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Details:

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**WISCONSIN STATE LEGISLATURE ...  
PUBLIC HEARING - COMMITTEE RECORDS**

**2007-08**

(session year)

**Assembly**

(Assembly, Senate or Joint)

**Committee on ... Agriculture (AC-Ag)**

**COMMITTEE NOTICES ...**

- Committee Reports ... **CR**
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- Public Hearings ... **PH**
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**INFORMATION COLLECTED BY COMMITTEE FOR AND AGAINST PROPOSAL**

- Appointments ... **Appt**
- Clearinghouse Rules ... **CRule**
- Hearing Records ... bills and resolutions
  - (**ab** = Assembly Bill)                      (**ar** = Assembly Resolution)
  - (**sb** = Senate Bill)                            (**sr** = Senate Resolution)
  - (**ajr** = Assembly Joint Resolution)
  - (**sjr** = Senate Joint Resolution)
- Miscellaneous ... **Misc**



Tom Lochner, Executive Director

Date: April 5, 2007  
To: Assembly Committee on Agriculture  
Re: AB 117 and AB 119

This testimony is presented on behalf of the Wisconsin State Cranberry Growers Association in opposition to Assembly Bills 117 and 119. The WSCGA was founded in 1887 to represent the interests of Wisconsin cranberry growers. Cranberries are Wisconsin's largest fruit crop and the state produces more than 55% of the US crop of cranberries. The legislature adopted cranberries as the state fruit in 2003 Act 174.

We are opposed to AB 117 and 119 primarily because we believe that the issues that these bills attempt to address are *already* addressed in current statutes and administrative rules.

#### **AB 117**

AB 117 would require written approval from every owner of agricultural land through or along which a drain passes for the construction, enlargement or modification of a dam. This approval is required in addition to any other state or federal approvals. This approval is required for lands that are within organized drainage districts and lands that are outside of organized drainage districts.

We believe that ATCP 48.33 more than adequately regulates the installation of structures in drainage districts and sets up an already well understood process for drainage boards to make decisions on structures or dams that may impact water levels in a manner that will insure landowners' right to drainage. We oppose this expansion to areas under other jurisdictions (i.e., lands outside of organized drainage districts).

We appreciate the author's willingness to provide an amendment to AB 117 that would specifically exempt lands adapted to cranberry culture from this legislation. However, we still oppose AB 117 because it creates an additional approval requirement for other agricultural producers and expands jurisdiction to lands that are outside of organized drainage districts.

#### **AB 119**

AB 119 would allow drainage districts to impose setback distances and no build zones related to drain maintenance. While we are sympathetic to the concerns and problems that some districts have had with respect to building in district corridors we do have serious concerns about the bill. However, we understand that if the proposed amendment is adopted, the setback distance from the "main drain" will be 100 feet yet the term "main drain" is neither defined nor is the point at which this distance will be measured.

Second, we appreciate the author's willingness to offer an amendment that would remove structures in drains used for pumping or to divert water for cranberry flooding or crop irrigation. However, we are still concerned about the effect that this statute would have on ATCP 48.33, which allows for the installation of temporary modifications in drains for cranberry harvest and winter ice cover.

Finally, ATCP 48.24 already details how a drainage board shall establish a corridor, maintain it and gain access. The rule also protects boards from damages done to structures by drainage board activities. As a result we find this bill unnecessary and potentially harmful to the provisions already contained in ATCP 48. Accordingly, we ask you to oppose AB 119.

We appreciate the opportunity to present our position and remain committed to working with drainage boards across the state to address their needs as well as the needs of local farmers. I have attached and highlighted the relative sections of ATCP 48 to this testimony.

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**ATCP 48.22 Construction and maintenance; general.** (1) **REQUIREMENT.** A county drainage board shall design, construct, maintain, repair and restore district drains and corridors in compliance with this subchapter.

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

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

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

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

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

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

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

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

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

1. A plan for routine maintenance of drainage structures.

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

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

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

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

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

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

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

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

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

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

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

(3) **EMPLOYEES AND AGENTS.** A county drainage board may employ or contract with qualified persons to survey, design,

construct, maintain, repair or restore district drains and corridors on behalf of the county drainage board.

**Note:** Under s. ATCP 48.36 (1) (f), a construction project must be designed by a qualified engineer. Sections 88.20 and 946.13, Stats., prohibit conflicts of interest by members of a drainage board. Under s. 88.145, Stats., a county drainage board may authorize any owner of land in a drainage district to undertake work approved by the drainage board. The liability of a landowner who does work with the approval of the county drainage board is limited by ss. 88.145, 893.80 and 895.46 (8), Stats.

(4) **AUTHORITY TO ENTER LANDS.** A member of a county drainage board or an employee or other authorized agent of a county drainage board may do any of the following:

(a) Enter onto any lands in a drainage district in order to survey, design, construct, maintain, repair or restore a district drain or corridor.

(b) Perform survey, construction, maintenance, repair and restoration operations on a district drain or corridor, including operations requiring excavation or modification of private land.

**Note:** See s. 88.13, Stats.

(5) **NOTICE TO LANDOWNER.** Before a county drainage board or its agent performs any survey, design, construction, maintenance, repair or restoration operations on private land, other than in a district corridor under s. ATCP 48.24, the county drainage board or its agent shall notify the landowner. Notice may be given in person, by telephone, by mail or, if the landowner is not available, by posting notice at a conspicuous location at an entrance to the land. Notice under this section is adequate if given at any time prior to entry.

(6) **CONSTRUCTION PLANS.** No county drainage board or its agent may, without the department's written approval, proceed with any construction project or other action under s. ATCP 48.34 for which that approval is required. No county drainage board or its agent may, without the department's written approval, deviate from the project plan and specifications approved by the department.

(7) **OTHER AGENCIES; APPROVAL.** Before starting any construction, maintenance, repair or restoration operation under this chapter, a county drainage board shall obtain from the appropriate government agencies all permits and approvals required for that operation.

**Note:** Certain construction, maintenance, repair and restoration operations in a drainage district may require permits or approvals from the army corps of engineers; the Wisconsin department of natural resources; the Wisconsin department of agriculture, trade and consumer protection or local zoning authorities.

**History:** Cr. Register, June, 1995, No. 474, eff. 7-1-95; r. and recr. (2), cr. (2m) and (2r), am. (6), Register, August, 1999, No. 524, eff. 9-1-99.

**ATCP 48.24 District corridors.** (1) **CORRIDOR REQUIRED.** A county drainage board shall establish and maintain a district corridor around every district ditch. The county drainage board shall maintain the district corridor, in compliance with this subchapter, for all of the following purposes:

(a) To provide effective access for the county drainage board and its agents, and for their vehicles and equipment, over the entire length of the district ditch.

(b) To provide a buffer against land uses which may adversely affect water quality in the district ditch.

(2) **WIDTH OF CORRIDOR.** A district corridor shall extend for 20 feet from the top of the ditch bank on each side of a district ditch. A county drainage board may, by giving specific notice to landowners, establish a wider corridor if necessary to permit vehicle access or to protect water quality in the district ditch.

**Note:** Under s. ATCP 48.28, a county drainage board is required to control the growth of woody vegetation in a district corridor, except that 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 to district drains.

(3) **ACCESS TO CORRIDOR.** Except as provided under sub. (4), a member of a county drainage board or an employee or other authorized agent of a county drainage board may, without prior notice to a landowner, do any of the following:

(a) Enter a district corridor, and bring vehicles and equipment into a district corridor, for the purpose of inspecting, surveying,

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maintaining, repairing, restoring or improving a district drain or corridor.

(b) Perform operations in a district corridor related to the maintenance, repair, restoration or improvement of a district drain or corridor, including cutting, mowing, pesticide application, dredging, excavation and other operations.

(4) NOTICE OF ACTIVITIES IN THE CORRIDOR. Before a county drainage board or its agent does either of the following in a district corridor, the county drainage board or its agent shall notify the landowner by one of the methods specified under s. ATCP 48.22 (5):

(a) Cutting trees that are more than 6 inches in diameter measured at breast height.

(b) Excavating or depositing materials in the district corridor.

(5) ROW CROPPING AND OBSTRUCTIONS IN DISTRICT CORRIDOR.

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

1. Engage in row cropping in a district corridor.

2. Place in a district corridor any building or other obstruction that interferes with the county drainage board's ability to inspect, restore and maintain the district ditch and corridor.

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

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

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

(d) This subsection does not require a landowner to remove any building or fixture constructed or installed in a district corridor prior to September 1, 1999. The owner of the preexisting building or fixture waives any claim for damages to that building or fixture that may be caused by county drainage board activities authorized under ch. 88, Stats., or this chapter.

**Note:** See s. ATCP 48.28 related to the control of woody vegetation in a district corridor.

**History:** Cr. Register, June, 1995, No. 474, eff. 7-1-95; r. and recr. (5), Register, August, 1999, No. 524, eff. 9-1-99.

**ATCP 48.26 District drains; design, construction and maintenance.** (1) DRAINAGE CAPACITY. Every district drain constructed after July 1, 1995 shall be designed and constructed so that it is capable of removing the volume of water from a 10-year 24-hour rainfall event within 48 hours after that rainfall event. For each county, a 10-year 24-hour rainfall event is the amount of rain shown in table 1 falling in 24 hours.

(2) DITCH STABILITY. (a) A county drainage board shall design and construct every district ditch, including the ditch bed, banks, and related structures such as culverts, bridges and inlets, so that the ditch will remain stable when subjected to a 10-year peak discharge under sub. (1). A district ditch is not required to contain the entire volume of water from the peak discharge. The stability standard under this paragraph does not apply to a district ditch or related structure constructed prior to July 1, 1995.

(b) A county drainage board shall repair and maintain every district ditch, as necessary, to restore and maintain the stability of that ditch.

(3) DISTRICT DRAINS MUST CONFORM TO SPECIFICATIONS. A county drainage board shall restore, repair, maintain and, if necessary, modify district drains so that each district drain conforms to the specifications formally established for that drain by court order, or by county drainage board action under s. ATCP 48.20 or

48.21. If the county drainage board levies any cost assessment for work needed to conform a drain to formally established specifications, it shall levy the assessment according to subchapter II.

(4) REMOVING OBSTRUCTIONS. A county drainage board shall remove sediment dams, windfalls, deadfalls, sand bars, beaver dams and other obstructions from district ditches. The county drainage board shall remove the obstructions annually, or more frequently as necessary. The county drainage board shall also remove submerged vegetation from district ditches as necessary.

(5) RESTORATION PROJECTS; NOTICE TO DEPARTMENT. A county drainage board shall notify the department in writing before the county drainage board initiates any restoration project in a drainage district which involves the removal of more than 3,000 cubic yards of material.

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

**History:** Cr. Register, June, 1995, No. 474, eff. 7-1-95; r. and recr. (3), cr. (5), Register, August, 1999, No. 524, eff. 9-1-99.

#### ATCP 48.28 Controlling woody vegetation.

(1) REQUIREMENT. Except as provided under sub. (2), a county drainage board shall control the growth of woody vegetation in district ditches and corridors to ensure effective drainage and effective access for inspection, maintenance and repair. A county drainage board may control woody vegetation by one or more of the methods specified under sub. (3).

(2) EXCEPTION. A county drainage board may allow the growth of woody vegetation in portions of a district corridor, provided that the woody vegetation does not interfere with effective access to district drains. A county drainage board, when deciding whether to allow the growth of woody vegetation, shall consider how the woody vegetation may affect the cost of maintaining and cleaning district drains. Any portions of a corridor left in woody vegetation shall be maintained under a resource conservation plan developed in cooperation with the county land conservation department or the United States natural resources conservation service.

**Note:** In some parts of a district corridor, woody vegetation may have important value as wildlife habitat, or for controlling soil erosion. Ordinarily, ditches are not subject to local shoreland or wetland zoning ordinances. However, in a small number of situations, where ditches are considered natural navigable streams, local ordinances may limit the cutting of woody vegetation. See s. 281.31 (2m), Stats., and chs. NR 115 and 117.

(3) METHODS FOR CONTROLLING WOODY VEGETATION. A county drainage board may use any of the following methods to control the growth of woody vegetation in a district ditch or corridor:

(a) *Mowing.* A county drainage board may mow a district ditch or corridor to control the growth of woody vegetation. Mowing may include hand cutting where necessary. If only mowing is used to control the growth of woody vegetation in a district ditch or corridor, the county drainage board shall mow the ditch or corridor at least once every 5 years, and more often if necessary.

(b) *Pesticide applications.* A county drainage board may apply pesticides to control the growth of woody vegetation in a district ditch or corridor. Pesticides shall be applied according to label directions, and in compliance with ch. ATCP 29 and other applicable state and federal laws and regulations.

(c) *Burning.* Subject to applicable local regulations, a county drainage board may use controlled burning to control the growth of woody vegetation in a district ditch or corridor.

**History:** Cr. Register, June, 1995, No. 474, eff. 7-1-95.

#### ATCP 48.30 Controlling soil erosion and runoff.

(1) GENERAL. A county drainage board shall take appropriate measures to minimize soil erosion and the movement of suspended solids into district drains. A county drainage board may

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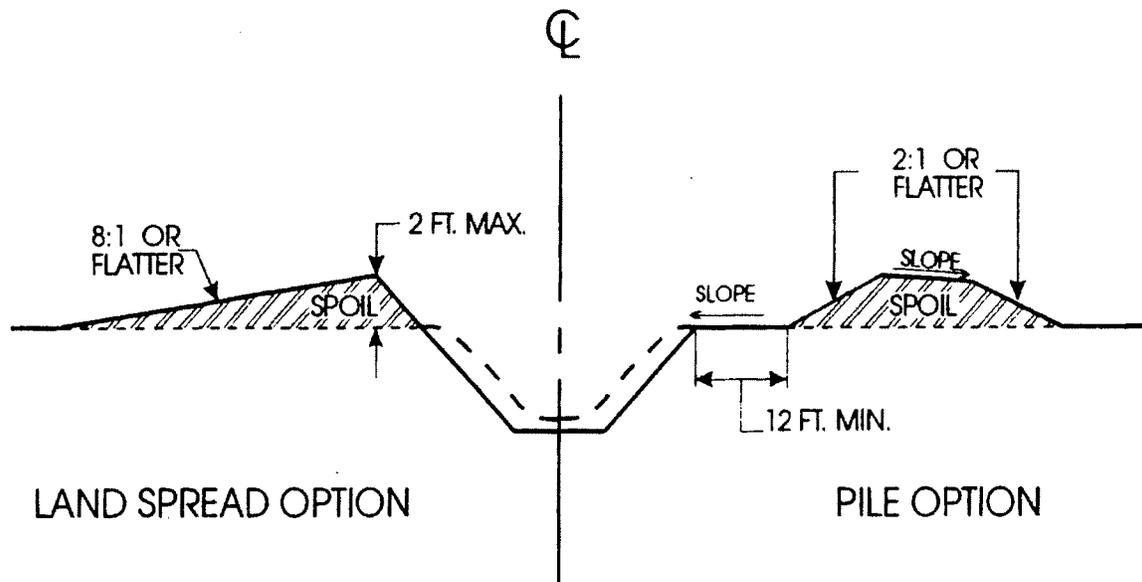


Figure 1. Methods of Material Disposal

**History:** Cr. Register, June, 1995, No. 474, eff. 7-1-95; am. (2), Register, August, 1999, No. 524, eff. 9-1-99.

**ATCP 48.33 Structures impeding drainage. (1) PROHIBITION.** Except as provided in sub. (2), no county drainage board may install or modify any structure in a district drain, or approve 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 of that district drain. An installation or modification is rebuttably presumed to cause or aggravate a deviation from the formally established grade profile if it raises the water level in a district drain, or slows the runoff of water from upstream lands in the drainage district.

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

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

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

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

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

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

2. The county drainage board resolves, to the satisfaction of the objecting landowner, every objection by an upstream landowner who is entitled to notice under subd. 1.

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

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

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

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

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

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

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

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

**Note:** A county drainage board may not authorize a cranberry grower to install a temporary structure under par. (d) for more than 14 days, except that the board may

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extend a 14-day authorization for up to 7 more days in response to a separate application from the cranberry grower under par. (d) 1. An authorization under par. (d) does not extend from season to season, or from year to year.

A county drainage board might be able to resolve a landowner's objection under par. (d) 3., to the satisfaction of a landowner, by imposing conditions under par. (d) 4. which protect the interests of that landowner.

History: Cr. Register, August, 1999, No. 524, eff. 9-1-99.

### Subchapter V — Construction Projects and Drainage Alterations; Department Approval

**ATCP 48.34 Construction projects and drainage alterations; department approval required. (1) REQUIREMENT.** Except as provided in sub. (2), a county drainage board may not do any of the following without the department's written approval:

(a) Construct or modify any district drain, or authorize any person to construct or modify a district drain.

(b) Install or modify any structure in a district drain, or authorize any person to install or modify any structure in a district drain.

(c) Authorize any person to connect a private drain to a district drain.

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

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

(a) 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. An action is rebuttably presumed to cause or aggravate a deviation from a formally established grade profile if it raises the water level in a district drain or slows the runoff of water from lands in the drainage district.

(b) Restoration projects.

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

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

Note: A county drainage board should consult with the department to determine whether a particular county drainage board action requires department approval under this section. A county drainage board may seek the department's advice or assistance regarding any proposed construction, repair, restoration or maintenance action, regardless of whether the action requires the department's approval under this section. A county drainage board should consult with the department at the early planning stage to facilitate timely assistance and, if necessary, timely approval. A county drainage board may not deviate from approved project specifications without the department's approval.

A person may need to obtain a permit from the state of Wisconsin department of natural resources before undertaking a construction or restoration project in a district drain which has a navigable stream history. See ss. 30.12, 30.18 (2), 30.20, 31.02, 88.31 and 88.62 (3), Stats. See also ch. 31, Stats.

History: Cr. Register, June, 1995, No. 474, eff. 7-1-95; r. and recr. Register, August, 1999, No. 524, eff. 9-1-99.

**ATCP 48.36 Applying for approval. (1) APPLICATION REQUIRED.** A county drainage board shall apply in writing for department approval of a proposed action under s. ATCP 48.34. The application shall include all of the following information, in detail commensurate with the proposed action:

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

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

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

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

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

(f) *Design specifications.* Design specifications for the proposed action, prepared by an engineer who is qualified under s. 88.21 (5), Stats. The design specifications shall comply with applicable standards under subch. IV. The engineer preparing the design specifications shall state whether, in the engineer's judgment, the proposed action as designed will be effective in achieving the county drainage board's stated objectives.

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

1. The current and proposed use of the affected lands.
2. The topography of the affected lands.
3. The location of any affected wetlands.
4. The identity and location of any affected navigable waterway, stormwater management district, lake district, priority watershed or lake under s. 281.65, Stats., or wellhead protection area under ch. NR 811.
5. The identity and location of any affected building, transportation corridor or utility easement.

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

1. Water surface elevations in district drains at base flow. The hydrology analysis shall use a method described in *Appendix A*, or another method approved by the department, to estimate water surface elevations at base flow.
2. Peak water surface elevations in district drains in the event of a 10-year 24-hour storm event. The hydrology analysis shall use the method described in *Appendix A*, or another method approved by the department, to estimate peak water surface elevations in the event of a 10-year 24-hour storm event.
3. Peak water surface elevations in district drains in the event of a 25-year 24-hour storm event. The hydrology analysis shall use the method described in *Appendix A*, or another method approved by the department, to estimate peak water surface elevations in the event of a 25-year 24-hour storm event.

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

1. A plan for controlling construction site erosion.
2. The estimated amount of material, if any, that will be removed.
3. A plan for depositing removed material, if any, including the location and configuration of any deposits.

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

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

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

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

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

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

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

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

Note: See s. ATCP 48.02.

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

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

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

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

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

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

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

- (a) The Wisconsin department of natural resources.
- (b) The United States army corps of engineers.
- (c) The county zoning administrator.
- (d) The county land conservation committee.
- (e) Every municipality affected by the proposed action.
- (f) The county highway committee if the proposed action may affect a public highway.

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

History: Cr. Register, June, 1995, No. 474, eff. 7-1-95; r. and recr. Register, August, 1999, No. 524, eff. 9-1-99; correction in (1) (g) 4. made under s. 13.93 (2m) (b) 7., Stats., Register January, 2002 No. 553.

#### ATCP 48.38 Department approval or disapproval.

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

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

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

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

(2) DEADLINE FOR APPROVAL OR DISAPPROVAL. Within 45 days after a county drainage board files a complete application under s. ATCP 48.36, including any additional information which the department requests under s. ATCP 48.36 (4), the department shall issue a written notice approving or disapproving the county drainage board's proposed action under s. ATCP 48.34. The department may, for good cause, extend the deadline to a date specified by the department.

Note: See also ss. 88.32 (3m) and 88.35 (7), Stats.

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

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

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

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

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

(d) 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.

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

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

(a) 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.

(b) The proposed action will drain more than 5 acres of wetlands.

(c) The proposed action involves the construction or modification of a dam in a drain with a navigable stream history.

(d) The proposed action involves a cold water fishery in a district drain with a navigable stream history.

(e) The proposed action will substantially affect the base flow in surface waters of the state.

(f) The department determines that an environmental assessment is needed to determine whether an environmental impact statement is required under s. ATCP 3.03.

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

History: Cr. Register, June, 1995, No. 474, eff. 7-1-95; r. and recr. Register, August, 1999, No. 524, eff. 9-1-99.

### Subchapter VI — Landowner Rights and Responsibilities

ATCP 48.40 Notice of landowner actions affecting drainage district. (1) REQUIREMENT. A landowner under sub. (2), including the state of Wisconsin or any county, town, village or city, shall notify the county drainage board before undertaking any action, including any change in land use, that will do any of the following:

(a) Alter the flow of water into or from a district drain.

(b) Increase the amount of soil erosion, or the movement of suspended solids to a district drain.

(c) Affect the operation of the drainage district, or the costs incurred by the drainage district.

## Unofficial Text (See Printed Volume). Current through date and Register shown on Title Page.

(2) **APPLICATION.** Subsection (1) applies to an owner of land that receives water from or discharges water to a drainage district, regardless of whether the land is included in the drainage district.

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

**History:** Cr. Register, June, 1995, No. 474, eff. 7-1-95.

**ATCP 48.42 Removing lands from drainage district.** No landowner, including the state of Wisconsin or any county, town, village or city, may do either of the following:

(1) Remove lands from inclusion in a drainage district without obtaining the approval of the county drainage board under s. 88.80, Stats.

(2) Disconnect a private drain from a district drain, except with the approval of the county drainage board.

**History:** Cr. Register, June, 1995, No. 474, eff. 7-1-95.

**ATCP 48.43 Connecting private drains to district drains; extending private drains.** No person may do either of the following without written approval from the county drainage board:

(1) Connect a private drain to a district drain.

(2) Extend a private drain that is currently connected to a district drain.

**Note:** Under s. 88.92 (1), Stats., a county drainage board may approve the connection of private drains to district drains, or the extension of private drains from district drains, and may establish conditions for approval. Under s. 88.92 (2), Stats., a person who connects or extends a private drain, or removes a spoil pile, without drainage board approval is liable for damages incurred by the drainage district as a result of that action. "Damages" include payments that the drainage district would have received during the time that the illegal connection or extension existed if the territory drained by the illegal connection or extension had been subject to assessment.

**History:** Cr. Register, June, 1995, No. 474, eff. 7-1-95; renum. from ATCP 48.44, Register, August, 1999, No. 524, eff. 9-1-99.

**ATCP 48.44 Obstructing or altering district drains.**

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

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

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

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

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

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

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

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

1. Damage to any structure in a district drain.

2. The deposition of excavated materials in a district drain.

3. The weakening, undercutting or accelerated erosion of any side bank in a district drain.

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

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

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

**History:** Cr. Register, August, 1999, No. 524, eff. 9-1-99.

**ATCP 48.45 Landowner rights.** (1) **ACTION TO ENFORCE COMPLIANCE.** (a) 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:

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

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

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

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

(b) A petition under par. (a) shall 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.

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

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

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

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

**Note:** The remedies provided to a landowner under sub. (1) are in addition to any other legal remedies which may be available to the landowner. A landowner is not required to pursue any of the remedies under sub. (1) before pursuing other legal remedies. A landowner may challenge a county drainage board action that violates this chapter or ch. 88, Stats., even if the department has approved that action. (In some cases, the department may not be aware of facts constituting a violation when it approves a county drainage board action.)

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

**History:** Cr. Register, August, 1999, No. 524, eff. 9-1-99.

### Subchapter VII — Drainage District Records and Financial Management

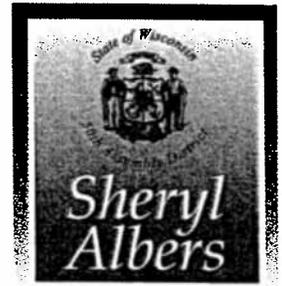
**ATCP 48.46 Records required.** (1) **ORDERS.** A county drainage board secretary and the county zoning administrator shall maintain in perpetuity a copy of every order of the circuit court or the county drainage board that does any of the following:

(a) Creates, modifies, suspends or dissolves a drainage district. The record shall include maps or descriptions showing the district boundaries affected by the order.

(b) Approves the construction, enlargement, extension or modification of a district drain. The record shall include any infor-



AB 117



Testimony of Rep. Sheryl Albers  
Assembly Committee on Agriculture  
Thursday April 5, 2007

Mr. Chairman and Members, thank you for allowing all of us to testify before you on what we believe is a very important package of proposals to firm up the authority of the state's Drain Districts. As you have already heard, these proposals are the result of hours and hours of meetings with Drain District representatives over the past year or more.

When a Drain District needs work done, the board authorizes a contract for bid and must advertise using a class 2 notice when the amount of work is \$10,000. Assembly Bill 116 increases the bidding threshold for drain-related contracted services to \$20,000. The work required to maintain a drain includes, but is not limited to dead tree removal, sediment removal through dredging, and hauling spoils.

Assembly bill 116 will make the first significant adjustment to the bidding threshold enacted in 1993 WI ACT 456. Although property owners often perform minor work along a main drain which either abuts or traverse their property, this proposed increase will provide boards and drain districts greater flexibility in carrying out their statutory functions.

Assembly Bill 116 is a simple change to the bidding threshold and we hope that you will give serious consideration to passing this bill out of committee.

Thank you

Assembly Bill 117 -

This bill requires a property owner who intends to construct or alter a dam to first obtain agreement from other property owners whose lands would be impacted by the construction or alternation of an existing dam. Under this bill, agreement needs to be reached between the permit applicant and other affected property owners in writing, and if such an agreement among affected property owners is unattainable, the DNR will be prohibited from issuing a permit for the proposed dam construction/alteration.

A comparable analogy would be: If the homeowner in the middle of a city street decided to cut off the sewage pipe to his neighbors up the street, the neighbors impacted by the shut off would want to be informed and have an opportunity for input (an avenue of administrative recourse). After all, no one wants sewage backed up in their home. Similarly, impacted property owners who farm upstream do not want water backing up on their property, nor do they desire to have a down stream property owner create a wetland that might alter water table levels or raise the ordinary high water mark. Such conduct could adversely impact crop production; alter land uses, both which could impact property values.





State of Wisconsin  
Jim Doyle, Governor

**Department of Agriculture, Trade and Consumer Protection**  
Rod Nilsestuen, Secretary

Public Hearing Testimony of  
David Jelinski, Director, Land and Water Resources  
Agricultural Resource Management Division  
Department of Agriculture, Trade and Consumer Protection

Assembly Committee on Agriculture  
AB 115, 116, 117, 118, 119, 120

April 5, 2007

Chairman Ott and Committee Members:

I am David Jelinski of the Department of Agriculture, Trade and Consumer Protection. The purpose of this testimony is to provide information related to the operation of county drainage boards and the maintenance of drainage districts. I believe this information is important as you consider the series of Assembly Bills before you regarding proposed changes to the related statutes.

The Department of Agriculture, Trade and Consumer Protection is required by law to assist county drainage boards with the supervision and operation of drainage districts under the provisions of Ch. 88, Stats, and ATCP 48, Wis. Adm. Code.

In order to understand the bills in front of you, it is also necessary to understand the role county drainage boards play in operating drainage districts in their county. Although in some cases, a county drainage board's jurisdiction may extend into another county because some drainage districts extend across more than one county. The county circuit court judge is responsible for appointing the members of the drainage boards, and delineating the boundaries of drainage districts. Beyond these well established court authorities, modern legislation enacted under ch. 88, Wis. Stats. has provided extensive authorities and responsibilities to county drainage boards to carry out their duties.

While only a circuit court can create or dissolve a drainage district, the county drainage board assists the court in creating new drainage districts. When a drainage district is created, the county drainage board is responsible for:

- operating and maintaining district drains and dams within district drains;
- levying assessments with landowners who benefit from the provided drainage;
- awarding damages, as appropriate, to landowners injured by the construction of district drains;
- inspecting the district drains and corridors;

*Agriculture generates \$51.5 billion for Wisconsin*

- making or recommending modifications to a drainage district; and
- resolving drainage disputes, subject to applicable law.

The drainage boards periodically meet with the landowners in the drainage district (at least once a year). If a drainage board determines that any work is needed in the district, the drainage board will send landowners in the district an assessment for costs. Some drainage boards wait many years to issue assessments to landowners; other drainage boards conduct annual assessments. In certain cases, small projects may be done by the landowners in the district with credits given to them for work they have performed. Assessment for costs may also be issued to individual landowners to pay for damages they have caused to district drains. This authority extends to landowners in or outside of the district boundary.

Drainage districts are special purpose units of government organized to drain land for agricultural and other purposes. While the districts are created through the court, they are formed following the filing of a petition with the court by land owners within the proposed district (Sec. 88.27, Wis. Stats.). There are approximately 200 drainage districts in 27 counties in Wisconsin. I have attached a map showing the counties with drainage districts. Some counties have only one district and others have over 30. The size of the districts varies from about 50 acres to over 55,000 acres. The number of landowners in each district can be a very few but some districts have thousands of land owners.

Land within a drainage district is drained by a system of ditches or tiles that cross individual property boundaries. Landowners pay the cost of constructing, maintaining, and repairing the district drains based on who benefits from drainage. The drainage board must conduct an assessment to determine who benefits from this drainage system. The greater the benefit, the greater amount paid. Any assessment that is needed to cover the cost of operating the drainage system must be based on these confirmed benefits.

Drainage issues can be very divisive. Drainage districts have major impacts on land use, and on rights of individual landowners. 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.

DATCP Testimony  
AB 115, 116, 117, 118, 119, and 120  
April 5, 2007  
Page Three

Finally, it is important to note that lands in drainage districts are some of Wisconsin's most productive farmland. By the very nature of drainage districts, the effects of floods and droughts are minimized and optimal water levels are maintained to enhance this production. As you know, Wisconsin is ranked first in the nation in the production of cranberries, third in the nation in the production of potatoes, and we are currently ranked first in the production of cheese. Much, but not all, of this multi-billion dollar production occurs in drainage districts along side of other important mint, sod and more traditional crops.

Any changes to the law need to enhance this production as well as the responsibilities of the county drainage boards to ensure orderly drainage, and appropriately resolve drainage disputes.

Thank you for allowing me to testify today, and I would be happy to answer any questions you might have for me concerning our drainage program.



Department of Agriculture, Trade and Consumer Protection  
April 5, 2007

AB-0115

**Purpose**

The seller of real property located in a drainage district must disclose that the property is in a drainage district.

**Comment**

For information purposes only: The Department believes that it is in everyone's best interest for the landowners in a drainage district to be well informed.

AB-0116

**Purpose**

The public contract minimum bid would be increased from \$10,000 to \$20,000.

**Comment**

Support: The cost of doing maintenance in a drainage district has increased since this bid amount was originally set in the statute. This change will help drainage boards run the drainage districts more efficiently.

AB-0117

**Purpose**

The installation or modification of a dam in a district or private drain would require the approval of all landowners affected.

**Comment**

Oppose: The department believes this bill applies to drains both in and outside of drainage districts. Currently, the drainage board already has the authority to set water levels, listen to the desires of landowners in the district, and establish a consensus on the procedures for installing, modifying, and operating dams affecting lands in the drainage district. The department believes this bill would negatively impact the ability of drainage boards to resolve conflicting land use requirements within a drainage district.

Department of Agriculture, Trade and Consumer Protection  
April 5, 2007

AB-0118

**Purpose**

The seller of real property located in a drainage district must disclose that the property is in a drainage district and require local governments to consider relationships with drainage districts in comprehensive plans.

**Comment**

For informational purposes only: The department believes that it is in everyone's best interest for the landowners in a drainage district to be well informed. This right to know should extend to drainage districts and comprehensive plans prepared by other governmental agencies.

AB-0119

**Purpose**

The drainage boards are allowed to impose setbacks or no-build zones for maintenance along district ditches. It also provides for recording an order to impose the setback.

**Comment**

For informational purposes only: The department believes this bill establishes protections similar to those already codified under the provisions ATCP 48.24 (Wis. Adm. Code).

AB-0120

**Purpose**

The seller of real property located in a drainage district must disclose that the property is in a drainage district and require local governments to consider relationships with drainage districts in comprehensive plans.

**Comments**

For informational purposes only: The department believes it is in everyone's best interest for the landowners in a drainage district to be well informed. This right to know should extend to drainage districts and comprehensive plans prepared by other governmental agencies.



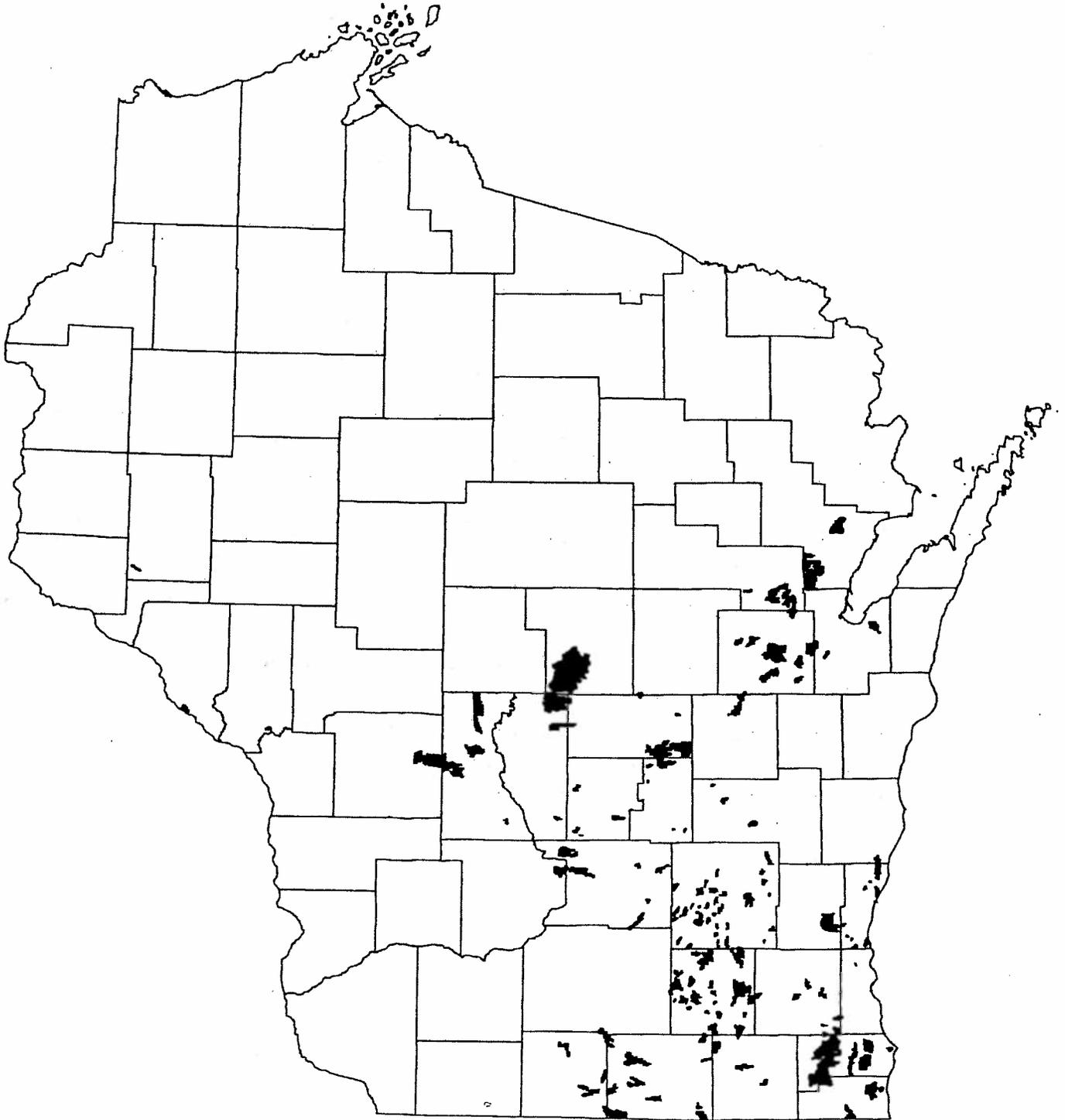
### What is a Drainage District under Chapter 88?

1. Special local unit of government
2. Group of landowners come together to petition their local circuit court to authorize the creation of the special district
3. Original Purpose: to drain land for agricultural use and thereafter for the purpose of controlling the flow of the water through the district to avoid material injury to the land (i.e. flooding)
4. Funding Mechanism: the drain district's governing board assesses a fee to the landowners; individual landowners pay a share of the assessment according to their parcel's benefit of the drain
5. Funding Use: to maintain the drain (i.e. dredging), engineering studies, meeting costs, etc.

### What are some of the major issues facing Drain Districts?

1. Drain Districts are not consistently recognized by other local units of government (i.e. cities) as having planning jurisdiction
2. Nearly all Drain Districts are situated in the eastern part of the state where developmental pressure is the greatest
3. Because of increasing developmental pressure, Drain Districts desire to affirm their interest in preserving drains and they want impending land buyers to be aware of real estate drain district status so an informed decision can be made
4. Drains need to be preserved in order to control the flow of water to avoid material injury to land (i.e. water back-up, flooding)
5. If the ability of Drain Districts to maintain their respective drain is limited or restricted, the land will be subject material injury (i.e. flooding), whereby threatening the use and value of the land for agricultural purposes (original intention) or for developmental use such as sub-divisions

# Active and Stop Work / Suspended Drainage Districts in Wisconsin



Drainage Districts



Drainage District Program  
Agricultural Resource Management Division  
October 1999