative impact on the upstream farmers, who are then not receiving sufficient drainage.

**SUMMARY OF WRITTEN TESTIMONY  
PROPOSED AMENDMENTS TO CHAPTER ATCP 48**

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**Ann Wasielski** - She supports the proposed revisions to the rule as they currently read. Drainage is very important to her farming operation, however, over the years the drains have fallen into disrepair or have been altered. Those drains that have been altered make it seem that the base flow levels in the ditches are higher than the ones originally established by the courts. It is important to document base flow and profiles so it is clear how much drainage everyone can access. She opposes grandfathering in existing cranberry structures and opposes extending the 14 day harvest/winter freeze period.

**Jeff Sommers, Sommers Farms** - The proposed revisions should be adopted in their entirety. He is opposed to the request by the cranberry interests that drainage ditch profiles that have been altered to integrate the drainage ditches into cranberry operations to manipulate the water table be grandfathered and be declared the profile. He is also opposed to extending the 14-day harvest and winter freeze requirement for temporary modifications. It's time the cranberry industry be made to acknowledge the rights of others and amend their operations accordingly.

**Robert Woyak, Woyak Farms, Inc.** - He supports the proposed revisions to the rule as they currently read. Drainage is very important to his farming operation, however, over the years the drains have fallen into disrepair or have been altered. Those drains that have been altered make it seem that the base flow levels in the ditches are higher than the ones originally established by the courts. It is important to document base flow and profiles so it is clear how much drainage everyone is entitled to. He opposes grandfathering in existing cranberry structures and opposes extending the 14-day harvest/winter freeze period.

**Ron Williams, Waukesha County Drainage Board** - The Waukesha County Drainage Board, like many drainage boards in the state, is struggling with the mapping and specification requirements set forth in ch. ATCP 48. Financial assistance is needed in order to accomplish these tasks.

**Michael Carter, Director, Government and Grower Relations, Wisconsin Potato and Vegetable Growers Association** - (As an addition to oral and written testimony he presented at the hearing, he provided additional written comments further expressing his support of the proposed revisions to the rule.) Drainage is very important to the farmers represented by his organization, however, over the years the drains have fallen into disrepair or have been altered. Those drains that have been altered make it seem that the base flow levels in the ditches are higher than the ones originally established by the courts. It is important to document base flow and profiles so it is clear how much drainage everyone can access. He opposes grandfathering in existing cranberry structures and opposes extending the 14-day harvest/winter freeze period.

**SUMMARY OF WRITTEN TESTIMONY  
PROPOSED AMENDMENTS TO CHAPTER ATCP 48**

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**Wayne Propst** - As a landowner in Dodge County Drainage District #74, he is opposing the proposed rule revisions for the single reason that it is too costly for the county drainage board, and ultimately the landowner, to provide drain specification information. He has been involved with this drainage district for a number of years and, during that time, has had three different drainage board chairs. It is difficult to find people to handle that type of position. He suggests that DNR and county soil maps have most of the necessary information at their disposal, except for the grades which could be obtained for each new project as it presents itself.

**Andy Propst** - He opposes the revision of ch. ATCP 48 because it will be too costly to the drainage boards and landowners.

**Sheryl Paczwa, acting for Patricia Leavenworth, State Conservationist, USDA Natural Resources Conservation Service** - NRCS would like to see additional language inserted into the proposed rule in Section 3. ATCP 48.01(6m) and Section 16. ATCP 48.20(1)(b) that explains that the cross-section should include a details of any in-channel structure such as culverts or bridges. The proposed definition of cross-section applies strictly to ditch drains. The definition should be expanded to include documentation requirement for district subsurface drainage conduits.

- In Section 5. ATCP 48.01 (13m) and Section 16. ATCP 48.20(1)(c), the grade profile should also include the elevations of any in-channel structures such as culverts or bridges. The definition should be expanded to include documentation requirements for subsurface drainage conduits. If the 10-year peak discharge elevation will continue to be required, it should be further clarified as the peak discharge from a 10-year frequency, 24-hour storm duration.
- Under Section 18. ATCP 48.22(2)(b), NRCS has commented that this section seems to assume the district drain is an aggrading ditch. The ditch could be degrading and dredging would not apply. The district drain could also be a subsurface conduit. Requirements for a restoration plan should include the proposed method of restoring noncomplying drains to formally established conditions. This general requirement should encompass all types and conditions of district drains.
- Regarding Section 18. ATCP 22(2)(d), the inclusion of a requirement for a plan to control erosion and runoff in the drainage district is excellent. Does the proposed rule require implementation of the plan?
- It seems counter-productive for the rule to require an erosion runoff control plan for the district, yet under Section 22. ATCP 48.24(5), allow row cropping in the district corridor. The corridor is an excellent opportunity to gain the effects of buffers adjacent to surface drains.

**SUMMARY OF WRITTEN TESTIMONY  
PROPOSED AMENDMENTS TO CHAPTER ATCP 48**

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**James Burns, James Burns & Sons Farm, Inc.** - He has specific complaints regarding cranberry growers in the Leola Drainage District in Adams County. Through what he believes to be arrogant and illegal actions, he claims that the cranberry growers have essentially shut down his drainage completely. After two years of ineffectual efforts to bring about a remedy, he gave up trying to restore his drainage.

**Russell Rasmussen, Chief, Environmental Services Section, Department of Transportation** Section ATCP 48.34 (Construction Projects and Drainage Alterations), should specifically exempt from DATCP approval all projects not initiated by the drainage district itself, or at a minimum, should specifically exempt highway departments. The requirement that DATCP approve the qualifications of DOT engineers preparing design plans for construction projects in a district drain should be deleted, as this requirement goes well beyond the intent of the statutes. It should also be noted that drainage boards have a responsibility to provide DOT information on their district boundaries and drain locations and elevations if effective cooperative efforts are to be achieved.

**Justin Isherwood** - Mr. Isherwood is an upland farmer in Plover. With the addition of the cranberry element, he has witnessed many conflicts over drainage rights. He believes what is necessary is a new and involved study of water management. What is fair land use? How can we more equitably share an extremely good quality water source, and protect it at the same time?

**Attachment 3**

**Final Draft Environmental Assessment**

DEPARTMENT OF AGRICULTURE, TRADE AND CONSUMER PROTECTION

DRAFT FINAL ENVIRONMENTAL ASSESSMENT

Division Affected: Agricultural Resource Management

Rule Number: Chapter ATCP 48

**HISTORY AND BACKGROUND**

1. *Rule number and title:* Chapter ATCP 48, Drainage Districts

New Rule

Modification of Existing Rule

2. *Statutory Authority*

A. To adopt the proposed rule: Sections 88.11 and 93.07(1), Wis. Stats.

B. Statute(s) being interpreted by proposed rule: Chapter 88, Wis. Stats.

3. *Summarize the history of the proposed rule and the reason the rule was developed:*

Chapter ATCP 48 of the *Wisconsin Administrative Code* was originally promulgated in June of 1995. The department was directed by the Legislature to establish rules for performance standards in drainage districts, procedures for assessments and reassessments of properties benefited by drainage, and procedures for investigating whether a drainage district complies with existing state law.

The Department of Agriculture, Trade and Consumer Protection (department) is authorized to develop and implement this rule revision under section 88.11(i) of the *Wisconsin Statutes*. This section of the statute states that the department shall establish, by rule, performance standards for drainage district structures, ditches, maintenance and operations in order minimize adverse effects on water quality.

The department is proposing revisions to Chapter ATCP 48 because it has determined that the existing rule is inadequate to meet the objectives of the drainage district program. In order to address these inadequacies, the department assembled an advisory committee to address potential changes to the Chapter ATCP 48. As a result of the comments received from the advisory committee, the department is proposing to revise or repeal sections of Chapter ATCP 48.

4. *Description of the Proposed Rule*

A. *Objective of proposed rule (be specific and cite internal and external studies, reports, and other information or rationale used in establishing the objectives addressed by the proposed rule).*

The objectives of the proposed rule revisions are to clarify the legal obligations of county drainage boards, landowners within drainage districts, and the department. Proposed changes to the rule include the following:

- Requires that every county drainage board shall adopt by December 31, 2000, certain drainage map specifications, including a map showing district boundaries, the alignment

profile for each district drain. The information required in the compliance plan includes identification of the district drain(s) that require restoration, the amount of material to be removed or added to restore the drain(s), the schedule for restoration, and the cost of restoration. The proposed rule establishes procedures to change the specifications. In addition, the proposed rule streamlines the process by which construction projects, drainage modifications, and water withdrawal from a district drain are approved.

B. *Summarize the key assumptions on which the proposed rule is based:*

The current rule is based on the assumptions that some farmers need organized drainage districts to provide them with adequate agricultural drainage, that both county drainage boards and landowners in the district want to maintain their drainage districts in good operating condition, and that failure to control on-farm practices could result in severe degradation of water quality in ditches and downstream. Once drainage districts are created, all landowners in the district have the right to receive drainage as established by the profile for that district. This right runs with the land.

Another key assumption is that some drainage districts are in disrepair and that performance standards are needed to improve their operation. The proposed rule will assist drainage districts in achieving these goals by requiring county drainage boards to meet specifications such as defining drainage district boundaries, identifying district drains, and establishing the location and width of district corridors. County drainage boards will also need to identify the cross-section and grade profile of each district drain. We are assuming that by establishing standards, the proposed rule will reduce landowner conflicts and *ad hoc* decision-making by county drainage boards. Finally, we assume that by clarifying standards and extending deadlines, county drainage boards will comply with the requirements of the rule.

C. *Provide a summary of procedures required by the proposed rule.*

(1) Requirements the public and county drainage boards have to follow:

The proposed rule creates new procedures, and expands on procedures included in the existing rule, to be followed by county drainage boards and the public. The proposed rule will require every county drainage board to adopt a complete set of specifications for each district in its county by December 31, 2000. These specifications must be approved by the department. The proposed rule specifies the minimum information required to be included in the specifications that a county drainage board must submit to the department.

The current rule requires that a county drainage board include a map that identifies the district boundaries, the alignment of every district drain, and the location and width of every district corridor. Under the proposed rule, the county drainage board must provide additional specifications, including cross-sections and a grade profile of every district drain. The proposed rule includes a provision that modifications to the grade profile legitimately made under the county drainage board's actions prior to the effective date of the proposed rule may not be used as the formally established grade profile if the county drainage board did not resolve an objection of a landowner whose access to drainage was affected by that modification. Before a county drainage board can adopt the district specifications, it must notify the landowners by mail, announcing that a public meeting will be held and where copies of the specifications can be reviewed. It must also publish a class 2 notice of the meeting under ch. 985, Stats., and give landowners at least 30 days after the public meeting to provide written objections to the specifications.



(2) Requirements the department will have to follow:

The proposed rule identifies the process the department must follow when reviewing county drainage board proposals for a construction project or drainage alteration. Although the department may not approve any project that causes any deviation from the established cross-section, alignment, or profile, it may approve an action to reestablish a section of a district drain if certain conditions are met. These conditions include obtaining the consent of each owner of land that is newly included in the district corridor, and giving notice to each landowner in the drainage district whose right to drainage may be affected by the proposed changes in the established cross-section or profile.

D. *Identify and explain implicit or explicit exemptions to the proposed rule and explain why they are exempt (i.e., what similar activities or entities would not be affected).*

This rule contains no exemptions.

5. *Specifically identify those governmental units, industries, organizations, and other parties that would be affected by the proposed rule. Explain how each would be affected:*

County drainage boards, which are local governmental units, will be affected by the proposed rule because they will be responsible for submitting the required information, holding meetings and hearings, and resolving drainage disputes within the drainage district. A landowner may petition a county drainage board to comply with the requirements of the proposed rule.

Landowners in a drainage district will also be affected. The proposed rule will grant them certain rights and responsibilities under the proposed rule. Drainage rights are based on specifications initially established by the circuit court. A county drainage board cannot change these specifications without the department's approval. In addition, county drainage boards cannot change these specifications without complying with the procedures outlined in the rule that are designed to protect landowners' rights.

Residential, commercial, and industrial landowners who discharge stormwater, waste water or runoff into district drains will be affected, whether they are inside or outside of the boundary of a drainage district. All such landowners, including the state or a municipality, will be required to notify the county drainage board before undertaking any action, including any change in land use, that will alter the flow of water into or from a district drain, increase the amount of soil erosion, or affect the operation or costs of a district. Additionally, a county drainage board can enter into an agreement with any person under which that person agrees to compensate the drainage district for costs sustained.

Cranberry and vegetable growers will also be affected by the rule revisions. As owners of land within drainage districts, they would be required to comply with the plans and specifications contained adopted by the county drainage board and approved by the department. These standards will also benefit them by reducing landowner conflicts and minimizing *ad hoc* decisions by county drainage boards.

The Department of Natural Resources will be affected because it will be required to document the reasons for refusing to issue a clean-out permit for a district drain in a drainage district.

The department will be affected because its workload will increase significantly due to the proposed rule revisions. It will be required to review specifications, compliance plans, and county board proposals to install or modify construction projects; to evaluate proposals to change drainage district cross-sections or grade profiles; and to formally approve of county drainage board specifications. The department will also have to revise the County Drainage Board Handbook and perform training to county drainage boards.

(2) Impact on state and local economies:

The proposed rule revisions are expected to reduce landowner conflicts in drainage districts, thereby reducing litigation costs.

(3) Economic impact on individuals:

Landowners in drainage districts will be affected since the costs to the drainage districts will be assessed to them. Engineering consultants may also have increased business opportunities, as drainage district construction projects will now require engineering plans.

(4) Cost to the department:

Adoption of the proposed rule is expected to result in increased costs to the department for administration and enforcement of the rule. Once the rule is passed, significant staff time will be needed to inform and educate landowners and the county drainage boards on the requirements of the rule. The proposed rule requires the department to review county drainage board proposals for construction projects or drainage alterations in a district drain. The department would also be required to review county drainage board proposals to reestablish cross-sections and grade profiles of a drainage district.

C. *Identify and briefly describe anticipated direct and indirect impacts on the social and cultural environment lifestyle of the parties affected by the proposal:*

The proposed rule will improve water quality in drainage districts, which is beneficial to the landowners and the public. The proposed rule establishes new procedures and expands on existing procedures that the county drainage board and landowners in a drainage district must follow in order to effectively meet their water quality objectives. These include the minimum information required to be included in the district compliance plans, approval procedures for construction projects within drainage districts, and prohibiting the installation of certain structures in a district drain.

D. *Impact on energy:*

None anticipated at this time.

11. *Identify which of the impacts are adverse impacts that cannot be avoided if the proposed rule is implemented.*

The cost of implementing the rule revisions will be an unavoidable, adverse impact to county drainage boards, landowners, and the department.

12. *Identify irreversible and irretrievable commitments of resources required or implied if the proposed rule is implemented.*

County drainage boards, and indirectly landowners within the drainage district, will be required to allocate funds to establish district boundaries, the cross-sections and grade profiles of district drains, and the alignment and extent of district drains.

## EVALUATION

14. *Evaluation: Discuss each category using additional sheets or pertinent information if necessary. Specifically identify those factors that may distinguish the proposed rule as a major action significantly affecting the quality of the human environment.*

A. *Secondary Effects: To what extent would the proposed rule result in other events or actions that may significantly affect the environment? Identify the parties affected by secondary effects in item 5.*

The proposed rule will result in maintenance and repair activities and possibly construction and restoration projects that will have an effect on the environment. However, implementing the standards contained in the proposed rule would be expected to have a positive impact on protecting water quality in drainage districts. Establishing and maintaining district corridors will improve bank stability and provide a buffer strip between land use practices and the district drain.

The requirements in the proposed rule, along with more compliance with the existing statutory requirements, may lead to the dissolution of some drainage districts. This would eventually result in a loss of farmland.

B. *New Environmental Effects: To what extent would the proposed rule result in new physical, biological, or socio-economic impacts?*

None are known at this time. Most of these drainage districts have been in place for more than 40 years. The proposed rule will improve their operation.

C. *Geographically Scarce Resources: To what extent would the proposed rule affect existing environmental features that are scarce, either locally or statewide?*

None are known at this time.

D. *Precedent: To what extent would the proposed rule establish a new precedent affecting future policy decisions?*

The proposed rule establishes procedures the department must follow regarding review and approval of drainage district projects. While the department review and approval of projects established by the rule formalizes new procedures, it also establishes a new relationship between the department and the county drainage boards.

E. *Consistency with Plans: To what extent is the proposed rule consistent or inconsistent with local, state, or national long-range plans or policies?*

The proposed rule is very consistent with the department's mission statement, which states in part "To assure the... efficient use of agricultural resources in a quality environment; and to promote the interests of agriculture."

F. *Exercise of Discretion: The law which authorizes or is interpreted by this proposed rule will provide for varying degrees of discretion to be used by the department in formulating the policies and procedures contained in the rule. In some cases, the department is bound by or limited to federal rules or regulations dealing with the same issues. To what extent is the proposed rule limited by Wisconsin or federal statutes or regulations?*

**Attachment 4**

**Final Draft Fiscal Estimate**

**FISCAL ESTIMATE**

LRB or Bill No. / Adm. Rule No. ch. ATCP 48
Amendment No. (If Applicable) Not Applicable

DOA-2048 (R 10/94)

- ORIGINAL       UPDATED  
 CORRECTED       SUPPLEMENTAL

**Subject:**

Drainage District Program

**Fiscal Effect**

State:  No State Fiscal Effect  
 Check columns below only if bill makes a direct appropriation or affects a sum sufficient appropriation

- Increase Existing Appropriation       Increase Existing Revenues  
 Decrease Existing Appropriation       Decrease Existing Revenues  
 Create New Appropriation

- Increase Costs - May be possible to Absorb Within Agency's Budget       Yes       No  
 Decrease Costs

Local:  No local government costs

- |  |   |
|--|---|
| 1. <input checked="" type="checkbox"/> Increase Costs<br><input type="checkbox"/> Permissive <input checked="" type="checkbox"/> Mandatory | 3. <input type="checkbox"/> Increase Revenues<br><input type="checkbox"/> Permissive <input type="checkbox"/> Mandatory |
| 2. <input checked="" type="checkbox"/> Decrease Costs<br><input checked="" type="checkbox"/> Permissive <input type="checkbox"/> Mandatory | 4. <input type="checkbox"/> Decrease Revenues<br><input type="checkbox"/> Permissive <input type="checkbox"/> Mandatory |

5. Types of Local Governmental Unit Affected:
- Towns       Villages       Cities  
 Counties       Others Drainage Bd.  
 School Districts       WTCS Districts

**Fund Source Affected:**

- GPR       FED       PRO       PRS       SEG       SEG-S

Affected Ch. 20 Appropriations:  
s. 20.115(7a) and (8a)

**Assumptions Used in Arriving at 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 ATCP 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. ATCP 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

(continued on page 2)

**Long - Range Fiscal Implications**

Agency/prepared by: (Name & Phone No.)

DATCP  
Dave Jelinski, ph. 608-224-4621

Authorized Signature/Telephone No.

*Barbara Knapp*  
Barbara Knapp, ph. 608-224-4746

Date

2/22/99  
2/10/99

### 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 been 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.

**Attachment 5**

**Final Draft Regulatory Flexibility Analysis**

STATE OF WISCONSIN

DEPARTMENT OF AGRICULTURE, TRADE & CONSUMER PROTECTION

**Draft Final Regulatory Flexibility Analysis**

Proposed Revisions to Chapter ATCP 48, Wis. Adm. Code  
(Drainage District)

**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 are already 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. It is estimated that there are 200 drainage districts located in 30 Wisconsin counties. Currently, 26 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 drainage district maps (specifically, cross-sections, 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 landowners within drainage districts, some of whom are 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, Wis. Stats.
- c) To correct a violation of this chapter or ch. 88, Wis. 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 the following three reasons:

**First**, farmland 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 17th day of February, 1999.

By Nicholas J. Neher  
Nicholas J. Neher, Administrator  
Agricultural Resource Management Division



State of Wisconsin  
Tommy G. Thompson, Governor

Department of Agriculture, Trade and Consumer Protection

Ben Brancel, Secretary



DATE: March 26, 1999

TO: The Honorable Fred Risser  
President, Wisconsin State Senate  
Room 220 South, State Capitol  
Madison, WI 53703

The Honorable Scott Jensen  
Speaker, Wisconsin State Assembly  
Room 211 North, State Capitol  
Madison, WI 53703

FROM: Ben Brancel, Secretary *Ben Brancel*  
Department of Agriculture, Trade and Consumer Protection

SUBJECT: **Drainage Districts Rule (Clearinghouse Rule 98-081)**

Pursuant to ss. 227.19(2) and (3), Stats., the Department of Agriculture, Trade and Consumer Protection hereby transmits the above rule for legislative committee review. This rule makes important changes to the department's current rules related to drainage districts (ch. ATCP 48, Wis. Adm. Code). We are enclosing 3 copies of the final draft rule, together with the following report. Pursuant to s. 227.19(2), Stats., the department will publish a notice of this referral in the Wisconsin Administrative Register.

**Background**

Drainage districts are special purpose districts formed for the purpose of draining agricultural and other lands. There are currently about 185 drainage districts in Wisconsin. These districts drain large areas of land, mainly in central and eastern Wisconsin. Drainage districts can have a critical impact on agriculture, land use, land values and development. They also affect wetlands, flood control, water quality and wildlife habitat.

Drainage districts affect private property rights as well as shared public resources. Many agricultural operations depend on established drainage systems. Drainage districts cross individual property lines, and have the power to assess landowners for the cost of constructing and maintaining drainage ditches.

Honorable Fred Risser  
Honorable Scott Jensen  
March 26, 1999  
Page 2

Drainage issues can be very divisive. Drainage board actions (or inactions) may have serious long-term consequences. Actions by individual landowners may harm other landowners or the public at large. Developments outside a drainage district may also affect landowners in a district. (For example, land use changes may increase storm runoff and flooding in district drains.)

Drainage districts are operated by county drainage boards. County drainage boards have broad authority under ch. 88, Stats., and other applicable law. Drainage boards are responsible for ensuring orderly drainage, and appropriate resolution of drainage disputes. But some county drainage boards have failed to keep pace. Many districts lack adequate engineering specifications, and some county drainage boards are poorly equipped to deal with complex drainage issues.

### **Legislation and Rules**

Several years ago, the Legislature enacted major changes to ch. 88, Stats. Among other things, the Legislature expanded the authority of county drainage boards. The Legislature also assigned DATCP to supervise county drainage boards, and directed DATCP to adopt rules for drainage districts. The legislation was broadly designed to upgrade the administration of drainage districts.

DATCP adopted its current drainage district rules in 1995. The current rules spell out standards and procedures for creating, financing, operating and maintaining drainage districts. This rule strengthens and clarifies the current drainage district rules. Among other things, this rule:

- Requires better maps and engineering specifications for drainage districts. (These specifications will help prevent and resolve drainage conflicts.)
- Clarifies landowner rights and responsibilities.
- Clarifies standards and procedures for resolving drainage conflicts.
- Clarifies DATCP's role related to drainage districts.

### **Biennial Budget Initiative**

Governor Thompson, in his biennial budget, has proposed a major initiative to improve the administration of drainage districts. In each year of the biennium, the Governor proposes to provide \$750,000 in cost-share funding. DATCP could award grants to fund 60 percent of a county drainage board's cost to prepare adequate drainage district specifications (and comply with other regulations). The Governor's budget initiative is important for the implementation of this rule, and vice-versa.

### **Advisory Council and Public Input**

The department drafted this rule in consultation with a drainage advisory committee that included farmers and agricultural representatives, county drainage board members, drainage engineers, environmental representatives, and the Department of Natural Resources. The DATCP Board's Committee on Agricultural Resource Management and Conservation reviewed the hearing draft rule, and the DATCP Board authorized public hearings on May 19, 1998. The department held 4 public hearings in July, 1998, and revised the final draft rule in response to hearing comments. The Board of Agriculture, Trade and Consumer Protection unanimously approved the final draft rule on March 17, 1999.

### **Other State Agencies**

The department is working with the Department of Natural Resources (DNR) to facilitate the orderly administration of drainage districts. DNR issues permits for dams and dredging operations in navigable waterways (including some drainage ditches). DATCP proposes to approve drainage district specifications in consultation with DNR. Once DATCP approves those engineering specifications, it should be possible for DNR to issue long-term permits to facilitate ditch maintenance to the specifications.

DATCP has also entered into a Memorandum of Agreement with the Department of Transportation (DOT). The agreement is designed to prevent and resolve drainage problems related to highway construction and maintenance projects.

### **Rule Contents**

#### **Drainage District Specifications**

Under 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, a county drainage board must establish "cross-sections," "grade profiles" and other specifications for district drains. DATCP must approve proposed drainage district specifications.

Drain "cross-sections" and "grade profiles" are important, because they determine drainage access and efficacy. Deviations from established specifications may deprive landowners of drainage to which they are entitled, and may seriously affect land use and land values. This rule requires county drainage boards to establish "cross-sections" and "grade profiles" based on historical specifications (if available). The rule spells out a procedure for changing historical specifications, or establishing missing specifications. The procedure is designed to protect landowners whose drainage rights may be affected.

Under this rule, county drainage boards must prepare better maps of drainage districts. Maps must show drainage district boundaries, district drains, drain alignments and district maintenance corridors surrounding each drain. In some cases, it is not clear whether an existing drain is a "private drain" or a "district drain." A county drainage board must follow specific legal procedures if it wishes to designate a disputed drain as a "district drain." The procedures are designed to protect affected landowners.

### **Drainage District 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 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 the rules. For various reasons, few county drainage boards have filed compliance plans. Few, if any, drainage boards will bring all of their drainage districts into compliance 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.

### **Obstructing 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 install facilities for that purpose) if certain conditions are met. A county drainage board may not install or approve an obstruction that causes a deviation from an established "grade profile." (There are limited exceptions for certain temporary structures.)

### **Restoration Projects**

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." A county drainage board may still need a dredging permit from the Department of Natural Resources.

### **Construction Projects and Drainage Alterations**

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. This rule prohibits a county drainage board from doing any of the following without DATCP approval (there are some exceptions):

- Constructing or modifying a district drain (or authorizing another person to do so).
- Installing or modifying any structure in a district drain (or authorizing another person to do so).
- Authorizing any person (including any municipality or government entity) to connect a "private" drain to a district drain.
- Changing the formally established "cross-section," "grade profile" or "alignment" of a district drain.

A county drainage board applying for DATCP approval must provide a project description and supporting documents. 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, the department may approve a change to the formally established "cross-section," "grade profile" or "alignment" if the county drainage board complies with specified conditions that protect landowner drainage rights.

### **Landowner Rights**

Under this rule, a county drainage board may restore, repair, maintain and (if necessary) modify a district drain to comply with formally established drain specifications. A landowner may petition the county drainage board to comply with established specifications, remove a drainage obstruction, or correct other violations of this rule or ch. 88, Stats.

If a landowner is not satisfied with a drainage board's response, and believes that the drainage board is violating this rule or ch. 88, Stats, the landowner may ask the department to issue an order requiring the county drainage board to comply. 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.

### **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. Current rules completely prohibit "row cropping" in district corridors. 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. 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.

### **Benefit Assessments and Cost Assessments**

Under current law, a county drainage board may levy assessments against landowners in a drainage district to cover drainage district costs, including costs of construction, maintenance, restoration, district operation, and compensation to injured 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. Under this rule, a county drainage board must exclude, from any assessment of benefits, certain lands in a district corridor from which the landowner derives no significant benefit.

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. This rule identifies some potential land uses which the county drainage board may consider. Under current rules, a county drainage board assessing benefits to agricultural land 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.

### **Rule Modifications After Public Hearings**

The Board approved a hearing draft rule on May 19, 1998. The department held public hearings in July 1998. A total of 98 people attended morning or evening sessions at four locations, and 27 people provided oral testimony. Of those who attended the hearings, 15 supported the rule and 28 opposed portions of the rule. The department also received 31 written comments. Twelve of these supported the rule, 13 opposed, and 6 took no position. A complete hearing summary is attached.

The department modified the final draft rule in response to hearing comments. The final draft includes the following changes:

- The final draft clarifies that a county drainage board may establish a “cross-section” or “grade profile” that reflects legitimate drainage board actions taken prior to the effective date of this rule. However, a county drainage board may not establish “grade profiles” that reflect prior modifications made over the unresolved objection of a landowner whose access to drainage was affected.
- The final draft clarifies that the “cross-section” of a district drain must show drainage structures located along the drain.
- With certain limited exceptions, this rule prohibits landowners from obstructing district drains. A cranberry grower may install a structure for no more than 14 days to provide water for cranberry harvest or ice cover. The final draft adds that the drainage board may grant a 7-day extension for cause.
- The final draft clarifies that a county drainage board, when assessing costs to landowners, may allow a reasonable “credit” to a landowner who provides maintenance services or other “in kind” payments to the drainage district.
- The final draft clarifies that a county drainage board, when assessing benefits to agricultural lands in a drainage district, must consider (among other factors) the depth of the water table on that land.
- The final draft provides sample methods for computing “base flow” and “peak flow” (new Appendix A).
- The final draft adds “notes” alerting readers to possible DNR permit requirements under current law. The final draft moves other hearing draft “notes” into the text of the rule.
- The final draft makes other minor editorial changes to clarify the rule or address comments from the Legislative Council Rules Clearinghouse.

#### Response to Rules Clearinghouse Comments

The Legislative Council Rules Clearinghouse made a number of comments on the hearing draft rule. The final draft rule accommodates all of the Rules Clearinghouse Comments except the following:

**Comment 2(f)** The department believes that the references are correct as written. The changes suggested by the Rules Clearinghouse would make the references too narrow.



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**Comment 2(g)** The department is not creating any new challenge or appeal process. The department is merely acknowledging a fact: that landowners may challenge drain specifications which violate applicable provisions of ch. 88, Stats., or ch. ATP 48. The department does not presume to specify or limit the legal procedures which landowners may use to challenge illegal specifications.

**Comment 2(h)** This comment is moot in light of other changes to the final draft rule.

**Comment 2(k)** The rule provides an intentionally rigorous process for changing drainage district specifications (especially grade profiles, which have a critical bearing on landowner access to drainage). Drain specification changes are similar to construction projects, and often involve actual construction. The review process is intentionally similar.

**Comment 2(l)** The department believes that the rule is clear as written, and that the recommended changes would make it less clear.

**Comment (2)(h)** The department has added the language suggested by the Rules Clearinghouse. The department may deny approval for reasons other than those listed, although the listed reasons are those for which the department would normally deny approval.

**Comment 5(b)** The department believes the reference is correct as written.

**Comment 5(i)** The procedure for changing a "grade profile" is intentionally more rigorous, because "grade profile" has a more critical bearing on landowner access to drainage.

**Comment 5(j)** The final draft rule, like the hearing draft, requires the county drainage board to contact "every known landowner" in the drainage district. The county drainage board will normally maintain a list of landowners for assessment purposes. The rule assumes that the drainage board will take reasonable steps to maintain a current list of landowners. However, a failure to notify an unknown landowner (e.g., because of a recent ownership change) does not automatically render a notice invalid.

**Comment (5)(l)** The department does not believe that the suggested change is necessary. Rule violations are subject to statutory penalties.

### Environmental Assessment

The department has prepared an environmental assessment on this rule. A copy of the final draft environmental assessment is attached.

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**Fiscal Estimate**

This rule will increase costs to the department. A fiscal estimate is attached.

**Small Business Analysis**

This rule will have some impact on small businesses, particularly farmers and agricultural food processors. A small business analysis ("final regulatory flexibility analysis") is attached.



# Al Ott

State Representative • 3rd Assembly District

## Assembly Agriculture Committee

### MEMO

**To: Members of the Assembly Agriculture Committee**

**From: Representative Al Ott, Chair**

**Date: April 9, 1999**

**The following clearinghouse rule has been referred to the Assembly Agriculture Committee:**

**Clearinghouse Rule 98-081**

**Relating to Drainage Districts Rule. Submitted by the Department of Agriculture, Trade and Consumer Protection.**

**The deadline for action on this rule is May 9, 1999. If you would like a copy of the rule, please contact Linda in my office at 266-5831.**

Reynolds 04/09/99

Hahn 04/14/99

Portnowsky 04/15/99

Sykora 04/27/99

# **MEMORANDUM OF AGREEMENT**

**Between**

**The Wisconsin Department of Transportation and the  
Wisconsin Department of Agriculture, Trade and Consumer Protection**

## **1. Purpose**

This agreement is intended to clarify the working relationship between the Wisconsin Department of Transportation (DOT) and the Wisconsin Department of Agriculture, Trade and Consumer Protection (DATCP) on highway construction and maintenance projects affecting drainage districts. This agreement does not limit the authority or responsibilities of county drainage boards, which are primarily responsible for administering drainage districts.

## **2. Scope**

This agreement pertains to highway construction and maintenance projects that affect drainage districts.

## **3. Agency Responsibilities and Authority**

Drainage districts are special purpose districts formed for the purpose of draining agricultural and other lands. Drainage districts are governed by ch. 88, Stats., ch. ATCP 48, Wis. Adm. Code, and other applicable law. County drainage boards are primarily responsible for administering drainage districts. County drainage districts have the authority and responsibilities specified under ch. 88, Stats., and ch. ATCP 48. Landowners also have rights and responsibilities under ch. 88, Stats., and ch. ATCP 48. This agreement does not limit the authority or responsibilities of county drainage boards, or the rights or responsibilities of landowners, under ch. 88, Stats., or ch. ATCP 48.

DATCP is responsible, under ch. 88, Stats., for supervising county drainage boards. DATCP has adopted drainage district rules under ch. ATCP 48, Wis. Adm. Code. DOT has responsibility for planning, constructing and maintaining highways in this state. DOT has authority and responsibilities identified in chs. 80-86, Stats., and other applicable law. This agreement does not limit the authority or responsibilities of DATCP or DOT.

#### **4. Identifying Drainage Districts and Boards**

At DOT's request, DATCP will provide DOT with the following information if available, and will update that information as necessary:

- Drainage districts and their locations.
- County drainage boards and their members.

DATCP will make available to DOT, at DOT's request, other available information related to drainage districts.

#### **5. Reviewing Construction and Maintenance Projects**

DOT will notify DATCP and the county drainage board chair whenever DOT plans a highway construction or maintenance project that affects a drainage district. This includes highway construction or maintenance projects that cross drainage districts, obstruct or alter district drains, change flows to or from district drains, place or modify structures in district drains, connect or disconnect drains, or extend drains connected to district drains. DATCP will facilitate DOT notice and communications to county drainage boards, as appropriate.

DOT will give this notice at the project planning stage, and will invite DATCP and the county drainage board to identify potential concerns. DOT will provide relevant project information, including relevant plans, designs and specifications, as that information becomes available.

DATCP will encourage and facilitate timely county drainage board review of DOT construction and maintenance projects affecting drainage districts. Within 45 days after DOT provides administratively complete plans and specifications, DATCP will make its comments to DOT. DATCP will encourage the county drainage board to make its comments within the same time period. DOT understands that DATCP cannot mandate county drainage board action that is within the county drainage board's legal discretion.

DATCP and DOT will meet, at the request of either department or the county drainage board, to address concerns identified by DATCP or the county drainage board. DATCP and DOT will invite the county drainage board or its representative to attend, subject to the state Open Meeting Law. The parties will meet within 14 days after the meeting is requested, unless the parties agree to a later meeting date. The parties may agree to hold additional meetings, as appropriate.

DATCP and DOT will endeavor to resolve, to the satisfaction of both departments and the county drainage board, any concerns identified before or after construction by DATCP or the county drainage board. If formal county drainage board action is required, DATCP will encourage the board to act within a reasonable period of time. DOT understands that DATCP

cannot mandate county drainage board action that is within the county drainage board's legal discretion. If DATCP action is required, DATCP will act within a reasonable period of time.

## **6. Drainage Specifications**

DOT will contact county zoning administrators to obtain relevant drainage specifications for districts that may be affected by highway construction or maintenance projects. Relevant drainage specifications may include drainage district boundaries, drain locations and alignments, and drain cross-sections and grade profiles. DOT will contact DATCP if the zoning administrator does not have this information. DATCP will provide DOT with relevant specifications that are available to DATCP. If relevant specifications are not available, DOT may in its discretion do either of the following:

- Rely on available information to design and construct its project, consistent with established engineering and survey practices.
- Perform surveys to identify or reconstruct boundaries, elevations or other drainage specifications that are relevant to its construction project. DOT may enter into agreements with county drainage boards to obtain or provide this information.

## **7. Actions Affecting Drainage Districts**

DOT will do all the following:

- Notify the county drainage board before taking any action that will:
  - \* Alter the flow of water into or from a district drain.
  - \* Increase soil erosion to a district drain.
  - \* Affect the operation of a drainage district.
- Consult with the county drainage board before obstructing a district drain.
- Consult with the county drainage board and DATCP before:
  - \* Constructing or modifying any district drain.
  - \* Installing or modifying any structure in a district drain.
  - \* Connecting any drain to a district drain, or extending a drain that is connected to a district drain.
  - \* Taking any action that would cause district drains to deviate from their legally established specifications.

DOT may use the procedures in SECTION 5, where appropriate, to implement this section. DATCP will facilitate prompt review and action in response to DOT notice and consultation.

DOT and DATCP will endeavor to resolve conflicts to the satisfaction of both departments and the county drainage board. DOT understands that DATCP cannot overrule a county drainage board's objection on a matter that is within the county drainage board's legal discretion. DOT may consult with DATCP if relevant drainage district specifications are not available, the county drainage board is derelict in its duties, or there is no county drainage board.

A county drainage board may file a notice with DOT for construction or maintenance costs which the county drainage board incurs because of DOT actions or omissions. DOT will review these notices and determine whether DOT can or should reimburse any costs. DATCP will facilitate the review and resolution of conflicts, if requested to do so. This agreement does not expand or limit DOT's legal authority or responsibility to pay costs.

## **8. Conflict Resolution**

DATCP and DOT will work to avoid unnecessary conflicts, and will resolve conflicts in a timely and orderly fashion, consistent with their respective responsibilities. DATCP will encourage and facilitate the timely and orderly resolution of conflicts between DOT and county drainage boards. DOT understands that DATCP cannot mandate a county drainage board action or decision that is within the discretion of the county drainage board.

### **Request for Formal Conflict Resolution**

DATCP and DOT will try to resolve conflicts informally, in the ordinary course of business. DATCP's drainage engineer or DOT's project manager (or their superiors) may, at any time, request a formal conflict resolution if it appears that a conflict cannot be resolved by normal means. The request will be made in writing, and will describe the conflict and the reason for the request.

### **Initial Referral**

Requests for formal conflict resolution will normally be referred as follows:

- Conflicts between a DOT district office and DATCP or a county drainage board will normally be referred to the DOT project development engineer and the DATCP drainage engineer. They will meet in person or by phone, and will attempt to resolve the conflict. They will invite a county drainage board representative to participate, as appropriate. If they are unable to resolve the conflict within 2 weeks, they will prepare a written summary of the issue and the remaining points of conflict. They will promptly deliver this summary to DOT's district director and DATCP's land and water resources bureau director.
- Conflicts between the DOT central office and DATCP will normally be referred to DOT's bureau of environment director and DATCP's land and water resources bureau director.

### **Director Review**

If a conflict is referred to DOT's district director (or DOT's bureau of environment director) and DATCP's land and water resources bureau director, the directors will meet in person or by phone and will attempt to resolve the conflict. They will invite a county drainage board representative to participate, as appropriate. If they are unable to resolve the conflict within 2 weeks, they will prepare a written summary of the issue and remaining points of conflict. They will promptly deliver this summary to the appropriate division administrator(s) in their respective agencies, and will provide courtesy copies to DOT's bureau of environment.

### **Administrator Review**

If a conflict is referred to division administrators, the administrators (and no more than 2 additional representatives from each agency) will meet in person or by phone and attempt to resolve the conflict. They will invite a county drainage board representative to participate, as appropriate. If they are unable to resolve the conflict within 2 weeks, they will notify their respective secretaries in writing.

### **Secretary Review**

If a conflict is referred to the secretaries of DATCP and DOT, the secretaries will meet in person or by phone and attempt to resolve the conflict. They will invite a county drainage board representative to participate, as appropriate. The Secretaries will notify the Governor's Office if they are unable to resolve the conflict.

## **9. Effective Date**

This agreement takes effect when signed.

## **10. Revisions**

DATCP and DOT will periodically review this agreement to determine whether it should be revised or canceled. The agencies may, at any time, replace this agreement with a revised agreement signed by the agency secretaries.

## **11. Cancellation**

DATCP and DOT intend to fulfill their obligations under this agreement. DATCP or DOT may terminate this agreement upon 30 days advance written notice to the other party.



## 12. Nondiscrimination

Activities conducted under this agreement will be in compliance with the nondiscrimination provisions as contained in the Titles VI and VII of the Civil Rights Act of 1964, as amended, the Civil Rights Restoration Act of 1987 and other nondiscrimination statutes, namely Section 504 of the Rehabilitation Act of 1973, Title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, Chapter 16.765 of the Wisconsin Statutes requiring the posting in conspicuous places, available for employees and applicants for employment, of notices to be provided by the contracting officer setting forth the provisions of the State of Wisconsin nondiscrimination clause, and in accordance with regulation of the US Secretary of Agriculture (7 CFR-15, Subparts A & B) which provide that no person in the United States shall, on the grounds of race, color, national origin, age, sex, religion, marital status, or disability, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity receiving financial assistance.

## 13. Signatures

The undersigned, as representatives of their agencies, hereto agree to this memorandum of agreement:

Charles H. Thompson  
Charles Thompson, Secretary  
Wisconsin Department of Transportation

3-23-99  
Date

Ben Brancel  
Ben Brancel, Secretary  
Wisconsin Department of Agriculture, Trade  
and Consumer Protection

3-19-99  
Date



## **Final Draft Rule Chapter ATCP 48**

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### **WHAT DOES THE FINAL DRAFT RULE ACCOMPLISH?**

- Establishes rights to drainage
- Outlines procedures for altering drainage district drains
- Upgrades engineering requirements
- Revises compliance deadlines
- Establishes benefit and assessment standards
- Clarifies "construction project"
- Discusses the operation of dams
- Improves business and operational procedures
- Establishes a dispute resolution process



# Final Draft Rule Chapter ATCP 48

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## CHANGES FROM THE HEARING DRAFT

- Unresolved landowner objections ✍
- Harvest or ice cover time extension
- Crediting landowners ✍
- Factors for benefit assessments ✍
- Sample computation methods •
- DNR permit requirements ☐
- Editorial changes