



Home > News & Publications > WisBar News



ENVIRONMENTAL LAW SECTION BLOG

JUNE  
06  
2017

## Wisconsin Assembly Ponders Significant Changes to Chapter 88 Drainage Legislation

JOHN C. MITBY, ELIZABETH L. SPENCER

The Wisconsin State Assembly has introduced legislation to amend or eliminate numerous sections of Chapter 88 and related statutes, providing the biggest updates to the drainage statutes in decades. The bill proposed by the Wisconsin State Assembly affects a wide range of areas from farming to conservation, say John Mitby and Elizabeth Spencer.

The Wisconsin State Assembly recently considered legislation to amend or eliminate numerous sections of Chapter 88 and related statutes, providing the biggest updates to the drainage statutes in decades.

Drainage districts and their boards play a vital role in agriculture, the environment, and water law. Here's a brief overview of drainage districts and the proposed statutes governing them.

What Are Drainage Districts?

Live 1

4/4/2018

Formed in the early 1900s, drainage districts are local entities organized to drain land in order to provide aerated soil, vital for the optimal growing of corn and soybeans.

A drainage district acts as one system, orchestrating the drainage of farm land by ditches or tiles that cross individual property and municipal boundaries to prevent soil flooding. The drainage ditches not only benefit farmland but, depending on the district, take water from platted areas and municipal treatment plants. The property owners in a district whose land benefits from the drainage are required to pay an assessment to cover the cost of maintaining and repairing the drainage system.



**John Mitby**, U.W. 1971, is with **Hurley Burish & Stanton, S.C.**, Madison, where his commercial practice includes resolving a variety of matters relating to contracts, transactional work, real estate, employment, financing, mediation, municipal, business, insurance, and litigation.



**Elizabeth L. Spencer**, U.W. 2017, is an associate with **Hurley Burish & Stanton, S.C.**, Madison. She assists businesses and individuals in transactional matters, and has worked on drainage district law in the past year.

Drainage districts are governed by Chapter 88 of Wisconsin Statutes and ATP 48 of the administrative code. The districts are operated by independent drainage boards consist of three members nominated by local farmers and committees and appointed by the circuit court. Each member provides a separate area of expertise related to drainage.

Each summer, the board inspects the ditches for repair and generates a report on the physical and financial health of the district.

2017 Assembly Bill 246

Beginning in 2015, legislation was set forth to drastically change the structure of the drainage boards and maintenance of the districts.

Through feedback and public

hearings, the legislation has changed over time and, in April 2017, **Assembly Bill 246** was introduced.

While Chapter 88 has been amended previously, this legislation is unique, in that it seeks to increase the role of municipalities in maintenance and operation of the both the districts and the boards.

Here are seven areas affected by the legislation:



## Transfer of District Jurisdiction

Under current law, jurisdiction of a district may be transferred from the board to a local city or village. The owners of the majority of the land in a district located entirely, or partly, within the boundaries of a municipality may petition the board to transfer jurisdiction of the district, or the part within the municipality, to the municipality. This may only occur if the board and municipality are in agreement of the terms of the transfer. Additionally, a city or village may adopt a resolution to accept a drain, or part of one, and administer it under their own drainage laws.

Under the new legislation, the owners of the majority of the land proposed to be transferred in a district may petition the board to transfer jurisdiction to the municipality. After a hearing, the board would be able to order a transfer of jurisdiction if the petition was signed by a sufficient number of the land owners, the municipality has given its approval, and the municipality and district have entered into an agreement addressing a series of statutory requirements.

Additionally, a municipality could petition the board to transfer jurisdiction and after a hearing, the board may choose to transfer jurisdiction if there is an agreement meeting statutory requirements.

An interesting part of this new legislation includes the ability for the district to file a declaratory judgment action in the court having jurisdiction over the district if the municipality has entered into an agreement with the district for maintenance and does not perform it.

In 1992, the Legislative Council established the Special Committee on Drainage District Laws that reviewed circuit court involvement. At the time, each drainage board was supervised by the local circuit court. The majority of board decisions required court approval.

In September 1992, Portage County Circuit Court Judge Frederic Fleishauer testified to the Special Committee that, “many judges would rather have this responsibility removed and said that the primary difficulty with the present statutes is that judges may have a conflict of interest when they supervise drainage board activities and then deal with disputes where the drainage board may be a litigant.” Wis. Legis. Council Rep. No. 14, at 5 (1993).

Further, numerous judges urged the Special Committee to discontinue the supervisory role of the circuit courts with none requesting continuance of the authority. *Id.* at 10. At a meeting the following month the Special Committee concluded that most drainage board decisions should be removed from circuit court jurisdiction. *Id.* at 6.

In 1994, the 1993 Wisconsin Act 456 was approved dramatically decreasing circuit court influence on drainage districts. The Act removed

the circuit court's approval of final decisions for the majority of board actions and created a new procedure where a party can petition the circuit court by writ of certiorari to review a board decision.

#### Drainage Board Membership

Currently, members of the board are appointed by the circuit court of the applicable county. Board membership may vary from three to five members recommended by members of their county's committees on agriculture and extension education. Local landowners may also be part of the nomination process.

The new legislation proposes that the board must be made up of five members, including the district's city or village chief executive or designee. This provides the potential for complications in the future. Board members are required to inspect the ditches every summer; it seems unlikely that an individual representing just one municipality would want to inspect all ditches in the county. Further, the members participate in voting on assessments. There may be a conflict when a member must vote on an assessment that would affect his constituents.

Further the bill makes additions about who may nominate individuals to the board. For example, the new legislation includes specifically named growing associations and dairy groups, but "real estate organizations" that are undefined in the bill.

#### Access Corridors

Under current law, drain access corridors are governed by rules promulgated by the Department of Agriculture, Trade and Consumer Protection (DATCP). This bill provides statutory regulation of the corridors. This includes the requirement that there must be a 20-foot corridor on either ditch of the ditch for maintenance access. However, this requirement appears to be in conflict with NR 115, which requires a 35-foot buffer, and NR 110, which include a 5-foot nontillage requirement. These requirements make it difficult to determine which applies, and the setbacks remove valuable crop land from farm use.

#### Removal of Material

Currently, removing material from the bed of a navigable body of water is only authorized if the Department of Natural Resources (DNR) issues an individual permit or a general permit.

The new legislation creates an exemption from this prohibition if certain conditions are met. The district will only qualify for the exemption to remove material if the removal is done in the process of maintaining the ditch, it is not part of any area designated by the DNR as being



contaminated, and the equipment is properly cleaned to prevent the spread of invasion species.

#### Floodplain Zoning

Currently, there is a prohibition on placing structures within any floodplain in violation of a floodplain zoning ordinance. However, this does not apply to lands adjacent to drainage ditches if the lands are not within the floodplain of a natural navigable stream or river.

This bill expands this exception, stating that the floodplain zoning ordinance also does not apply to lands adjacent ditches if the ditch is subject to the jurisdiction of a district, the disposals of the material in a floodplain is within the district corridor, and the lands adjacent to the corridor are maintained in nonstructural agricultural use.

#### Wetland Permits

The DNR currently may issue general wetland permits for discharges or dredge or fill material into certain wetlands, and may require a person to obtain an individual permit if the DNR determines that conditions require additional restrictions on the discharge to prevent adverse impacts to wetland function.

The new legislation creates an exemption to wetland permitting requirements for discharge that is the result of activity undertaken by the district to maintain it in accordance with plans approved by DATCP. Further, this will require the DNR to waive any state water quality certification requested under the federal Clean Water Act for such a discharge.

#### Maintenance Permits

Finally, current law requires a board to obtain a permit to conduct certain activities affecting the district drain including repairing, enlarging, clearing or maintaining the drain. This bill exempts the board from this requirement if the board is removing material from the bed if it also is required to obtain a permit from the DNR.

The bill proposed by the Wisconsin State Assembly affects a wide range of areas from farming to conservation. However, it seems to be focused on increasing the involvement of municipalities and representatives who may not have the necessary background to make well-informed decisions affecting a broad population with varying interests.

**Need help? Want to update your email address?**  
**Contact [Customer Service](#), (800) 728-7788**

Environmental Law Blog is published by the State Bar of Wisconsin. To contribute to this blog, contact [Gabe Johnson-Karp](#) and review [Author Submission Guidelines](#). Learn more about the [Environmental Law Section](#) or [become a member](#).

**Disclaimer:** Views presented in blog posts are those of the blog post authors, not necessarily those of the Section or the State Bar of Wisconsin. Due to the rapidly changing nature of law and our reliance on information provided by outside sources, the State Bar of Wisconsin makes no warranty or guarantee concerning the accuracy or completeness of this content.

© 2018 State Bar of Wisconsin, P.O. Box 7158, Madison, WI 53707-7158.

