



## WISCONSIN DRAINAGE DISTRICT PROGRAM UPDATE

WINTER 2018

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Wisconsin Counties Containing  
Drainage Districts



### SUMMARY OF THE NEW DRAINAGE LEGISLATION

After a lot of effort from many of you, the drainage legislation became effective on December 2, 2017. Most of the language in the drainage bill relates to four issues: 1) district corridors, 2) district maintenance and related activities, 3) drainage board membership and operation, and 4) district creation, expansion, and transfers.

No doubt, you will have some questions about the new legislation. We do, too. As we learn more about how these changes might impact drainage districts, we will get this information out to you.

In the meantime, the attached summary of the key provisions provides you with our understanding of the new legislation. To help develop this summary, we consulted with an attorney at the Wisconsin Legislative Council who was involved in creating the drainage bill. Take a look, and let us know if you have questions.

### CHANGES TO THE DRAINAGE BOARD HANDBOOK

Changes to the drainage law will necessitate revising several parts of the County Drainage Board Handbook. Knowing that many drainage board members refer to the handbook regularly, we will contact you when we have a revised handbook available on the DATCP website. Stay tuned.

On a related note, looking at how the new legislation borrowed language from ATCP 48, we are considering our options for changing our rule.

### ANNUAL REPORTING

Thank you to the twelve county drainage boards that have filed their annual report for the fiscal year which ended on August 31, 2017.

Remember that it is in your districts' interest to complete the annual report and file it with DATCP and the local governments in which district territory is located. Section 88.24, Wis. Stat., requires local governments that receive your annual report to consider it before making zoning and

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planning decisions that may affect drainage districts.

Also, the new law allows drainage boards to choose a different fiscal year for annual reporting. Your board must notify DATCP if you intend to move to a different fiscal year than the standard fiscal year spanning from September 1 to August 1. As part of your notification, you would need to identify a new date for filing your report to DATCP, which is typically 3 months from the end of your fiscal year.

**PERMIT EXEMPTIONS**

One of the main purposes of changing the drainage law was to provide exemptions from certain state and local permits for the maintenance of ditches. However, the details of each exemption matter for the following reasons: not all maintenance activities are exempt from permits, some permit exemptions come with conditions, and new notice requirements apply. To take advantage of the permit exemptions, it is worth understanding the differences between each as they apply to ditch and corridor maintenance activities.

See the attached tables providing a breakdown of the different permit exemptions now provided by statute. Because the permit exemptions are new and based on certain conditions, we highly recommend that drainage board members check in with each applicable permitting authority before claiming a permit exemption. And if exemptions from DNR permits will be claimed, consider revising or establishing a Memorandum of Agreement with DNR to document a common understanding of how Boards may properly claim permit exemptions.

**DISTRICT CORRIDOR CHANGES**

Of the various new provisions added to the drainage law, you may not appreciate how the newly created section 88.74, Wis. Stat., makes changes to district corridor requirements originally in ATCP 48. For example, there are new requirements relating to the establishment of district corridors.

So how does a drainage board establish district corridors? This should be done whenever creating a district, designating private drains as district drains, and annexing land in which new district drains are designated.

A better question is how does a drainage board create a record of established district corridors? One very obvious way is through the DATCP-approved plans and specifications. Recording the corridor on a deed would be another way to create a record. An order by the drainage board, alone, may not constitute a sufficient record of an established corridor. For instance, if a board decides to issue an order widening a district corridor beyond the usual 20-foot corridor, the board should then revise their DATCP-approved specifications to record the wider corridor.

Also boards must now give notice of any corridor established under the drainage law to the county and the city, village, or town in which the corridor is located. Boards may provide such notice when they share their annual reports with these entities.

**Summary of New Drainage Law, 2017 Wisconsin ACT 115,**  
<https://docs.legis.wisconsin.gov/2017/related/acts/115.pdf>

**Drainage District Corridors**

1. Codifies corridor requirements in s. 48.24, Wis. Admin. Code, with these distinctions:
  - a. Identifies a new purpose to maintaining corridors, in addition to providing effective access to drains and protecting water quality in drains: “to allow for the placement of dredge materials from maintaining the drain or facility.”
  - b. Requires establishing, at minimum, a corridor extending 20 feet on either side of district ditches as well as from the centerline of any other district drain or facility (e.g. underground drainage tiles).
  - c. Requires that boards provide notice of corridors to affected local governments.
  - d. Adds a new notice requirement for general maintenance work in the corridor, requiring a board to notice affected landowners no later than March 1 of the year work will be performed.
  - e. If the board gives written permission to a landowner to crop or place obstructions in a corridor, the board may now be liable for any damage done to crops or obstructions while performing corridor maintenance.
2. Precludes city, village, town, or county from restricting or imposing conditions (through ordinance or other means) on the board's maintenance of district corridors or ditches unless specifically required by federal law.
3. Requires that land in corridors be assessed for property taxes in the same class as adjoining land if owned by the same person.
  - a. While of no immediate impact to boards, this provision will require property tax reassessment of lands in corridors that are assessed at a higher value than cropland (e.g. classified as undeveloped, ag forest or productive forest). This provision will reduce tax assessed value for land in corridors adjacent to cropland and decrease local tax revenues from these properties, shifting tax burdens on other classes of property (e.g. residential and other development uses).

**Drainage District Maintenance and Related Activities**

1. Creates a new exemption from Chapter 30 permits to dredge drainage ditches that are navigable waters
  - a. Establishes conditions that must be followed to claim the exemption, including standards for disposing of dredged material, controls to prevent the spread of invasive species, restrictions to protect wetlands and fish.
2. Creates a new exemption from local floodplain zoning ordinances for lands that are adjacent to farm drainage ditches if the disposal of material in a floodplain is within the drainage district corridor and the lands are used for nonstructural agricultural use or other nonstructural use.
  - a. Retains the floodplain requirements to the extent necessary for the municipality to maintain eligibility in the National Flood Insurance Program.
3. Creates a new exemption from wetlands permitting requirements for the deposit of material into a wetland that is a result of activity undertaken by a drainage district to maintain district drains in accordance with plans and specifications approved by DATCP.
  - a. DATCP estimates that 116 of the 175 drainage districts are active, and 61 of the active drainage districts have DATCP approved plans. For drainage districts without approved

- plans, DATCP estimates a one-time cost to each district of \$20,000 to \$70,000 to develop a plan and specification that is approvable under ATCP 48.
4. Creates a new exemption from local storm water permit requirements for the discharge of storm water from land containing dredged material removed from an adjacent drainage district ditch.
  5. Ends the requirement that drainage boards keep a minimum dollar amount (equal to 5% of the confirmed benefits to lands in the drainage district) in a maintenance and repair fund.

### **Drainage Board Membership and Operation**

1. Expands the entities that can nominate persons to serve as county drainage board members.
  - a. May help boards identify potential members, but increases the possibility that nominees are not local farmers.
2. Requires that drainage boards expand to five members to add a local official if they oversee a district drain located in a city or village.
  - a. Affected villages or cities must recommend chief executive for appointment to the county drainage board. Approximately 60 cities and villages have some part of a drainage district within their boundaries.
  - a. If at least one such recommendation is received, the county drainage board must become a five-member board. DATCP estimates as many 20 county drainage boards may need to accommodate appointment of a city or village official.
  - b. The circuit court must appoint one of the five drainage board members from the list of those recommended by cities and villages.
    - a. If there comes a time when no such cities or villages wish to recommend board members, the board may transition back to a three-member board.
3. Creates new requirement to notify cities, villages and towns about drainage board meetings when there are agenda items affecting these entities.
  - a. Costs are not significant because electronic notice is allowed.
4. Allows a drainage board to use a different fiscal year for reporting
  - a. Must notify DATCP that if the board intends to use fiscal year other than one that begins on September 1 and ends on August 31<sup>st</sup>.
5. Reinstates Leola District (lifting the suspension) but restricts authority to levy assessments.

### **Drainage District Creation, Expansion and Transfers**

1. Requires local government approval for the creation or expansion of a drainage district within the city or village, or within a town if the town has a permit for stormwater management.
2. Prohibits expansion of a drainage district into a county in which no portion of the drainage district is already located.
3. Modifies requirements for a partial transfer of drainage district to a municipality and to require an agreement between the municipality and the board that:
  - a. Outline the duties and responsibilities of the respective parties to maintain the drain system as provided in the DATCP approved plans and specification for the drain system.
  - b. Describe the financial arrangement for paying the costs to maintain the drain.
  - c. Require that corridors are maintained on land transferred under agreement, and there is access to these corridors. Drainage boards and others have a new right to enter lands transferred to municipality.
  - d. Provides a mechanism for the drainage district to conduct maintenance work in the transferred area if the municipality fails to do so, and recover its costs.

## How does the new drainage law (2017 Act 115) change what permits are needed to do work in a drainage district?

### Activity 1: Ditch cleaning and disposal of dredged materials (spoils)

| You will need this permit           | If the activity   | Unless   | And you must   |
|-------------------------------------|---|--|--|
| DNR Chapter 30                      | Impacts navigable waters                                      | All conditions in Table A are met  | 1. Notify affected landowners of general maintenance in a corridor before March 1 of the year in which maintenance will be performed<br>2. Provide specific notice to affected landowners in advance of deposition of spoils in the corridor (may be combined with #1) |
| DNR wetland*                        | Impacts wetlands  | Dredged materials are removed and disposed of as a part of maintaining a drain in accordance with DATCP-approved drainage district plan and specification                          |  |
| DNR stormwater/site disturbance     | Disturbs one or more acres of land                            | Materials are placed on land adjacent to where the materials were removed  |  |
| Local stormwater / site disturbance | Disturbs land; triggers may vary (e.g. 4000 sq feet of land)  | Materials are placed in an established corridor as part of maintenance   |  |
| Local Shoreland zoning              | Disturbs land within 300 feet of a waterway (river or stream) | Materials are placed in an established corridor as part of maintenance   |  |
| Local Floodplain zoning             | Occurs in designated floodway or flood fringe                 | Materials are placed in an established corridor as part of maintenance (exemption may not apply if local officials must regulate to maintain the National Flood Insurance Program) |  |

\*There are additional federal requirements that are unaffected by the new drainage law

| <b>Table A: Answer "yes" to each question to qualify for the exemption from DNR dredging permit</b>  |
|--|
| 1. The material is removed for the purpose of maintaining the ditch  |
| 2. None of the materials to be removed is listed in a DNR database identifying contaminated properties   |
| 3. The removed material is spread either of the following manner:  |
| a. Materials are graded and smoothed to blend into cultivated lands, be spread in slope of less than 8 to 1, and spread no more than 2 feet deep at the top of the bank of the ditch   |
| b. If the removed material is placed in a district corridor, it must be <b>setback 12 feet from the top of the bank of the ditch</b> , piled at a stable angle of repose for that material, or piled at a slope of 2 to 1 or less  |
| 4. The following actions are taken to prevent spread of invasive species or viruses after dredging and before reuse of equipment:  |
| a. Remove plants, animals, mud and other debris from equipment   |
| b. Use a high pressure wash on equipment or let dry for 5 days   |
| 5. The material is not discharged into these high quality wetlands: Great Lakes ridge and swale complexes, interdunal wetlands, coastal plain marshes, emergent marshes containing wild rice, sphagnum bogs in the area located south of a horizontal line drawn across the state based on the routes of STH 16 and STH 21 west of Lake Winnebago and on USH 151 east of Lake Winnebago, boreal rich fens, and calcareous fens |
| 6. To protect fish spawning and habitat, no removal activities may occur:  |
| a. Between March 15 and June 1 unless the DNR area fish biologist waives this requirement.   |
| b. In a trout stream or a tributary of trout stream unless coordinated with the DNR fisheries staff  |

## How does the new drainage law (2017 Act 115) change what permits are needed to do work in a drainage district?

### Activity 2: Vegetation or tree removal in corridor – cutting, mowing or pesticide application

| You will need this permit   | If the activity   | Unless  | And you must   |
|---|---|---|--|
| DNR stormwater / site disturbance   | Disturbs one or more acres of land  | Materials are placed on land adjacent to where the materials were removed | 1. Notify affected landowners of general maintenance in a corridor before March 1 of the year in which maintenance will be performed<br>2. Provide specific notice to affected landowners in advance of cutting trees over 6 inches in diameter (may combine with # 1) |
| Local stormwater / site disturbance   | Disturbs land; triggers may vary (e.g. 4000 sq feet of land)  | Materials are placed in an established corridor as part of maintenance    |  |
| Shoreland zoning  | Disturbs land within 300 feet of a waterway (river or stream)   | Materials are placed in an established corridor as part of maintenance    |  |
| DNR aquatic herbicide   | Is applied to vegetation within the ordinary high watermark and immediately adjacent to the navigable waterway* | Herbicide is applied only within the corridor**                           |  |
| *Use DNR-approved aquatic herbicides and obtain NR 107 Aquatic Herbicide permit<br>**Apply according to label directions and in compliance with ATCP 29. See s. ATCP 48.28(3) |   |   |  |

**Note:** The new legislation does nothing to affect the need to obtain federal permits.

Additional Resources:

Final law, <http://docs.legis.wisconsin.gov/2017/related/acts/115.pdf>