

STATE OF WISCONSIN
DEPARTMENT OF AGRICULTURE, TRADE AND CONSUMER PROTECTION

NOTICE OF SUBMISSION OF PROPOSED RULES TO
PRESIDING OFFICERS OF EACH HOUSE OF THE LEGISLATURE

NOTICE IS HEREBY GIVEN, pursuant to s. 227.19(2), Stats., that the State of Wisconsin Department of Agriculture, Trade and Consumer Protection is submitting a final draft of proposed Clearinghouse Rule Number 98-081 to the presiding officer of each house of the legislature for standing committee review. The proposed rule amends Chapter ATCP 48, relating to drainage districts.

Dated this 25 day of March, 1999.

APR 01 1999

STATE OF WISCONSIN
DEPARTMENT OF AGRICULTURE, TRADE
AND CONSUMER PROTECTION

By Ben Brancel
Ben Brancel, Secretary



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.

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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.

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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

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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. ATCP 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.

Attachment 1

Final Draft Rule

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

1 The state of Wisconsin department of agriculture, trade and consumer protection
2 proposes the following order to repeal ATCP 48.01(5) and (16), 48.08(1)(g) and
3 48.46(3); to renumber ATCP 48.08(1)(h) and 48.44; to amend ATCP 48.01(21),
4 48.02(3) and (3)(note), 48.08(1)(a) and (b), 48.14(1)(e), 48.22(3)(note) and (6),
5 48.32(2) and (note), 48.40(2)(note), and 48.46(1)(b); to repeal and recreate ch. ATCP
6 48(note), 48.01(9) to (11) and (13), subch. IV (title), 48.20, 48.22(2), 48.24(5),
7 48.26(3), subch. V (title), 48.34, 48.36, 48.38, subch. VI (title) and 48.46(2); and to
8 create ATCP 48.01(6m), (6m)(note), (13m), (13m)(note), (13r), (14m) and (26),
9 48.08(1)(b)(note) and (3) to (5), 48.14(3)(note), 48.21, 48.22(2m) and (2r),
10 48.24(2)(note), 48.26(5) and (5)(note), 48.33, 48.44, 48.45, 48.46(1)(d), and
11 *Appendix A*; relating to drainage districts.

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

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

Statutes interpreted: ch. 88, Stats.

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

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

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

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

RULE CONTENTS

Drainage District Specifications

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

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

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

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

Drainage District Boundaries

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

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

Designating District Drains

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

- Documents that a circuit court has designated the drain as a district drain.
- Documents that the drain has historically been operated and maintained as a district drain.
- Purchases the land required for the district drain and district corridor, or condemns and pays compensation for that land as provided by statute.
- Properly designates the drain as a district drain in a proceeding under s. 88.73 or 88.77 to 88.80, Stats.

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

Drain “Cross-Section” and “Grade Profile”

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

Under this rule, a county drainage board must:

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

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

- A “cross-section” is a series of vertical sections of a drain, taken at periodic intervals along the length of a drain at right angles to the center line of the alignment of the drain. Each vertical section in the formally established “cross-section” of a district ditch must include all of the following:

- * The intended top and bottom width of the ditch.
 - * The intended depth of the ditch.
 - * The intended side slope angle of the ditch.
 - * Every drainage structure intersected by that vertical section.
- A “grade profile” is a vertical section along the alignment of a drain. The formally established “grade profile” of a district ditch must include all of the following:
 - * The grade elevations at the top and bottom of the ditch.
 - * The estimated water surface elevations in the ditch at base flow.
 - * The estimated peak water surface elevations in the ditch in the event of a 10-year 24-hour storm event.

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

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

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

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

Under this rule, 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 a “grade profile” that reflects prior modifications made over the unresolved objection of a landowner whose access to drainage was affected by that modification. Before approving a “cross section” or “grade profile,” DATCP will review landowner objections.

Drain Alignment

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

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

County Drainage Boards; Compliance Plans

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

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

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

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

- A professionally drawn map of the drainage district.
- A restoration plan that identifies:

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

Persons Obstructing or Altering District Drains

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

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

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

Structures Impeding Drainage

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

- A temporary structure or modification that is reasonably necessary to protect the public health, safety or welfare in an emergency.
- A temporary structure or modification that is necessary for other lawful construction or maintenance operations under this rule.
- A temporary structure or modification to provide essential crop irrigation during a drought if all of the following apply:
 - * The county drainage board gives notice to upstream landowners whose access to drainage may be affected.
 - * The county drainage board resolves any objections from affected landowners to the satisfaction of those landowners.
 - * The county drainage board imposes written conditions to protect the public interest and the interests of all landowners in the drainage district.
- A temporary structure or modification to provide water for cranberry harvest, or for cranberry winter ice cover, if all of the following apply:
 - * The structure or modification is installed for no more than 14 days for cranberry harvest, and no more than 14 days for cranberry winter ice cover. The county drainage board may, for good cause, extend the 14-day period for up to 7 more days at the request of a cranberry grower.
 - * The county drainage board gives notice to upstream landowners whose access to drainage may be affected.
 - * The county drainage board resolves any objections from affected landowners to the satisfaction of those landowners.

- * The county drainage board imposes written conditions to protect the public interest and the interest of all landowners in the drainage district.

Restoration Projects; Notice to DATCP

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

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

Construction Projects and Drainage Alterations; DATCP Approval Required

Under current rules, DATCP must approve a “construction project” before a county drainage board undertakes or approves that “construction project.” (A county drainage board may also need DNR approval for certain “construction projects.”) This rule expands and clarifies the current rules.

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

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

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

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

Applying for DATCP Approval

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

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

- A discussion of significant environmental effects, if any.
- Additional information requested by the department.

DATCP Approval or Disapproval

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

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

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

- The county drainage board has failed to provide required information.
- The proposed action or approval would violate DATCP rules or ch. 88, Stats.
- The proposed action is not technically feasible, is not technically sound, or is not adequately designed to achieve the county drainage board’s stated objectives.

- The proposed action will have a substantial adverse effect on water quality, or on the human or natural environment.

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

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

Landowner Drainage Rights

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

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

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

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

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

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

A landowner may also proceed in court to enforce drainage rights confirmed under this rule. A landowner is not required to petition the county drainage board, or obtain an order from DATCP, before taking court action to enforce his or her rights.

Land Ownership Change

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

Row Cropping and Obstructions in District Corridors

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

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

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

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

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

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

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

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

Assessing Costs and Benefits to Landowners in Drainage Districts

Under current law, a county drainage board may levy assessments against landowners in a drainage district to pay for drainage district costs, including costs of construction, maintenance, restoration, district operation, and compensation to landowners. The county drainage board must apportion cost assessments among landowners according to the benefits which they derive from the drainage district. This rule allows a county drainage board, when assessing costs, to allow a reasonable “credit” to a landowner who provides maintenance services or other “in kind” payments to the drainage district.

A county drainage board must assess benefits according to a procedure specified in ch. 88, Stats., and current rules. When assessing benefits to agricultural lands in a drainage district, a county drainage board is currently required to consider a number of factors including:

- The estimated increase in land value resulting from drainage.
- The amount of drainage required by, or provided to the assessed land.
- The thoroughness and reliability of drainage provided.

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

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

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

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

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

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

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

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

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

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

- 3
- 4 • Drainage districts are special purpose districts formed for the
- 5 purpose of draining land, primarily for agricultural purposes. Lands
- 6 within a drainage district are drained by means of common drains
- 7 that cross individual property boundaries. Chapter 88, Stats., spells
- 8 out procedures for creating, modifying and dissolving drainage
- 9 districts.
- 10
- 11 • County drainage boards are responsible for operating drainage
- 12 districts in compliance with ch. 88, Stats., and this chapter. A
- 13 county drainage board may levy assessments against landowners in a
- 14 drainage district to pay for the design, construction and maintenance
- 15 of district drains, and to pay other district operating costs. The
- 16 county drainage board must allocate cost assessments between
- 17 landowners based on a drainage district benefit assessment that
- 18 complies with this chapter.
- 19
- 20 • The state of Wisconsin department of agriculture, trade and
- 21 consumer protection monitors county drainage board compliance
- 22 with ch. 88, Stats., and this chapter. Drainage district specifications
- 23 and construction projects must be approved by the department.
- 24 Within the limits of available resources, the department also provides
- 25 technical assistance to county drainage boards.
- 26
- 27 • County drainage boards are primarily responsible for resolving
- 28 drainage disputes within and between drainage districts. A
- 29 landowner may petition a county drainage board to comply with
- 30 applicable requirements under ch. 88, Stats., and this chapter. A
- 31 landowner may also ask the department to order a county drainage
- 32 board to comply.

- 1 • A county drainage board may prevent municipalities and other
2 persons from connecting their drains to district drains, except under
3 terms prescribed by the county drainage board. A county drainage
4 board may also require a person to disconnect a drain. If a proposed
5 connection will increase costs to the drainage district, the county
6 drainage board may assess costs to the person wishing to connect.
7
- 8 • Landowners in a drainage district have certain rights and
9 responsibilities prescribed by ch. 88, Stats., and this chapter.
10 Drainage rights are based on drain specifications formally established
11 by the circuit court (or by a county drainage board under this
12 chapter). A county drainage board may not change established drain
13 specifications without department approval. The county drainage
14 board must comply with procedures designed to protect landowner
15 rights.
16
- 17 • A change of land ownership does not relieve or deprive a succeeding
18 landowner of rights or responsibilities that run with the land under
19 ch. 88, Stats., or this chapter.
20
- 21 • A county drainage board must comply with public records and open
22 meeting laws under ch. 19, Stats. A county drainage board must
23 also comply with specific procedures required by ch. 88, Stats., and
24 this chapter.
25
- 26 • This chapter is adopted under authority of ss. 88.11 and 93.07(1),
27 Stats.
28

29 Questions related to drainage districts and this chapter may be referred
30 to the county drainage board or to the department at the following
31 address:
32

33 Wisconsin department of agriculture, trade and consumer
34 protection
35 Division of agricultural resource management
36 Bureau of land and water resources
37 P.O. Box 8911
38 Madison, WI 53708-8911
39

40 **SECTION 2.** ATCP 48.01(5) is repealed.

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

1 ATCP 48.01(6m) “Cross-section” means a series of vertical sections of a
2 drain, taken at periodic intervals along the length of the drain at right angles to the
3 center line of the alignment of the drain.

4 NOTE: See s. ATCP 48.20(1)(b).

5 **SECTION 4.** ATCP 48.01(9) to (11) and (13) are repealed and recreated to
6 read:

7 (9) “District ditch” means a district drain which is in the form of a ditch.

8
9 (10) “District drain” means a drain, including a main or lateral drain and all
10 points of inlet to that drain, that is located within a drainage district and is designated
11 as a district drain by one of the following:

12 (a) A court order.

13 (b) A county drainage board action that complies with s. ATCP 48.20(5) or
14 48.21(2).

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

22
23 (11) “Drain” means any facility, including a ditch, tile, pipe or other facility,
24 for draining water from land. “Drain” includes structures and facilities, such as dams,
25 culverts, pumps, inlet facilities, dikes, dams and levees, that are appurtenant to a drain.

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

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

5 ATCP 48.01(13m) "Grade profile" means a vertical section along the
6 alignment of a drain.

7 NOTE: See s. ATCP 48.20(1)(c).

8 (13r) "Formally established" means established or reestablished by any of the
9 following:

10 (a) Circuit court order.

11 (b) County drainage board action that complies with s. ATCP 48.20 or 48.21.

12 (14m) "Navigable waters" has the meaning given in s. 30.01(4m), Stats.

13 **SECTION 5m.** ATCP 48.01(16) is repealed.

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

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

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

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

1 **SECTION 8.** ATCP 48.02(3) and (3)(note) are amended to read:

2 ATCP 48.02(3) **ALLOCATING COST ASSESSMENTS.** Except as provided
3 under sub. (4), a county drainage board shall allocate cost assessments among all of the
4 parcels of land in a drainage district in proportion to the last confirmed assessment of
5 benefits for each parcel. A county drainage board, when levying cost assessments,
6 may allow a reasonable credit to a landowner who provides maintenance services or
7 other “in kind” payments to the drainage district.

8 **NOTE:** A county drainage board assesses benefits to land parcels in a drainage
9 district according to s. ATCP 48.06, and allocates cost assessments on
10 the basis of those benefit assessments.

11
12 **SECTION 9.** ATCP 48.08(1)(a) and (b) are amended to read:

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

19 (b) The type, depth, quality and character of surface soils and subsoils on the
20 assessed land, and the depth of the water table on that land.

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

22 **NOTE:** Soils with high water tables normally receive the greatest benefit from
23 drainage.

24 **SECTION 11.** ATCP 48.08(1)(g) is repealed.

25 **SECTION 12.** ATCP 48.08(1)(h) is renumbered (g).
26

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

2 ATCP 48.08(3) **ACREAGE EXCLUDED FROM ASSESSMENT.** A county
3 drainage board shall exclude the following acreage from any assessment of benefits
4 under this subchapter:

5 (a) Acreage in a district corridor unless the county drainage board authorizes
6 the landowner, under s. ATCP 48.24(5), to engage in row cropping in the district
7 corridor.

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

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

14 (a) Residential uses.

15 (b) Commercial uses.

16 (c) Cropland, including dryland cropland, pasture, irrigated cropland or
17 cranberry cropland.

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

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

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

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

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

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

9 SECTION 14m. ATCP 48.14(3)(note) is created to read:

10 NOTE: The department will make available, to the state of Wisconsin
11 department of natural resources, copies of the reports which the
12 department receives under sub. (3).
13

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

16 **SUBCHAPTER IV**

17 **DISTRICT MAP, DRAINS AND CORRIDORS**

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

19 ATCP 48.20 DRAINAGE DISTRICT SPECIFICATIONS. (1)

20 SPECIFICATIONS REQUIRED. By December 31, 2000, every county drainage
21 board shall adopt complete specifications for each drainage district under that board's
22 jurisdiction. The department shall approve the specifications before the county drainage
23 board adopts them. The specifications shall include all of the following:

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

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

3 NOTE: If the existing boundary of a drainage district is not clearly documented
4 by a circuit court order, or by a county drainage board order under ss.
5 88.77 to 88.80, Stats., the county drainage board should clarify that
6 boundary by appropriate procedures under ss. 88.77 to 88.80, Stats.
7 See s. ATCP 48.21(1).
8

9 2. The intended alignment and extent of every district drain. If private drains
10 are connected to district drains, the map shall clearly identify which drains, or portions
11 of drains, are district drains.

12 3. The intended location and width of every district corridor required under s.
13 ATCP 48.24.

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

- 16 1. The intended top and bottom width of the ditch.
- 17 2. The intended depth of the ditch.
- 18 3. The intended side slope angle of the ditch.
- 19 4. Any drainage structures intersected by that vertical section.

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

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

- 27 1. The intended grade elevations of the top and bottom of the ditch.

1 2. The estimated water surface elevations in the ditch at base flow. The county
2 drainage board shall use a method described in *Appendix A*, or another method
3 approved by the department, to estimate water surface elevations at base flow.

4 3. The peak water surface elevations in the ditch in the event of a 10-year 24-
5 hour storm event. The county drainage board shall use the method described in
6 *Appendix A*, or another method approved by the department, to estimate peak water
7 surface elevations in the event of a 10-year 24 hour storm event.

8 NOTE: The formally established “grade profile” effectively determines
9 drainage access and the depth of drainage provided to landowners.
10 When a county drainage board documents the “grade profile” of a
11 district drain, the county drainage board may also wish to determine the
12 elevations of known points at which private drains empty into that
13 district drain.
14

15 (2) NOTICE TO LANDOWNERS; OPPORTUNITY TO OBJECT. Before a
16 county drainage board applies to the department for approval of proposed drainage
17 district specifications required under sub. (1), the county drainage board shall do all of
18 the following:

19 (a) Mail or deliver, to every known landowner in the drainage district, written
20 notice of the proposed specifications. The notice shall include the proposed
21 specifications or shall explain how the landowner may obtain them. The notice shall
22 also include an announcement of the meeting required under par. (c), including the
23 date, time and place of the meeting.

1 (b) Publish a class 2 notice, under ch. 985, Stats., of the meeting under par.

2 (c). The notice shall explain the purpose of the meeting, and shall include the meeting
3 date, time and place.

4 (c) Hold a public meeting to explain and discuss the proposed specifications.

5 The county drainage board shall make the proposed specifications available for public
6 inspection at the meeting.

7 (d) Give landowners at least 30 days after the public meeting to file, with the
8 county drainage board, written objections to the proposed specifications.

9 (3) DEPARTMENT APPROVAL. (a) To obtain the department's approval
10 under sub. (1), a county drainage board shall file all of the following with the
11 department:

12 1. The drainage district specifications for which the county drainage board
13 seeks approval.

14 2. A description of how the county drainage board established the
15 specifications.

16 3. Documentation showing that the county drainage board has complied with
17 sub. (2).

18 4. Notice of every landowner objection filed under sub. (2)(d).

19 5. The county drainage board's position on every unresolved objection under
20 sub. (2)(d).

21 6. Other relevant information required by the department.

1 (b) Within 90 days after a county drainage board files a complete application
2 under par. (a), the department shall approve or disapprove the specifications proposed
3 by the county drainage board. The department may, for good cause, extend the
4 approval deadline to a date specified by the department.

5 NOTE: The department will consult with the department of natural resources
6 before approving drainage district specifications proposed by the county
7 drainage board. Among other things, the department will ask the
8 department of natural resources to identify which, if any, drains in the
9 district have a navigable stream history.

10
11 (4) FILING APPROVED SPECIFICATIONS. Within 30 days after the county
12 drainage board adopts drainage district specifications under this section, the county
13 drainage board shall file the specifications with the department, the county zoning
14 administrator and the county register of deeds. Specifications are not formally
15 established until they are approved, adopted and filed.

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

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

25 (a) Documents that a circuit court has, by order, designated that drain as a
26 district drain.

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

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

4 NOTE: A drain is not necessarily a “district drain” merely because it is
5 located on land within a drainage district, or merely because it provides
6 drainage for more than one landowner. In some cases, lands within a
7 drainage district are drained by private drains that empty into district
8 drains. Private drains are not operated or maintained by the county
9 drainage board; nor is there any district corridor surrounding a private
10 drain.
11

12 (6) DRAIN CROSS-SECTION, GRADE PROFILE AND ALIGNMENT. (a)

13 Except as provided in par. (b) or (c), the county drainage board shall adopt under sub.

14 (1) the cross-sections, grade profiles and alignments last confirmed by the circuit court.

15 If a county drainage board is unable to locate court specifications for a drain cross-

16 section, grade profile or alignment, the drainage board may reconstruct those

17 specifications based on physical evidence of historical conditions in the drainage

18 district.

19 NOTE: For example, a county drainage board may be able to document a
20 historical grade profile by physical evidence including soil conditions
21 and invert elevations of historical structures along the alignment of the
22 district drain.
23

24 (b) A cross-section, grade profile or alignment adopted under sub. (1) shall

25 incorporate changes which the county drainage board, acting within its statutory

26 authority, approved prior to the effective date of this section [revisor inserts effective

27 date], except that a grade profile adopted under sub. (1) may not incorporate a change

28 which the drainage board purported to approve prior to the effective date of this section

1 [revisor inserts effective date] over the unresolved objection of a landowner whose
2 access to drainage was affected by that change. A grade profile change is deemed to
3 affect a landowner's access to drainage if it impedes gravity flow of water from his or
4 her land, through a real or assumed drain, to any real or assumed outlet at the formally
5 established cross-section and grade profile of the district drain.

6 (c) A county drainage board may proceed under s. ATCP 48.21 to change or
7 clarify the cross-section, grade profile or alignment of a district drain.

8 **SECTION 17. ATCP 48.21 is created to read:**

9 **ATCP 48.21 CHANGING DRAINAGE DISTRICT SPECIFICATIONS.**

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

13 **NOTE:** If the existing boundary of a drainage district is not clearly documented
14 by a circuit court order, or by a county drainage board order under ss.
15 88.77 to 88.80, Stats., the county drainage board should clarify that
16 boundary by appropriate procedures under ss. 88.77 to 88.80, Stats.
17

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

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

1 (2) DESIGNATING PRIVATE DRAIN AS DISTRICT DRAIN. (a) A county
2 drainage board may not designate a private drain as a district drain unless the county
3 drainage board does at least one of the following:

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

6 2. Purchases or condemns, pursuant to s. 88.21(6), Stats., and ch. 32, Stats.,
7 all of the land newly required for that district drain and for any district corridor
8 required for that drain under s. ATCP 48.24.

9 3. Properly designates the drain as a district drain in a proceeding under s.
10 88.73 or 88.77 to 88.80, Stats.

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

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

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

18 NOTE: A drain is not necessarily a "district drain" merely because it is
19 located on land within a drainage district, or merely because it provides
20 drainage for more than one landowner. In some cases, lands within a
21 drainage district are drained by private drains that empty into district
22 drains. Private drains are not operated or maintained by the county
23 drainage board; nor is there any district corridor surrounding a private
24 drain. Under s. ATCP 48.24, a district corridor is required for a
25 "district ditch" but not for other district drains.
26

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

4 NOTE: A "formally established" cross-section is one established by
5 circuit court order, or by county drainage board action under s. ATCP
6 48.20 or this section. See s. ATCP 48.01(13r).
7

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

12 (4) CHANGING A FORMALLY ESTABLISHED ALIGNMENT. (a) A
13 county drainage board may not change the formally established alignment of a district
14 drain unless the county drainage board does all of the following:

15 1. Obtains the written consent of each owner of land that is newly included in
16 the district corridor because of the realignment, or condemns that newly included land
17 pursuant to s. 88.21(6), Stats., and ch. 32, Stats. This subdivision does not apply if
18 the realignment brings no new land into the district corridor, or if no district corridor is
19 required under s. ATCP 48.24.

20 2. Obtains the department's approval under s. ATCP 48.34.

21 NOTE: A "formally established" alignment is one established by
22 circuit court order, or by county drainage board action under s. ATCP
23 48.20 or this section. See s. ATCP 48.01(13r). Under s. ATCP 48.24,
24 a district corridor is required for a "district ditch" but not for other
25 district drains.
26

1 (b) Whenever a county drainage board changes the formally established
2 alignment of a district drain, the county drainage board shall file a record of the change
3 with the department, the county zoning administrator and the county register of deeds.
4 The record shall specifically describe the change, and shall include a new map of the
5 drainage district if the change affects a map previously filed under s. ATCP 48.20 or
6 this section.

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

10 1. Provides, to every landowner in the drainage district whose access to
11 drainage will be affected by the proposed change, a written notice that clearly describes
12 the proposed change and gives the landowner at least 30 days to object. A change is
13 deemed to affect a landowner's access to drainage if it impedes gravity flow of water
14 from his or her land, through a real or assumed drain, to any real or assumed outlet at
15 the formally established cross-section and grade profile of the district drain.

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

19 3. Obtains the department's approval for the proposed change under s. ATCP
20 48.34.

21 NOTE: A "formally established" grade profile is a grade profile established by
22 circuit court order, or by county drainage board action under s. ATCP
23 48.20 or this section. See s. ATCP 48.01(13r).
24

1 The department may not approve a change to a formally established
2 grade profile if any objection by an affected landowner under par. (a)1.
3 remains unresolved. See ss. ATCP 48.34, 48.36 and 48.38.
4
5

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

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

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

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

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

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

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

1 3. An estimate of the amount of material to be removed from each drain
2 scheduled for restoration.

3 4. The intended disposition of removed materials, including the locations at
4 which the materials will be deposited.

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

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

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

8 2. A plan for maintaining district corridors and controlling woody vegetation in
9 those corridors.

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

11 4. The projected costs of repair and maintenance, and a plan for financing
12 those costs.

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

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

16 **ATCP 48.22(2m) HEARING ON COMPLIANCE PLAN.** (a) Before a
17 county drainage board files a compliance plan with the department under sub. (2), the
18 county drainage board shall do all of the following:

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

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

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

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

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

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

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

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

24
25 (6)(title) CONSTRUCTION PLANS. No county drainage board or its agent
26 ~~may proceed with a construction or restoration project for which department approval~~
27 ~~is required under s. ATCP 48.34 unless the county drainage board has obtained the~~

1 ~~department's written approval for that construction or restoration project under s.~~
2 ATCP 48.38 , without the department's written approval, proceed with any
3 construction project or other action under s. ATCP 48.34 for which that approval is
4 required. No county drainage board or its agent may, without the department's written
5 approval, deviate from the project plan and specifications approved by the department.

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

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

12
13 **SECTION 22.** ATCP 48.24(5) is repealed and recreated to read:

14 **ATCP 48.24(5) ROW CROPPING AND OBSTRUCTIONS IN DISTRICT**
15 **CORRIDOR.** (a) No person may do any of the following without written permission
16 from the county drainage board:

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

21 (b) A county drainage board may give a person written permission to engage in
22 activities under par. (a), subject to conditions or limitations which the drainage board
23 specifies in writing.

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

1 district corridor, and the type, quality and character of the soils and
2 subsoils in the district corridor.

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

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

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

14 **ATCP 48.26(3) DISTRICT DRAINS MUST CONFORM TO**
15 **SPECIFICATIONS.** A county drainage board shall restore, repair, maintain and, if
16 necessary, modify district drains so that each district drain conforms to the
17 specifications formally established for that drain by court order, or by county drainage
18 board action under s. ATCP 48.20 or 48.21. If the county drainage board levies any
19 cost assessment for work needed to conform a drain to formally established
20 specifications, it shall levy the assessment according to subchapter II.

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

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

23 A county drainage board shall notify the department in writing before the county

1 drainage board initiates any restoration project in a drainage district which involves the
2 removal of more than 3,000 cubic yards of material.

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

10
11 SECTION 25. ATCP 48.32(2) and (note) are amended to read:

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

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

24
25 SECTION 26. ATCP 48.33 is created to read:

26 ATCP 48.33 STRUCTURES IMPEDING DRAINAGE. (1)

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

1 from the formally established grade profile if it raises the water level in a district drain,
2 or slows the runoff of water from upstream lands in the drainage district.

3 NOTE: A "formally established" grade profile is a grade profile established by
4 court order, or by the county drainage board under s. ATCP 48.20 or
5 48.21. A person installing or modifying a structure in a district drain
6 may also need a permit from the state of Wisconsin department of
7 natural resources if the district drain has a navigable stream history. See
8 ss. 30.12, 30.18(2), 30.20, 31.02, 88.31 and 88.62(3), Stats. See also
9 ch. 31, Stats.

10
11
12 (2) TEMPORARY MODIFICATIONS. Subsection (1) does not apply to any
13 of the following which the county drainage board undertakes or approves:

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

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

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

20 1. The county drainage board gives written notice of the proposed structure or
21 modification to every upstream landowner whose access to drainage be affected. A
22 structure or modification is deemed to affect a landowner's access to drainage if it
23 impedes gravity flow of water from his or her land, through a real or assumed drain, to
24 any real or assumed outlet at the formally established cross-section and grade profile of
25 the district drain.

26 2. The county drainage board resolves, to the satisfaction of the objecting
27 landowner, every objection by an upstream landowner who is entitled to notice under

1 subd. 1.

2 NOTE: For example, a county drainage board may resolve a landowner's
3 objection, to the satisfaction of a landowner, by imposing conditions
4 under subd. 3 which protect the interests of that landowner.
5

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

9 NOTE: A landowner withdrawing water for irrigation may need to obtain
10 a permit from the state of Wisconsin department of natural resources
11 under s. 30.18(2)(a)2., Stats.
12

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

15 1. The structure or modification is installed for not more than 14 days for
16 cranberry harvest, and not more than 14 days for cranberry winter ice cover. The
17 county drainage board may, for good cause, extend a 14-day period for up to 7 more
18 days at the request of a cranberry grower.

19 2. The county drainage board gives written notice of the proposed structure or
20 modification to every upstream landowner whose access to drainage will be affected.
21 A structure or modification is deemed to affect a landowner's access to drainage if it
22 impedes gravity flow of water from his or her land, through a real or assumed drain, to
23 any real or assumed outlet at the formally established cross-section and grade profile of
24 the district drain.

25 3. The county drainage board resolves, to the satisfaction of the objecting
26 landowner, every objection by an upstream landowner who is entitled to notice under