

Clearinghouse Rule 18-052

PETITION OF THE STATE OF WISCONSIN DEPARTMENT OF AGRICULTURE, TRADE AND CONSUMER PROTECTION REPEALING AN UNAUTHORIZED RULE

The Wisconsin Department of Agriculture, Trade and Consumer Protection proposes the following permanent rule *to repeal* ATCP 48.01(8), ATCP 48.24; and *to amend* ATCP 48.01(14), ATCP 48.08(3)(a), ATCP 48.12(2), ATCP 48.14(1)(b), ATCP 48.14(3), ATCP 48.20(1)(a)3., ATCP 48.21(2)(a)2., ATCP 48.21(2)(b)1., ATCP 48.21(Note), ATCP 48.21(4)(a)1., ATCP 48.21(Note), ATCP 48.28(Note), *relating to* drainage districts.

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

Statutes Interpreted

Statutes interpreted: Wis. Stats. ch. 88.

Statutory Authority

Statutory authority: Wis. Stats. §§ 88.11 and 93.07(1).

Explanation of Agency Authority

The Department has general authority to adopt rules interpreting statutes under its jurisdiction (*see* Wis. Stat. § 93.07(1)). Under Wis. Stat. § 88.11, the Department is authorized to do all of the following by rule:

- Establish procedures for assessments and reassessments.
- Establish performance standards for drainage district structures, ditches, maintenance and operations, in order to minimize adverse effects on water quality.
- Establish a procedure for an investigation of whether a drainage district complies with this section and any requirements imposed by the department under this section.

Related Statutes and Rules

This rule is related to Wis. Stats. §§ 19, 20.115(7)(d), 30.01(4m), 30.12, 30.18(2), 30.20, 31.02, 32, 93.08, 93.14, 93.15, 93.16, 227, 281.31(2m), 281.65, 893.80, 895.46(8), 946.13, and 985; Wis. Admin. Code chs. ATCP 1, NR 115, NR 117, and NR 811.

Brief Summary of Proposed Rule

First adopted in July 1995, Wis. Admin. Code ch. ATCP 48 (drainage rule) established the statewide framework of performance standards and procedures required to implement Wisconsin's drainage of lands law, Wis. Stat. ch. 88 (drainage law). The requirements in statute and rule apply to drainage districts—special purpose districts formed primarily for the purpose of draining agricultural land—and the county drainage boards responsible for operating these drainage districts.

Among other things, the drainage rule includes a definition of a drainage district corridor, provisions for establishing, accessing and maintaining corridors, requirements for annual inspections and reports, and guidance on state and local permits required to perform maintenance activities.

2017 Wisconsin Act 115 made a number of changes to the drainage law, which created inconsistencies with the drainage rule. Act 115 redefined a drainage district corridor to apply to more than ditches, and codified requirements with respect to the establishment, accessibility, and maintenance of corridors. It created an option for county drainage boards to designate a different fiscal year for its annual reports. It also added exemptions to state and local permitting related to the maintenance of district ditches.

The proposed rule is intended to repeal rules that the Department lacks the authority to promulgate based on revisions to Wis. Stat. ch. 88, through enactment of 2017 Wisconsin Act 115. Furthermore, the proposed rule is intended to ensure consistency with Wis. Stat. ch. 88.

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CHAPTER ATCP 48 DRAINAGE DISTRICTS

SECTION 1. ATCP 48.01 (8) is repealed.

SECTION 2. ATCP 48.01 (14) is amended to read:

“Maintenance costs” means costs for the maintenance and repair of district drains and corridors ~~under subch. IV.~~

SECTION 3. ATCP 48.08 (3) (a) is amended to read:

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

SECTION 4. ATCP 48.12 (2) is amended to read:

Before a county drainage board or its agent performs an inspection on private lands, other than in a district corridor ~~under s. ATCP 48.24,~~ the county drainage board or its agent shall notify the landowner of the inspection. 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.

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

Whether a district corridor has been established and is being maintained ~~around every district ditch in compliance with this chapter.~~

SECTION 6. ATCP 48.14 (3) is amended to read:

INSPECTION REPORT. A county drainage board shall, in conjunction with its annual report for each drainage district under s. 88.24, Stats., prepare an annual report summarizing the results of its inspection under sub. (1), including any comments received under sub. (2). ~~The county drainage board shall file a copy of its report with the county zoning administrator and with the department by December 1 of each year.~~ Before filing the report under this subsection, the county drainage board shall present its report at a public meeting which is preceded by a class 2 notice under ch. 985, Stats. Notice of the meeting shall also be sent to all known landowners in the drainage district.

SECTION 7. ATCP 48.20 (1) (a) 3. is amended to read:

The intended location and width of every district corridor ~~required under s. ATCP 48.24.~~

SECTION 8. ATCP 48.21 (2) (a) 2. is amended to read:

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

SECTION 9. ATCP 48.21 (2) (b) 1. is amended to read:

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

SECTION 10. ATCP 48.21 (2) (b) (Note) is amended to read:

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

SECTION 11. ATCP 48.21 (4) (a) 1. is amended to read:

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

SECTION 12. ATCP 48.21 (4) (a) (Note) is amended to read:

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

SECTION 13. ATCP 48.24 is repealed.

SECTION 14. ATCP 48.28 (2) (Note) is amended to read:

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.~~

SECTION 15. EFFECTIVE DATE AND INITIAL APPLICABILITY.

This rule takes effect after the department files a certified copy of the rule with the legislative reference bureau under s. 227.20, Wis. Stat., together with a copy of a decision by the joint committee for review of administrative rules to approve the department's petition under s. 227.26(4)(b)3.a., Wis. Stat.

Dated this _____ day of June, 2018

WISCONSIN DEPARTMENT OF AGRICULTURE,
TRADE AND CONSUMER PROTECTION

By: Sheila Harsdorf, Secretary