

Clearinghouse Rule 21-039

**STATE OF WISCONSIN
DEPARTMENT OF AGRICULTURE, TRADE AND CONSUMER PROTECTION**

**PROPOSED ORDER OF THE DEPARTMENT OF AGRICULTURE, TRADE AND
CONSUMER PROTECTION REPEALING A RULE**

The Wisconsin Department of Agriculture, Trade and Consumer Protection (Department) is petitioning the joint committee for review of administrative rules to repeal rules the department has determined to be unauthorized rules using the processes under s. 227.26 (4), Stats.

PROPOSED ORDER

- 1 An order of the Department of Agriculture, Trade and Consumer Protection *to repeal* ss. ATCP
 - 2 48.01 (8), 48.24, Subchapter IX; and *to amend* ss. ATCP 48.01 (14), 48.08 (3) (a), 48.12 (2), 48.14
 - 3 (1) (b), 48.20 (1) (a) 3., 48.21 (2) (a) 2., (2) (b) 1., (4) (a) 1., and (Note), 48.22 (5) and (Note),
 - 4 48.28 (Note), *relating to* drainage districts.
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**Analysis Prepared by the Department of
Agriculture, Trade and Consumer Protection**

Statutes Interpreted

Statutes interpreted: Sections 88.15 and 88.74, Stats.

Statutory Authority

Statutory authority: Sections 88.11 (1) (h), (i), and (k), 88.15, and 93.07 (1), Stats..

Explanation of Agency Authority

The Department has general authority to adopt rules interpreting statutes under its jurisdiction (*see* s. 93.07 (1), Stats.). Under s. 88.11, Stats., 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.

Pursuant to s. 227.26 (4), Stats., the Department may petition for repeal of an unauthorized rule. An unauthorized rule is one that “an agency lacks the authority to promulgate due to the repeal or amendment of the law that previously authorized its promulgation.” Sections 20.115 (7) (d) and 88.15, Stats. (2005) appropriated funds and directed the Department to make grants to county drainage boards to aid compliance. Section 88.15, Stats. (2005), directed the Department to promulgate rules for the administration of the grant program, which are found in ATCP 48.60, the only section in subchapter IX. 2007 Wisconsin Act 20 repealed ss. 20.115 (7) (d) and 88.15, Stats.

Related Statutes and Rules

This rule is related to chs. 19 and 985, Stats.; ss. 20.115 (7) (d), 30.01 (4m), 30.12, 30.18 (2), 30.20, 31.02, 32, 88.74, 93.08, 93.14, 93.15, 93.16, 227, 281.31 (2m), 281.65, 893.80, 895.46 (8), 946.13, Stats.; and chs. ATCP 1, NR 115, NR 117, and NR 811, Wis. Admin. Code.

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.

There are several inconsistencies with the drainage rule due to 2007 Wisconsin Act 20 and 2017 Wisconsin Act 115. Sections 189 and 2258 of 2007 Wisconsin Act 20 repealed ss. 20.115(7) (d) and 88.15, Stats., which authorized and appropriated funds for grants to county drainage boards and directed the Department to make grants to county drainage boards to aid compliance. 2017 Wisconsin Act 115 made additional changes to Wis. Stat. ch. 88, relating to drainage districts and regulating the removal of material from certain drainage ditches.

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TEXT OF RULE

5 **SECTION 1.** ATCP 48.01 (8) is repealed.

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

7 (14) "Maintenance costs" means costs for the maintenance and repair of district drains and
8 corridors ~~under subch. IV.~~

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

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

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

13 (2) Before a county drainage board or its agent performs an inspection on private lands,
14 other than in a district corridor ~~under s. ATCP 48.24,~~ the county drainage board or its agent shall
15 notify the landowner of the inspection. Notice may be given in person, by telephone, by mail or,
16 if the landowner is not available, by posting notice at a conspicuous location at an entrance to the
17 land. Notice under this section is adequate if given at any time prior to entry.

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

19 (1) (b) Whether a district corridor has been established and is being maintained ~~around~~
20 ~~every district ditch in compliance with this chapter.~~

21 **SECTION 6.** ATCP 48.20 (1) (a) 3. is amended to read:

22 (1) (a) 3. The intended location and width of every district corridor ~~required under s.~~
23 ~~ATCP 48.24.~~

24 **SECTION 7.** ATCP 48.21 (2) (a) 2. is amended to read:

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

28 **SECTION 8.** ATCP 48.21 (2) (b) 1. is amended to read:

29 (3) (b) 1. A revised map of the drainage district, showing the designated drain and any
30 district corridor required ~~under s. ATCP 48.24~~ for that designated drain.

31 **SECTION 9.** ATCP 48.21 (2) (b) (Note) is amended to read:

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

38 **SECTION 10.** ATCP 48.21 (4) (a) 1. is amended to read:

39 (3) (a) 1. Obtains the written consent of each owner of land that is newly included in the
40 district corridor because of the realignment, or condemns that newly included land pursuant to s.
41 88.21 (6), Stats., and ch. 32, Stats. This subdivision does not apply if the realignment brings no
42 new land into the district corridor, or if no district corridor is required ~~under s. ATCP 48.24.~~

43 **SECTION 11.** ATCP 48.21 (4) (a) (Note) is amended to read:

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

48 **SECTION 12.** ATCP 28.22 (5) is amended to read:

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

55 **SECTION 13.** ATCP 48.24 is repealed.

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

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

62 **SECTION 15.** Subchapter IX — Grants to County Drainage Boards is repealed.

63 **SECTION 16.** EFFECTIVE DATE. The rules repealed in this order shall take effect on the first
64 day of the month following publication in the Wisconsin Administrative Register, pursuant to s.
65 227.22 (2) (intro.), Stats.

(END OF TEXT OF RULE)

Dated this __30th__ day of April, 2021

WISCONSIN DEPARTMENT OF AGRICULTURE,
TRADE AND CONSUMER PROTECTION

By: Randy Romanski, Secretary-designee