

## CHAPTER 88

### DRAINAGE OF LANDS

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#### SUBCHAPTER I

##### GENERAL PROVISIONS

**88.01 Definitions.** In this chapter, unless the context requires otherwise:

(1) “Benefits” includes all pecuniary advantages accruing to lands from the construction of the drain or proposed drain.

(2) “Board” or “drainage board” means the board created and appointed under s. 88.16, 1991 stats., or under s. 88.17.

(2m) “Bond” means any bond, note or other obligation of a drainage board issued under this chapter, including any refunding bond.

(3) “Clerk of court” means the clerk of circuit court.

(4) “Cost of construction” includes damages to lands both within and outside the district, reasonable attorneys’ fees for petitioners and the board, and all other reasonable and necessary expenses incurred in the organization of and in the construction and completion of the works of a drainage district.

(5) “County treasurer” means the treasurer of the county in which the drainage board having jurisdiction of the drainage district is located.

(6) “Court” means the circuit court of the county in which the drainage district is located or the circuit court having jurisdiction of the proceedings in any drainage district located in more than one county.

(7) “District” means any drainage district subject to this chapter.

(8) “Drain” means any device for the drainage of water from land or the protection of land from water, including open ditches, tiles, pipelines, pumps and levees.

(8m) “Duck Creek Drainage District” has the meaning given in s. 30.01 (1nm).

(9) “Interested person” includes the state or any agency or subdivision thereof.

(10) “Judge” means the judge of the circuit court having jurisdiction of the proceedings of any drainage district, or the person sitting for the judge.

(11) “Land” or “lands” means any real property or interest therein, whether privately or publicly owned, including railroad rights-of-way, public highways, streets and alleys.

(12) “Mortgagee” means every person holding a mortgage or an assignment of a mortgage against lands within a drainage district or proposed drainage district whose name and post-office address is known to the board or whose mortgage or assignment is legally recorded and contains the post-office address of such mortgagee or assignee.

**History:** 1977 c. 449 ss. 193 to 195, 497; 1983 a. 189; 1989 a. 31; 1993 a. 456, 490; 1999 a. 9.

**88.02 Outstanding securities and contracts not affected.** Nothing in this chapter may render more difficult the collection of outstanding bonds or notes of any drainage organization or impair the obligation of any contract made by the organization or defeat any vested property right of the organization. No assessment of supplemental benefits nor any reassessment of benefits may disturb any previous assessment for the cost of construction while bonds or notes based on the construction are unpaid. Assessments shall remain liens upon the same lands and claims against the same corporations in the same amounts as when first assessed and recorded, until the bonds and notes based on the construction are paid or refunded.

**History:** 1993 a. 456.

**88.03 Drainage proceedings equitable in nature.** All court proceedings under this chapter are equitable in nature. The court may in any proceeding bring in new parties as if they were original parties to the proceeding.

**History:** 1977 c. 449; 1993 a. 456.

**88.032 Amendment of documents. (1)** Any document or paper filed or entered in a proceeding before the court may at any time be amended, modified or corrected by the court as the facts warrant and upon such notice as the court orders.

(2) Any document or paper filed or entered in a proceeding before the drainage board may at any time be amended, modified or corrected by the drainage board as the facts warrant and upon such notice as the drainage board orders, except that no amendment, modification or correction of any assessment may be made after the issuance of money obligations based on the assessment if the result of the amendment, modification or correction would be to render the obligations more difficult to collect.

**History:** 1993 a. 456 ss. 10, 11.

**88.04 General rules relating to signatures on petitions. (1)** Any person entitled to sign a petition to the court or the drainage board under this chapter may sign through an agent. The authority of the agent shall be in writing and shall be filed with the drainage board but need not be acknowledged, sealed or witnessed.

(2) If any minor or incompetent person owns land in a drainage district or proposed drainage district or proposed annex to a drainage district, the general guardian or next of kin of such minor or incompetent may sign petitions under this chapter for and on behalf of the minor or incompetent.

**History:** 1991 a. 316; 1993 a. 456.

**88.05 General rules applicable to notices of hearings.** If a hearing is required on a petition or report filed with the court or a petition filed with the drainage board under this chapter, the

following rules apply unless some different procedure is expressly provided under this chapter:

(1) In the case of a court hearing:

(a) The order fixing the time and place of the hearing shall be made by the court.

(b) The notice of hearing is sufficient in form and substance if it recites all of the following:

1. That a particular petition or report has been filed.
2. The place of filing.
3. That it is subject to the inspection of all interested persons.
4. If a petition, the request for relief, or the substance of the request.
5. The time and place of the hearing.

6. That all objections to the jurisdiction of the court or to the sufficiency or legality of any petition or report shall be filed with the clerk of court in writing before the hearing and that the objections must be set forth clearly and in detail.

(2) In the case of a drainage board hearing:

(a) The order fixing the time and place of the hearing shall be made by the drainage board.

(b) The notice of hearing is sufficient in form and substance if it recites all of the following:

1. That a particular petition or report has been filed.
2. The place of filing.
3. That it is subject to the inspection of all interested persons.
4. If a petition, the request for relief, or the substance of the request.
5. The time and place of the hearing.

6. That all objections to the jurisdiction of the drainage board or to the sufficiency or legality of any petition, report or assessment or to the equity of any assessment or award of damages shall be filed with the drainage board in writing before the hearing and that the objections shall be set forth clearly and in detail.

(3) Notice of hearing shall be given by both mailing and publication, as follows:

(a) The notice shall be mailed, at least 20 days before the date set for hearing, to those persons designated by the applicable section as entitled to receive notice. Ordinary mail may be used.

(b) The notice shall be published as a class 3 notice, under ch. 985, in the affected area. The last insertion shall be not more than 20 days before the hearing.

(4) For the purpose of convenience of cross reference, persons commonly designated by specific sections of this chapter as entitled to receive notice are grouped as follows:

(a) The chairperson of the county highway committee except in a county with a highway commissioner appointed under s. 83.01 (1) (c), the highway commissioner; the chairperson of the county land conservation committee in the county involved; the secretary of natural resources; the state drainage engineer; and, where a railroad company is involved, the person specified in sub. (6).

(b) The persons enumerated in par. (a) and all owners of record whose lands may be affected.

(c) The persons enumerated in par. (a) and all owners and mortgagees of lands affected whose names and post-office addresses are known or can with reasonable diligence be ascertained.

(5) In the case of a court hearing, in lieu of the service by mail specified in sub. (3), the notice of hearing may be served as provided in s. 801.11 for the service of a summons, at least 20 days before the time fixed for hearing. The service is sufficient to give the court complete jurisdiction over the parties and their lands without any other service.

(6) Railroad companies shall file with the department of financial institutions a document stating the name and post-office address of the person upon whom any notice required by this chapter may be served.

(7) In the case of a court hearing, the board shall file with the court proof of publication and service of the notice required by this section. The certificate or affidavit of the person who made the service, publication or mailing, or who knows the facts, is sufficient proof of service, publication or mailing.

(8) Failure to give notice as provided by this section or to announce any adjournment does not defeat the jurisdiction of either the court or the drainage board. If a failure to give legal notice to any person entitled to notice is discovered before an order is entered, the court or drainage board shall adjourn the hearing and direct the giving of proper notice. If a failure to give the notice is discovered after the order is entered, the court or drainage board may order the person not served with notice to show cause why that person should not be bound by the order already entered. In any case, notice may be waived by appearance or by a written waiver filed with the court or drainage board.

**History:** Sup. Ct. Order, 67 Wis. 2d 585, 773 (1975); 1977 c. 449; 1981 c. 346 s. 38; 1985 a. 29; 1991 a. 316; 1993 a. 184, 456, 491; 1995 a. 27.

**88.06 General procedure for obtaining consent or approval of the court in drainage proceedings.** Whenever any action by the drainage board requires the consent or approval of the court and no other procedure is expressly provided, the procedure in this section applies:

(1) The board shall file with the clerk of court a petition asking the court's consent to or approval of the particular action that the board proposes to take.

(2) Upon receipt of the petition the court shall fix the time and place of the hearing on the petition and shall order the board to give notice of the hearing as provided in s. 88.05 (1) (b) to the persons specified in s. 88.05 (4) (b).

(3) At the hearing any interested person may appear and testify either for or against the petition, subject to the requirements of s. 88.07 (1). If the court is satisfied that the board's proposed action will be in the best interests of the districts involved, it shall grant the petition and approve the report, subject to the changes and conditions that it considers advisable. Otherwise, the court shall dismiss the petition.

(4) If a petition, which is basically the same in substance as a petition which has been decided or dismissed, is filed within 3 years after the dismissal, the court may refuse to order a hearing on the petition or to take any other action with respect to it.

**History:** 1977 c. 135 s. 19; 1993 a. 456.

**88.065 General procedure for drainage board hearings.** If this chapter requires the drainage board to conduct a hearing before issuing an order and no other procedure is expressly provided, the following procedure applies:

(1) Upon receipt of the petition, the drainage board shall fix a time and place of hearing on the petition and shall give notice of the hearing as provided in s. 88.05 (2) (b) to the persons specified in s. 88.05 (4) (b).

(2) At the hearing, any interested person may appear and testify either for or against the petition or object to the report assessing costs. If the drainage board is satisfied that the proposed action will be in the best interests of the districts involved, the board shall grant the petition and issue the order, subject to the changes and conditions that the board considers advisable. Otherwise, the drainage board shall dismiss the petition.

(3) If a petition, which is basically the same in substance as a petition which has been decided or dismissed, is filed within 3 years after the dismissal, the drainage board may refuse to order a hearing on the petition or to take any other action with respect to the petition.

(4) Except as provided in sub. (5), all meetings of the drainage board are subject to subch. V of ch. 19.

(5) (a) A gathering of drainage board members solely for one or more of the following purposes is not a meeting, as defined in s. 19.82 (2):

1. Observing, supervising or undertaking the construction, maintenance or improvement of drains.

2. Observing, supervising or undertaking the construction or maintenance of highways, railroads, bridges, utilities or other similar structures that may affect drains in any drainage district.

3. Collecting information by observation, survey or measurement or by discussions with an affected landowner at the site of a drainage ditch or a proposed drainage ditch.

4. Responding to natural disasters affecting a drain.

(b) Any action taken by a drainage board under par. (a) shall be reported by the board's secretary at the next meeting of the drainage board for inclusion in the board's minutes.

(c) A drainage board may not take any action at a gathering under par. (a) if the action will result in an increase in the assessment against any property in the drainage district.

**History:** 1993 a. 456.

**NOTE:** 1993 Wis. Act 456, which creates this section, contains extensive explanatory notes.

**88.07 General rules; drainage proceedings in court.**

(1) All objections made to the jurisdiction of the court or to the sufficiency or legality of any petition or report shall be in writing. The objections shall be set forth clearly and in detail and shall be filed with the clerk of court before the hearing.

(2) Several petitions may be filed in any proceeding. At any time before the sufficiency of the signers of the petitions has been adjudicated, additional signers may be added to the petitions with like effect as if they had signed the original petition.

(3) At any time before but not after the hearing has begun on any petition filed under this chapter, any petitioner may withdraw his or her name from the petition upon filing in court an undertaking with sufficient sureties to be approved by the court. The undertaking shall be conditioned that if the withdrawal of names reduces the number of signers below the number required by the section under which the petition is filed and thereby deprives the court of jurisdiction, the withdrawing petitioner will pay into court the costs of the drainage proceeding incurred prior to and including the making and entry of the order denying the relief requested in the petition and will pay into court the expenses incurred on the petition before his or her withdrawal.

(4) For satisfactory cause the court may adjourn any hearing for a period of not more than one month at any one adjournment. The adjournment of any meeting or hearing beyond the time, or failure to act within the time, provided in this chapter does not affect the jurisdiction of either the court or the drainage board, but a subsequent hearing shall be had and notice of the time and place thereof shall be given.

(5) Any hearing under this chapter may be adjourned by the court or presiding judge or, in his or her absence, by the clerk of court.

**History:** 1977 c. 135, 449; 1993 a. 456.

**88.08 Costs in drainage proceedings.** (1) In all proceedings under this chapter involving a petition to the court, the court shall by order tax the taxable costs of the proceeding. If costs are taxed against the drainage board, they shall not go against the board members personally but shall be paid out of the district funds or from funds received from the petitioners unless the court orders otherwise.

(2) If a petition for organization of a drainage district is dismissed before the appointment of a drainage board in the county, the order taxing costs shall be entered against the petitioners and in favor of any person who advanced moneys, rendered services or incurred other liabilities in prosecuting or contesting such proceedings, for the amount of such moneys, services and incurred liabilities.

(3) If proceedings are dismissed in any case where a drainage board has been appointed in the county, the order taxing costs shall be entered against the petitioners and in favor of the board for all costs, expenses and liabilities incurred by the board or by any

other person in prosecuting or contesting such proceedings and for the benefit of those who have rendered services or advanced or loaned money in prosecuting or contesting such proceedings.

(4) Before any order taxing costs is entered, a petitioner or the board or a person contesting the proceedings shall file with the clerk of the court a duly verified itemized statement of all costs, attorneys' fees, and other liabilities incurred in prosecuting or contesting such proceedings, upon which an order shall be issued requiring the petitioners to show cause why an order taxing costs should not be entered against them for the amount of costs, attorneys' fees and other liabilities. Notice of hearing of such order to show cause shall be given to the petitioners as provided in s. 88.05 (3). Such order need not contain an itemized statement of such account, but shall state where such account is filed.

(5) The petitioners shall, between themselves, contribute to the payment of such costs in proportion to the number of acres of land owned by them within the boundaries of the district or proposed district at the time of filing the petition.

**History:** 1977 c. 449.

**88.09 Certiorari; drainage board decisions.** Any person subject to an order or rule of the drainage board may, within 30 days after publication of the order or rule, commence an action seeking the remedy available by certiorari. The court may not stay proceedings involving the order or rule when an action is commenced, but may, on application, on notice to the board and for cause, grant a restraining order. The board is not required to return the original papers acted upon by it, but may return certified or sworn copies of the papers. If necessary for the proper disposition of the matter, the court may take evidence, or appoint a referee to take evidence and report findings of fact and conclusions of law as the court directs, which shall constitute a part of the proceedings upon which the determination of the court shall be made. The court may reverse or affirm, wholly or partly, or may modify, the order or rule brought up for review.

**History:** 1977 c. 187 s. 134; 1983 a. 219; 1993 a. 456.

**88.10 Guardian ad litem; failure to appoint.** Failure to appoint a guardian ad litem in a proceeding under this chapter is not jurisdictional, but when the failure is discovered a guardian ad litem shall be appointed and an order served upon the guardian ad litem to show cause why the minor or incompetent should not be bound by all prior proceedings pertaining to the drainage district. On such hearing the court shall enter such order or judgment as the facts warrant.

**History:** 1991 a. 316; 1993 a. 456; 1999 a. 83.

**88.11 Assistance to drainage districts.** (1) The department of agriculture, trade and consumer protection shall employ an engineer, who shall be the state drainage engineer, to improve district operations. The department shall do all of the following:

(a) Perform inspections in drainage districts to determine compliance with this section.

(b) Review and approve district maintenance plans including ditch designs; installation and maintenance of structures; and plans for drainage, drainage control, soil conservation and water conservation, and require alteration of plans and existing structures in order to achieve and maintain compliance with performance standards established under par. (i).

(c) Provide guidance to drainage boards and professional engineers in developing district surveys and maintenance plans.

(d) Review and approve district designs for new ditches and structures, assist districts in developing hydrologic and hydraulic information about project effectiveness, and require alteration of the designs in order to achieve and maintain compliance with performance standards established under par. (i).

(e) Coordinate district activities with the department of natural resources.

(f) Assist districts in applying for permits under s. 88.31.

(g) Provide guidelines for compliance with federal and state agricultural and conservation programs.

(h) Establish, by rule, procedures for assessments and reassessments.

(i) Establish, by rule, performance standards for drainage district structures, ditches, maintenance and operations, in order to minimize adverse effects on water quality. The performance standards shall be consistent with any requirements imposed by the department of natural resources under s. 88.31.

(j) Prepare reports for the purposes of sub. (3).

(k) Establish, by rule, a procedure for an investigation of whether a drainage district complies with this section and any requirements imposed by the department under this section.

(1m) The department of agriculture, trade and consumer protection may perform any functions related to drainage districts that the department considers appropriate.

(2) The state drainage engineer shall provide technical assistance to improve district operations on the request of the department of natural resources, drainage board, landowners in the district or the judge.

(3) If the area proposed for drainage exceeds 200 acres in a single project, the board or the petitioners, before the hearing on the report under s. 88.34, 88.36 or 88.77, shall procure a report of the department of agriculture, trade and consumer protection on all of the following:

(a) The location, design, feasibility and cost of the proposed outlet drains.

(b) A general description of the additional drainage necessary to reclaim the land fully for general agricultural purposes, and its probable cost.

(c) A general comparison of the benefits in the different parts of the district on the basis of the location and design of the proposed drains.

(d) The physical features of the land to be drained.

(4) The board or the petitioners, with the aid of an engineer having the qualifications specified in s. 88.21 (5), shall make the necessary survey and evaluation as directed by the department of agriculture, trade and consumer protection for its report.

(5) The report of the department of agriculture, trade and consumer protection under sub. (3) also shall include a report of the College of Agricultural and Life Sciences of the University of Wisconsin–Madison on all of the following:

(a) The quality and character of soils and subsoils in the proposed district.

(b) A soil map of the proposed district.

(c) The present agricultural value of the lands.

(d) The kind of crops to which the lands will be adapted after drainage.

(6) A drainage district shall comply with the rules promulgated under this section and any requirements imposed by the department of agriculture, trade and consumer protection under this section.

(7) The department of agriculture, trade and consumer protection may issue a special order directing the immediate cessation of work regulated under this section until the necessary plan approval is obtained or until the project complies with this section.

(8) Any person who violates this section may be required to forfeit not less than \$25 nor more than \$500 for each violation. Each day of continued violation constitutes a separate offense.

**History:** 1989 a. 31 ss. 2200d, 2200k; 1991 a. 309; 1993 a. 456; 2001 a. 103.

**Cross Reference:** See also ch. ATCP 48, Wis. adm. code.

**88.12 Proceedings when drainage area is in more than one county.** (1) If a proposed drainage district lies in more than one county, the petition for organization of the district shall be filed in the court of the county containing the largest acreage proposed for drainage by the petition, and the court of that county has jurisdiction of the organization of the drainage district.

(2) In cases affecting a multicounty drainage district, copies of all court orders and judgments shall be filed in the court of each of the other counties in which the drainage district is located.

(3) If a drainage district lies in more than one county, the drainage board of the county containing the largest acreage that is drained or proposed for drainage has jurisdiction of the operation of the drainage district. The drainage board that initially has jurisdiction of the operation of a drainage district retains that jurisdiction even if the drained acreage is subsequently changed, unless the drainage board that initially has jurisdiction agrees with the drainage board of any other county containing land of the drainage district to transfer jurisdiction.

(4) All moneys collected on behalf of the drainage district in the other counties shall be transmitted to the treasurer of the county in which the drainage board has jurisdiction.

**History:** 1977 c. 449; 1993 a. 456.

**88.13 Right to enter lands of drainage district.** Whenever necessary for any purpose connected with the organization of a district or the construction, maintenance or repair of drains and other works, members of the board, representatives of the department of agriculture, trade and consumer protection, and persons intending to bid on or to whom contracts have been let for the construction of the works within a district and their respective agents and employees may go upon any lands proposed for inclusion or included within a district or on adjoining lands, and are not guilty of trespass therefor but are liable for unnecessary damage caused to crops or structures.

**History:** 1989 a. 31.

**88.14 Controversies between districts.** (1) If a controversy arises out of the relationship of 2 or more drainage districts that are subject to the jurisdiction of a single drainage board, the board may hold hearings and take whatever other action it considers necessary toward settling the controversy, including the issuance of orders.

(2) If a controversy arises out of the relationship of 2 or more drainage districts that are subject to the jurisdiction of 2 or more drainage boards, the boards shall attempt to settle the controversy and may hold hearings and take whatever other action they consider necessary to accomplish that objective. If the drainage boards are unable to settle the controversy, the matter shall be submitted to arbitration under ch. 788.

**History:** 1977 c. 449; 1993 a. 456.

**88.145 Limitation of damages and suits.** In any action against a drainage district, drainage board, drainage board member, drainage board employee or an owner of land within the district who undertakes work approved by the drainage board, s. 893.80 is applicable and the limit on the amount recoverable by any person under s. 893.80 (3) applies to the drainage board, the members and employees of the drainage board, the drainage district and any owner of land within the district who undertakes work approved by the drainage board. This section does not apply to actions commenced under s. 19.37, 19.97 or 281.99.

**History:** 1993 a. 456; 1995 a. 158; 1997 a. 27.

**NOTE:** 1993 Wis. Act 456, which creates this section, contains extensive explanatory notes.

**88.15 Drainage board grants.** (1) From the appropriation under s. 20.115 (7) (d), the department of agriculture, trade and consumer protection shall make grants to boards to assist boards to comply with this chapter and rules promulgated under this chapter. A grant under this section may not exceed 60% of the costs incurred by the board to comply with this chapter and rules promulgated under this chapter.

(2) The department of agriculture, trade and consumer protection shall promulgate rules for the administration of the program under this section.

(3) The department of agriculture, trade and consumer protection may not make grants under this section after June 30, 2006.

**History:** 1999 a. 9.

**88.161 Transition for certain drainage districts.** A drainage district operating under s. 88.16, 1989 stats., becomes a drainage district under this chapter as a matter of law on June 1, 1993. The records, assessments, funds and indebtedness of such a drainage district become the records, assessments, funds and indebtedness of the drainage district that takes its place. Before June 1, 1993, the circuit court of each county having a drainage district that has elected to operate under s. 88.16, 1989 stats., shall appoint a county drainage board under s. 88.17, if none exists, to take the place of the board of drainage commissioners of a district that elected to operate under s. 88.16, 1989 stats. The terms of office of the members of the new board commence on June 1, 1993.

**History:** 1991 a. 309.

## SUBCHAPTER II

### APPOINTMENT, POWERS AND DUTIES OF DRAINAGE BOARD

**88.17 Appointment and organization of drainage board.** (1) The court shall appoint a drainage board either upon the filing of a petition for organization of a drainage district under this chapter in a county that does not already have a drainage board or upon the filing of a petition by a landowner in a drainage district or the state drainage engineer for appointment of a drainage board in a county that already has a drainage district. The board shall consist of 3 persons. One member of the original board shall be appointed for a term of one year, one for 2 years and one for 3 years. Upon the expiration of the term of office of a board member, the court shall appoint a successor for a 3-year term in the same manner as the original appointment was made.

(2) A drainage board may by rule, after the original board is appointed, increase the number of members to 5. In the rule increasing the number of members, the board shall provide for staggered terms, with all members serving terms of 5 years. After increasing the number of board members, the board may, by rule, reduce the number of members to 3, but only if the size of the board is reduced as vacancies occur on the board.

(2d) The board shall notify the court if any position on the board becomes vacant and the court shall appoint a successor. The board shall notify the court if the size of the board is increased under sub. (2) and the court shall appoint the additional board members. If a position on the board remains vacant for more than 6 months, either the state drainage engineer or any landowner in a drainage district subject to the jurisdiction of the board may petition the court to appoint a successor.

(2h) The court shall appoint drainage board members from among persons recommended by any of the following:

(a) The committee on agriculture and extension education created under s. 59.56 (3) (b), which shall recommend at least 3 persons for each position to be filled.

(b) At least 3 landowners owning property in a drainage district that is subject to the jurisdiction of the drainage board.

(2p) In appointing members, the court shall attempt to assure that at least one of the members serving on the drainage board at any time is an experienced farmer who is familiar with drainage and that another of the members is familiar to some extent with drainage engineering.

(2t) A drainage board member shall serve until a successor is appointed and qualified.

(3) Each member of the board shall take and file the official oath.

(4) Ownership of or interest in lands sought to be drained does not disqualify a person from acting as a member of the drainage board, but any board member may request the court to, and the court may in its discretion, appoint a suitable person to act in a member's place when the board is considering matters pertaining

to the particular drainage district in which the member is interested.

(5) When all its members have been duly sworn and qualified, the drainage board is a permanent body corporate and is subject to all rules of law applicable to public corporations.

(6) The board shall organize by election one of its members president and another of its members secretary. A majority of the board constitutes a quorum to do business. In the absence of a quorum, any member present may adjourn any meeting and make announcement thereof.

(7) Each board member shall be reimbursed for actual and reasonable expenses incurred in the performance of the member's duties and, in addition, shall receive as compensation for actual and necessary services a per diem in an amount determined by the drainage board, not to exceed \$40. In addition, the county board may reimburse drainage board members for actual and reasonable expenses incurred in performance of duties on behalf of the county.

(8) Each board member shall keep an accurate record of services rendered and expenses incurred by the member, together with the date thereof and the district for which services were rendered or in connection with which expenses were incurred. Board members shall file their bills for compensation and expenses with the county treasurer. Each bill shall indicate the district to which specific items are to be charged or the proportion of the bill to be paid by specified districts. The county treasurer, as treasurer of drainage districts, shall pay the bill if funds are available for that purpose and shall charge the accounts of the respective drainage districts liable for the bill in accordance with the order allowing the bill.

(9) The court may by order abolish the drainage board if there no longer are any drainage districts in the county.

**History:** 1977 c. 449; 1991 a. 316; 1993 a. 456; 1995 a. 201.

**NOTE:** 1993 Wis. Act 456, which substantially affects this section, contains extensive explanatory notes.

#### 88.172 Limited liability of drainage board members.

(1) Except as provided in subs. (2) and (3), a drainage board member is not liable to any other person for damages, settlements, fees, fines, penalties or other monetary liabilities arising from a breach of, or failure to perform, any duty resulting solely from his or her status as a drainage board member, unless the person asserting liability proves that the breach or failure to perform constitutes any of the following:

(a) A willful failure to deal fairly with any person in connection with a matter in which the drainage board member has a material conflict of interest.

(b) A violation of criminal law, unless the drainage board member had reasonable cause to believe that his or her conduct was lawful or no reasonable cause to believe that his or her conduct was unlawful.

(c) A transaction from which the drainage board member derived an improper personal profit.

(d) Willful misconduct.

(2) Except as provided in sub. (3), this section does not apply to any of the following:

(a) A civil or criminal proceeding brought by or on behalf of any governmental unit, authority or agency.

(b) A proceeding brought by any person for a violation of state or federal law if the proceeding is brought under an express private right of action created by state or federal statute.

(3) Subsection (2) does not apply to a proceeding brought by a governmental unit, authority or agency in its capacity as a private party or contractor.

**History:** 1993 a. 456.

**NOTE:** 1993 Wis. Act 456, which creates this section, contains extensive explanatory notes.

#### 88.18 County treasurer to serve as treasurer of drainage districts. (1) The county treasurer shall serve as treasurer

of all drainage districts under the jurisdiction of the drainage board. All moneys collected for or payable to any such drainage district shall be turned over to or paid to the county treasurer and shall be paid out by the treasurer only upon proper warrants of the drainage board. The county treasurer may retain for the benefit of the county a portion of the interest received on drainage district funds held by the county treasurer, not to exceed the cost to the county treasurer of providing services to the drainage board under this chapter, the cost to the zoning administrator of maintaining drainage board records under s. 88.19 and the cost to the zoning administrator of providing copies of drainage board records to the drainage board.

(2) The county treasurer shall keep a separate account for each drainage district in which the treasurer shall charge such district with all amounts paid out on its behalf pursuant to sub. (1) and shall credit the district with:

(a) All sums received in payment of drainage assessments of that district, including penalties and interest on the sums.

(e) All other sums received on account of the drainage district other than interest received on drainage district funds held by the county treasurer.

(3) The drainage board may appoint a treasurer who shall act as the deputy of the county treasurer. The drainage board may assign any part or all of the county treasurer's duties under this chapter to the drainage board treasurer. The drainage board treasurer shall be reimbursed for actual and reasonable expenses incurred in the performance of the treasurer's duties in the same manner as provided for drainage board member expenses under s. 88.17 (8). The drainage board shall require a bond from the drainage board treasurer in an amount, set by the board, that is sufficient to exceed the greatest amount of funds expected to be held in his or her custody, and with the sureties that the drainage board requires. The bond shall be conditioned in substantially the same form as the ordinary bond required from the county treasurer, with the necessary changes.

**History:** 1987 a. 378; 1991 a. 316; 1993 a. 456.

**88.19 Board to keep records. (1)** It is the duty of the secretary of the board to keep records of all drainage proceedings. The secretary shall also maintain a minute book in which the secretary shall enter the minutes of the board meetings. The secretary shall be compensated for such services under s. 88.17 (7) and (8).

(2) The secretary of the board shall keep a complete record of the assessed lands in each district under the board's jurisdiction. Such records shall be so arranged that they will readily show, for each parcel of land assessed, the latest confirmed assessment of benefits and the total assessments for costs which have been made against such lands, with adequate space provided for noting all payments of assessments for costs or installments thereof. The secretary of the board shall periodically check with the county treasurer to determine what drainage assessments or installments thereof have been paid and shall note such payments in the records required to be kept pursuant to this subsection.

(3) The secretary of the board is legal custodian of all drainage records and the secretary shall comply with subch. II of ch. 19. Upon request for any of the drainage records by the county treasurer, the secretary of the board shall furnish the county treasurer with a copy of the records specified in sub. (2).

(4) (a) Subject to pars. (b) and (d), and subject to criteria and standards under rules that the department of agriculture, trade and consumer protection shall promulgate, all of the following shall occur:

1. The drainage board secretary shall distribute drainage board records to the state drainage engineer and to the county zoning administrator.

2. The drainage board and the county zoning administrator shall retain certain records of the drainage board.

(b) The secretary of the drainage board and the county zoning administrator shall maintain in perpetuity any records consisting of an order creating or altering the boundaries of a district, maps

or descriptions of the boundaries of a district, profiles and cross sections of any drains and an order levying original or supplemental assessments for costs.

(c) The drainage board and the county administrator may destroy obsolete drainage board records.

(d) Before any records may be destroyed under this subsection, the secretary of the drainage board and the county zoning administrator shall give at least 60 days' prior written notice of the proposed destruction to the state historical society, which may preserve records that it determines to be of historical interest, and shall give at least 60 days' prior written notice to the state drainage engineer, who may preserve records determined to be of interest to the department of agriculture, trade and consumer protection.

(5) The state drainage engineer shall examine the records in the possession of all drainage board secretaries and drainage districts and the records received from clerks of court under 1993 Wisconsin Act 456, section 118, and may examine any other records held by any person relating to drainage in this state. The state drainage engineer shall determine the records that are required to be preserved under sub. (4) and make copies of the records. The state drainage engineer shall retain a copy of the records and deliver a copy to the county zoning administrator.

(6) The secretary of the drainage board, under sub. (4), shall provide a copy of drainage board records created after May 13, 1994, to the state drainage engineer and the county zoning administrator.

(7) The county zoning administrator shall maintain the records delivered under sub. (5) and any records provided under sub. (6) as provided under sub. (4).

History: 1991 a. 316; 1993 a. 456.

NOTE: 1993 Wis. Act 456, which amends (3) and creates subs. (4) to (7), contains extensive explanatory notes.

**88.20 Conflict of interest prohibited.** (1) No member of a drainage board shall be interested directly or indirectly:

- (a) In any contract with the drainage board; or
- (b) In any contract for work or materials in or for a drainage district; or
- (c) In any contract for the sale of machinery or materials for or to the drainage board; or
- (d) In the wages or supplies of persons employed on work in or for a drainage district.

(2) No board member shall deal in securities of a drainage district.

**88.21 General powers of the drainage board.** In addition to other powers expressly granted or necessarily implied, the drainage board may:

- (1) Adopt and use a corporate seal.
- (2) Sue and be sued and compromise suits and controversies.
- (3) Bring all necessary actions for the collection of moneys and forfeitures belonging to a district under its jurisdiction and for the protection and preservation of all works and property thereof.
- (4) Obtain injunctions to prevent unlawful interference with the performance of its duties or exercise of any of its powers.
- (5) Employ legal counsel, engineers and other assistants. Any engineer employed by the board shall be selected from a list of professional engineers approved by the department of agriculture, trade and consumer protection. The department of agriculture, trade and consumer protection shall furnish each drainage board, upon request, a list of professional engineers whom it considers qualified by training and experience to give competent advice in drainage matters.
- (6) Purchase or condemn such lands, whether within or outside a district, as are necessary for the construction, cleaning out, repair and maintenance of the drainage system and its works. Condemnation shall be as provided by ch. 32.
- (8) Level or permit the leveling of spoil banks and excavated materials to allow cultivation or use for roadway or other lawful

purposes if such use will not interfere with the proper functioning of the drains.

(9) Purchase or lease and maintain and operate the equipment and machinery necessary to construct, maintain or repair the drains within the districts under its jurisdiction, including the control of weeds or brush through use of herbicides.

(10) Purchase, construct, maintain and operate all levees, bulkheads, reservoirs, silt basins, holding basins, floodways, floodgates and pumping machinery necessary to the successful drainage or protection of any district or of any considerable area thereof, whether located within or outside the district.

(11) Call district meetings to report on the affairs of the district and to obtain the opinions and suggestions of landowners in the district with regard to the affairs of the district.

(12) Adopt rules and issue orders, which shall be published as a class 1 notice under ch. 985. In addition, any order that pertains to a specific named person or property shall be served on the person or owner of the property in the manner provided for service of a summons under s. 801.11. The court has jurisdiction to enforce an order of the drainage board by injunctive or other appropriate relief.

(13) Authorize legal counsel for the board to represent an individual owner of land with respect to any matter that arises under this chapter.

History: 1989 a. 31; 1993 a. 456.

The powers of the board are not superseded by the shoreline zoning board or the department. Although soil conservation districts and drainage districts are created for a different purpose, some activities of both accomplish similar ends; therefore, each district retains control over those activities which it undertakes for the purposes for which it was created. 63 Atty. Gen. 355.

Chapter 30 applies to navigable ditches that were originally navigable streams. If a navigable ditch was originally nonnavigable or had no previous stream history, DNR's jurisdiction depends upon the facts of each situation. 63 Atty. Gen. 493.

**88.215 Landowner petitions.** The owners of land in a district may petition the drainage board to hold a district meeting. The petition shall be signed by at least 10% of the owners of land within the district or by the owners of at least 10% of the lands within the district. The drainage board shall either schedule a district meeting to be held within 60 days after receiving the petition or deny the petition, by issuing a published order, within 60 days after receiving the petition. The drainage board may deny the petition only on the grounds that it is unreasonable.

History: 1993 a. 456.

NOTE: 1993 Wis. Act 456, which creates this section, contains extensive explanatory notes.

**88.22 Power of board to contract with the federal government and other agencies.** The drainage board may:

(1) Enter into agreements with the U.S. government or an officer or agency thereof to permit the drainage of lands owned or occupied by such government or agency, through the use of the drains of which the board has charge. Such agreement may result in adding lands to the drainage district, may provide for apportionment of the assessments for costs of repairs, maintenance and administration with respect to the draining of such lands, and may authorize the U.S. government or its officer or agency to repair, maintain, deepen, widen and change drains located upon lands owned or occupied by such government or agency as long as such change does not impair the drainage rights of other owners through such lands. No such agreement shall permit the draining of raw sewerage in any such drains.

(2) Negotiate and obtain a loan from the federal government or any officer or agency thereof, or from any other public or private loan agency, for the purpose of paying or redeeming outstanding bonds and other obligations of a district under its jurisdiction. Such loan may be negotiated upon such terms and conditions as the board deems to be in the best interest of the district, including without restriction by reason of enumeration provisions for:

- (a) Extending the time of payment of delinquent and unmatured installments of assessments for cost of construction, inclu-

sive of interest accrued thereon, for a period of not to exceed 40 years.

(b) Deferring payment of any portion of the principal of unpaid and unmatured assessments of cost of construction, inclusive of interest already accrued thereon, for a period of not to exceed 10 years and provide for the payment of such delinquent and unpaid assessments of cost of construction in equal annual installments over a period of years.

(c) Arrange with the holders of bonds and notes and other creditors of the district for surrender of their claims against the district and for accepting money or bonds in payment thereof.

(3) Enter into contracts with the U.S. government or an officer or agency thereof to accept the benefits of any federal law pertaining to flood prevention or the conservation, development, utilization and disposal of water. Without restriction by reason of enumeration, the contracts may provide that the district on whose behalf the contract is negotiated will:

(a) Provide without cost to the United States all lands necessary for the construction of the project and for the subsequent maintenance and operation of the project.

(b) Contribute such part of the first cost of construction of such project as is agreed upon with the United States, either in cash or in credits, for purchase of material or performance of work forming part of the project.

(c) Hold and save the United States harmless from claims for damages to any property resulting from construction of the works of the project.

(d) Maintain and operate all the works after completion of the project in accordance with regulations prescribed by the U.S. government or any officer or agency thereof.

**History:** 1971 c. 323 s. 27; 1981 c. 346 s. 38; 1993 a. 456; 1995 a. 225.

### 88.23 Power of board to levy assessments for costs.

(1) In addition to the assessments for cost of construction authorized by s. 88.35, the board may issue orders to levy assessments for costs of maintenance and repair or for any other lawful expenditures of a drainage district. All of the assessments shall be apportioned on the confirmed benefits then in effect in the district assessed.

(2r) The board may authorize one or more owners of land in a drainage district to prepare a proposed assessment for cost of construction or maintenance and repair.

(3) Assessments made under this section are subject to ss. 88.40 to 88.43. In no case may the total assessments against any land exceed the benefits assessed against that land unless an interested person agrees to pay such excess and furnishes the drainage board with sufficient security for the excess benefits or unless the assessment is for the purpose of covering the cost of repair and maintenance as defined in s. 88.63.

(4) The board may borrow money and issue notes or bonds based upon any assessments levied under this section in the same manner as for original assessments.

**History:** 1971 c. 67; 1993 a. 456.

**88.24 Board to file annual report.** On or before December 1 of each year the board shall file with the department of agriculture, trade and consumer protection and the county zoning administrator a separate report, for the preceding year ending August 31, on each drainage district under the board's jurisdiction. The reports shall constitute part of the records of the districts reported on, shall be verified by the oath of one or more of the board members, and shall contain:

(1) A financial statement.

(2) A statement of all bonds paid or issued during the preceding year.

(3) A statement of all work done during the preceding year, specifying where the same was done and the cost thereof.

**History:** 1993 a. 456.

## SUBCHAPTER III

### ORGANIZATION OF DRAINAGE DISTRICTS

**88.27 Who may petition for organization of a drainage district.** (1) Except as provided in sub. (1m), any of the following may petition for the organization of a drainage district under this chapter:

(a) The owners of more than one-half in area of the lands, excluding lands owned by this state, proposed to be included within the drainage district.

(b) The majority of landowners within the proposed drainage district, owning at least one-third in area of the lands, excluding lands owned by this state, proposed to be included within such district.

(1m) A state agency, as defined in s. 16.61 (2) (d), may not petition for the organization of a drainage district.

(2) No petition having as many signers as are required by this section shall be declared void, but the court may at any time permit the petition to be amended in form and substance to conform to the facts, if the facts justify the organization of a district. All petitions for the organization of the same or substantially the same district filed prior to the hearing under s. 88.34 shall be considered by the court as one petition, and all signatures to such petitions shall be counted in determining the jurisdiction of the court.

**History:** 1993 a. 456.

**88.28 Contents of petition.** (1) A petition for organization of a drainage district shall be filed with the court and shall set forth:

(a) A description of the lands proposed to be included in the district and that they will be improved by drainage.

(b) That the public health or public welfare will be promoted by the drainage.

(c) A map or sketch of the area sought to be drained, with the proposed drains shown thereon.

(d) That the cost of construction will not exceed 75% of the appraised benefits arising from such drainage.

(e) A proposed name or number for the district.

(f) The names and addresses of the owners and mortgagees of all lands in the district, so far as known to the petitioners.

(g) A request for the organization of the drainage district.

(h) If the purpose of such petition is the enlargement, repair or maintenance of a drain, heretofore constructed under any law of this state, the petition shall give a general description of the drain with such particulars as the petitioners deem important.

(2) In lieu of meeting with the requirements of sub. (1) (d), the petitioners may file with the petition a written agreement that they will pay such portion of the cost of construction as exceeds 75% of the appraised benefits to all lands resulting from the construction of the proposed drainage works.

(3) The petition need not be verified.

**History:** 1977 c. 449; 1993 a. 456.

**88.29 Referral of petition to board; examination of lands; hearing by board.** (1) Upon receipt of a petition for organization of a drainage district the court or judge by order shall refer the petition to the drainage board and order the board to report thereon.

(2) When a petition has been so referred to the board, the board, with the aid of an engineer having the qualifications specified in s. 88.21 (5), shall examine the lands described in the petition and all other lands that the board believes will be benefited or damaged by the proposed work and shall consider whether the drains as proposed in the petition are satisfactory.

(3) The board also shall hold a hearing on the petition to ascertain the sufficiency of the signers and to hear all interested persons who desire to be heard for or against the petition.



(4) The board shall fix a time and place of the hearing on the petition, on or conveniently near the lands described in the petition, and shall give notice of the hearing as provided in s. 88.05 (2) (b) to the persons specified in s. 88.05 (4) (c).

(5) The notice shall describe the lands involved and may be in substantially the following form:

“Notice is hereby given that the drainage board of .... County will meet on the .... day of ...., .... (year), at .... o’clock, .... M. at the (here describe the place of meeting) to consider the petition filed in the circuit court of .... County to drain lands among which are the following: (here describe the lands described in the petition). All persons interested may appear and be heard on the petition.

Dated ....

.....  
 .....  
 .....

Drainage Board”.

(6) The board may adjourn the hearing to a time and place that it considers convenient or necessary. The board shall either make a public announcement of the time and place of the adjournment or give notice as provided in s. 88.05 (2) (b) to the persons specified in s. 88.05 (4) (a) and also by publication of the notice once in the vicinity in a newspaper qualified under ch. 985, such publication to be not more than 20 days nor less than 10 days before the date set for the adjourned hearing.

**History:** 1979 c. 175 s. 50; 1993 a. 456; 1997 a. 250.

**88.31 Special procedure in cases affecting navigable waters.**

(1) If it is necessary to enter upon any waters that may be navigable, or to acquire and remove any dam or obstruction from the waters, or to clean out, widen, deepen or straighten any stream that may be navigable, the board shall file with the department of natural resources an application for a permit to do the work. The board shall file with the application any information that the board or the department of natural resources considers necessary. The department shall specify by rule the information to be included in an application. The application shall state that the public health or welfare will be promoted by the removal of the dam or other obstruction or by the straightening, cleaning out, deepening or widening of the waters and that other public rights in and public uses of the waters will not be materially impaired. The application shall be duly verified.

(2) Upon receipt of the application the department of natural resources shall fix a time and place for a hearing on the application, not less than 3 nor more than 8 weeks from the date of filing, at a place convenient to the interested parties. If the application is for a permit to remove a dam, notice of the hearing shall be given to all interested persons as provided by s. 31.06. In all other cases, the department shall direct the applicant to give notice under s. 88.05 (2) (b) to the persons specified in s. 88.05 (4) (b).

(3) At the hearing on the application, all interested persons may appear and be heard. The department also may make an independent investigation of the situation.

(4) Upon the conclusion of the hearing and investigation, the department of natural resources shall grant the permit if it finds:

(a) That the public health and welfare will be promoted by the proposed removal of the dam or other obstructions or by the proposed straightening, cleaning out, deepening or widening of such waters; and

(b) That the proposed work is necessary to the proper operation of the proposed drainage system; and

(c) That the proposed work will not materially impair the navigability of any such waters and will not materially impair any other public right in or public uses of such waters. The enjoyment of natural scenic beauty is declared to be a public right to be considered along with other public rights.

(4m) The department of natural resources shall grant or deny the permit within 6 weeks after the conclusion of the hearing on the application.

(5) When granting a permit under this section the department of natural resources also shall establish the minimum level at which the affected waters may be maintained.

(6) The department of natural resources may require the applicant for the permit to submit a plan for the work to be done in the waters in question and may amend or modify such plan before approving it. The department may at any time, on the application of any interested person, further amend such plan when the same can be done without materially impairing the navigability of any such waters and without materially impairing any other public right.

(7) Upon granting a permit under this section, the department forthwith shall transmit to the secretary of the drainage board a copy of the permit and the relevant findings, orders and approved plans.

(7m) The Duck Creek Drainage District is exempt from the permit requirements and procedures under subs. (1) to (7).

(8) Subject to other restrictions imposed by this chapter, a drainage board which has obtained all of the permits as required under this chapter and ch. 30 may:

(a) Do all acts necessary in and about the surveying, laying out, constructing, repairing, altering the course of, enlarging, clearing, deepening, widening, protecting and maintaining any drain in, through, or upon such waters, both within and beyond the limits of the drainage district; and

(b) Procure, purchase or condemn by proceedings had under ch. 32, riparian rights, rights of flowage, dams and waterpowers in such waters, both within and beyond the limits of the drainage district.

(9) In all cases a drainage district is liable to the owner of riparian rights, rights of flowage, dams and waterpowers for all property taken and for all damages which may be occasioned to such property by reason of any work done on it. Such damages shall be determined either by agreement, award of damages or condemnation proceedings and shall be paid by the drainage district before the work is done in the same manner in which payments are made where lands are acquired by railroad companies under condemnation proceedings.

**History:** 1993 a. 456; 1999 a. 9.

**88.32 Report to the court.** (1) Within 30 days after the final adjournment of the hearing provided for in s. 88.29, the board shall report in writing to the court:

(a) Whether the petition has the required number of signers;

(b) Whether the lands described in the petition will be improved by drainage;

(c) Whether other lands in the vicinity, draining to, from, or through the proposed drains, require drainage and if so a description of the same;

(d) Whether such drainage is feasible;

(e) Whether the public health or public welfare will be promoted by the proposed work;

(f) Whether the drains proposed in the petition will best accomplish the drainage prayed for and the area that should be drained;

(g) Whether the benefits from such work will exceed the cost of construction by the required amount;

(h) Such other facts as in the opinion of the board will aid the court in its decision upon the report.

(2) The board may recommend to the court an increase or decrease in the area proposed in the petition to be drained. If the proposed drains are not satisfactory the board shall recommend other drains.

(3) In determining whether public health and welfare will be promoted, the board shall include in its consideration whether the

cumulative effect of such drainage over a period of time will affect the temperature of the water of lakes or streams, or will lower the water levels of lakes or streams or of the subterranean sources that supply private and public water systems, and whether the general need for the type of land that will be made available for cultivation or other purposes by such drainage is sufficiently great to warrant the possible harmful effects described above.

**(3m)** If the area of the proposed district exceeds 200 acres, the report shall be submitted to the department of agriculture, trade and consumer protection before it is filed with the court. Within 45 days after receipt of the report, the department shall return it with a copy of the report prepared under s. 88.11 (3) and (5) with its recommendation for approval or disapproval for the creation of the district.

**(4)** The board shall attach to its report proof of the service of notice of hearing on the petition together with a copy of its minutes of such hearing.

**History:** 1993 a. 246, 456.

**88.33 Drainage project may be stopped prior to organization of district.** **(1)** At any time prior to the entry of the order organizing a drainage district, the owners who represent a majority of the lands described in the petition for drainage or who represent a majority of the lands contained in the report of the drainage board may file with the court a petition requesting that no further proceeding be had and that no further expense chargeable to the proposed drainage district be incurred.

**(2)** Upon receipt of the petition the court shall fix a time and place of the hearing on the petition and shall cause notice of the hearing to be given as provided in s. 88.05 (1) (b) to the persons specified in s. 88.05 (4) (b). If on the hearing the court finds that the petition is signed by the required number of owners, that notice of the hearing was properly given, and that the conditions of sub. (3) have been met, it shall enter an order directing that the proceedings to organize the district cease.

**(3)** As a condition of issuing the order under sub. (2), the court shall require those petitioners under this section who also were petitioners under s. 88.27 to pay the expenses of the hearing under this section and all expenses incurred to date in connection with the proceedings to organize the district.

**History:** 1993 a. 456.

**88.34 Hearing by the court; organization of drainage district.** **(1)** When the board has filed its report with the court, including any reports required by s. 88.11, the court shall fix a time and place of hearing on the report and shall cause notice to be given under s. 88.05 (1) (b) to the persons specified in s. 88.05 (4) (c).

**(2)** The order fixing the hearing may be in substantially the following form and a copy of the order may be served as notice of the hearing:

“Circuit court for .... County,

In the matter of the .... drainage.

Whereas a report has been filed in this court by the county drainage board recommending the drainage of the following described lands: (here describe the lands reported for drainage).

It is ordered that the report be heard and examined before this court on the .... day of ....., .... (year), at .... o’clock .... M. at the (here state the place of hearing) at which time and place all interested persons may appear and be heard. All objections must be in writing and comply with s. 88.07 (1).

Dated ....

.....  
Circuit Judge”

**(3)** The court shall make an order organizing the drainage district and direct the board to proceed with all convenient speed if on such hearing the court finds each of the following facts:

(a) That the petition or petitions have sufficient signers.

(b) That the lands described in the petitions together with any additional lands recommended by the board for drainage will be improved by the proposed work.

(c) That the public health or public welfare will be promoted thereby.

(d) That the cost of construction will not exceed 75% of the benefits to be derived from the proposed work.

(f) That the proposed work will not materially injure or impair fish habitat or wildlife habitat or scenic beauty or the conservation of natural resources or other public rights or interests.

**(4)** If the court finds the facts stated in sub. (3) (a), (b), (c) and (f) but finds that the cost of construction will exceed 75% of the benefits to be derived from the proposed work, the court nevertheless shall organize the drainage district if, within 10 days, petitioners file with the court a bond with sufficient sureties to be approved by the court and conditioned for the payment of the excess or deposits and leaves with the court a sum of money that the court determines will cover the excess.

**(5)** Unless the conditions specified in sub. (3) or (4) are met, the court shall deny the petition and shall tax the taxable costs of the proceedings as provided in s. 88.08.

**(6)** The court may include in a proposed drainage district any lands requiring drainage and lying adjacent to the lands described in the petition and shall not lose jurisdiction by reason of bringing in lands not described in the petition.

**(7)** If there are petitions before the court to organize 2 or more drainage districts and the court is of the opinion that the territory in the proposed districts should be included in one district or in a lesser number of districts than the petitions call for, the court may by order organize such territory into such number of districts as it deems will best conform to the purposes of this chapter, or the court may annex any territory asking to be organized as a drainage district to a district already organized.

**(8)** The territory in a district need not be all in one body if:

(a) It is so situated that the public health or public welfare will be promoted by drainage of each separate body thereof; and

(b) The cost of construction in each separate body thereof will not exceed 75% of the benefits to be derived from the proposed work therein; and

(c) The court is satisfied that the proposed work can be more cheaply done or maintained in a single district than otherwise.

**(9)** The order organizing a drainage district shall be recorded with the register of deeds of each county in which lands of the district are located.

**History:** 1977 c. 135 s. 19; 1977 c. 449; 1989 a. 31; 1993 a. 301, 456; 1997 a. 250.

**88.35 Laying out drains, assessment of benefits and award of damages in newly organized district.** **(1)** Upon the organization of a drainage district, the board shall with the aid of an engineer having the qualifications specified in s. 88.21 (5):

(a) Lay out drains of sufficient depth to adequately drain the lands proposed to be drained, including the preparation of profiles showing the grades of all drains and a map showing the boundaries of the drainage district and the proposed location of all drains;

(b) Assess the benefits that will accrue to each parcel of land benefited;

(c) Award damages to such lands as will be damaged;

(d) Estimate the cost of construction;

(e) Assess the cost of construction against the benefited lands in proportion to the benefits received by each;

(f) Estimate the annual cost of maintenance and operation of the drainage district.

**(2)** In laying out the drains the board shall not be confined to the points of commencement, routes or end points of the drains or the number, extent or size of the drains, or the location, plan or extent of any drain as proposed by the petition under s. 88.28, but shall locate, design, lay out and plan the drains in the manner that seems best to the board to promote the public health or welfare and

to drain or to protect the lands of the parties interested with the least damage and greatest benefit to all of the affected lands. In determining the sufficiency of the depth and capacity of the drains, the board shall consider whether other lands lie above and drain in the direction of, through and along the general course of the proposed drains.

(3) If the board finds that the drainage district, as described in the petition under s. 88.28, will not embrace all the lands that will be benefited by the proposed work or that it will include lands that will not be benefited or do not need to be included in the drainage district for any purpose, it may extend or contract the boundaries of the district so as to include or exclude all such lands using the procedures in s. 88.78 or 88.80.

(4) In assessing benefits to farm lands, the board shall ascertain and consider the depth, quality and character of the surface and subsoils, the thoroughness of drainage, the difficulty of drain-

age, the uses to which the land when drained will be adapted, and all other material elements entering into the increase in the value of such land resulting from the proposed work.

(5) If the damages to any land exceeds the assessment for cost of construction levied against such land the excess shall be paid out of the assessment for cost of construction levied against all lands.

(5m) If navigable waters are affected by the proposed drainage, the drainage board shall obtain a permit under s. 88.31. This subsection does not apply to the Duck Creek Drainage District.

(6) Upon the completion of its duties under subs. (1) to (5m), the board shall prepare a written report, including a copy of any maps, plans or profiles that it has prepared. The assessment of benefits and awards of damages shall be set forth in substantially the following form: [See Figure 88.35 (6) following]

Figure 88.35 (6):

Description of land or name of corporation	Assessed benefits	Assessed for construction	Damages	Net assessment for construction
Section 6, Town	—	—	—	—
Range, SE 1/4 NE 1/4	\$ 850.00	\$ 425.00	\$ 10.50	\$414.50
Lot 1	400.00	200.00	—	200.00
Village of	2,500.00	1,250.00	666.00	584.00
B.G. & Q. Ry. Co.	1,000.00	500.00	600.00	—
Town of	—	—	150.00	—

(7) If the area of the district exceeds 200 acres, the report shall be submitted to the department of agriculture, trade and consumer protection. Within 45 days after its receipt, the department shall return it with a copy of the report prepared under s. 88.11 (3) and (5) and the department's approval or disapproval of the report prepared under sub. (6).

**History:** 1979 c. 110; 1989 a. 31; 1993 a. 456; 1999 a. 9.

**88.36 Hearing on report.** (1) Upon the completion of the report provided for in s. 88.35, the drainage board shall fix the time and place of the hearing on the report and shall cause notice of the hearing to be given under s. 88.05 (2) (b) to the persons specified in s. 88.05 (4) (c).

(2) At the hearing on the report the drainage board shall hear all objections to the report by any person who feels aggrieved.

(3) With regard to objections relating to assessment of benefits against or award of damages to specified lands, any evidence may be introduced which tends to establish what assessments or awards would be equitable as compared with other lands in the district.

(4) If the drainage board finds that the report requires modification or amendment, it shall modify or amend the report as the facts warrant.

(5) Upon a determination by the board that the report is final, the board shall proceed with the work as provided in s. 88.62.

(6) The board may not proceed with the work unless it finds that the cost of construction of the work necessary under the order will not exceed 75% of the total assessment of benefits against those lands whose assessments of benefits and awards of damages are sought to be registered by the order.

**History:** 1977 c. 135 s. 19; 1993 a. 456; 1995 a. 225.

#### SUBCHAPTER IV

##### GENERAL RULES APPLICABLE TO ASSESSMENTS

**88.40 Assessments for costs to be certified to register of deeds; assessments are lien on lands.** (1) Immediately after the issuance of a drainage board order levying any assessments for costs, whether original or supplemental, the drainage board shall record in the office of the register of deeds in each

county in which the assessed lands are situated a certified copy of the order, including a true description of each parcel of land in that county that was so assessed and the amount that it was assessed.

(2) From the time of recording the order confirming such assessments for costs until they are paid, such assessments and the interest thereon are a first lien upon the lands assessed and take priority over all other liens or mortgages except liens for general taxes and liens under ss. 292.31 (8) (i) and 292.81, regardless of the priority in time of such other liens or mortgages.

(3) When any assessment which is a lien on land has been fully paid, the board shall execute in writing a satisfaction of such lien. Such satisfaction may be recorded in the office of the register of deeds.

**History:** 1993 a. 453, 456; 1995 a. 227; 1997 a. 27.

##### **88.405 Assessment for connection to district drain.**

When any new drain is connected to an existing district drain, whether or not the area drained by the new drain is within the drainage district, the drainage board by order may assess against the newly drained land a reasonable share of the cost of constructing the existing district drain. If an assessment is made under this section and the area drained by the new drain is not within the drainage district, the drainage board shall proceed under s. 88.78 to annex the land to the drainage district.

**History:** 1993 a. 456.

**NOTE:** 1993 Wis. Act 456, which creates this section, contains extensive explanatory notes.

**88.41 Payment of assessments for costs.** (1) All assessments for costs are due and payable 4 months after the date on which the order making the assessments is issued unless the drainage board by order directs that the assessments may be paid in installments. Assessments shall be paid to the county treasurer as treasurer of the drainage district.

(2) At the time of issuing an order making assessments for costs, or at any time after issuance of the order but before the issuance of bonds or notes which are a lien on the assessments, the drainage board may order the assessments for costs to be payable in annual installments. The drainage board shall order the installments to be payable in such amounts and at such times as will be convenient for the accomplishment of the proposed work or for the payment of the principal and interest of the notes or bonds of the drainage district, subject to the following limitations:

(a) The number of annual installments may not exceed 15 in the case of assessments for cost of construction or 3 in the case of assessments for cost of repairs.

(b) The first installment is due and payable on September 1 following the drainage board's order directing payment in installments and one installment, together with all accrued interest, is due and payable on September 1 of each succeeding year, except that the drainage board in its order may direct a delay in the commencement of the payment of installments for the cost of construction to September 1 of some year not more than 5 years after September 1 of the year in which the first payment otherwise would be due.

(3) Any owner of land assessed for costs may, at any time before the board contracts to borrow money upon notes or bonds based upon such assessment, pay to the county treasurer as treasurer of the drainage district the amount of the assessment against the owner's land or any tract thereof, together with any interest due thereon.

(4) The following rules govern interest on assessments for costs:

(a) All assessments for costs shall draw interest at the rate of 6% per year unless the drainage board orders a different rate.

(b) Interest shall run from the date of confirmation of the assessment unless the drainage board orders the interest to commence at a later date, but interest shall be waived if the assessment is paid within 60 days after the date of confirmation.

(c) If installment payments have been authorized pursuant to sub. (2), interest shall be computed as of September 1 and is payable annually on that date.

(e) Interest shall be collected in the same manner as the principal of the assessment.

(f) If it becomes necessary to certify past due assessments to the clerk of the town, village or city for collection, the provisions of s. 88.42 relating to interest also are applicable.

**History:** 1979 c. 110 s. 60 (13); 1991 a. 316; 1993 a. 456; 1997 a. 27.

**88.42 Unpaid drainage assessments to be collected as taxes.** (1) The secretary of the drainage board shall, in accordance with s. 88.19, keep a separate record of all assessments in each drainage district under the board's jurisdiction. On or before December 1 of each year, the secretary shall certify all past due assessments for costs, including past due installments, to the clerk of the town, village or city in which the delinquent lands are located or assessed, specifying the amount due from each tract, parcel or easement. The amount certified shall include interest at the rate of 6% per year computed through December 31 of the current year.

(2) Each town, village and city clerk shall insert in the tax roll for each year, but in a column separate from the general tax, the amounts certified to that clerk by the secretary of the board under sub. (1). Such assessments and interest shall be collected in the same manner as general taxes, except that the personal property of natural persons and private corporations, and all lands except those against which assessments were made, are not liable to seizure and sale therefor.

(3) In case of failure to certify or collect the unpaid assessments in any one year or if mistakes are made in certifying or collecting assessments, the same may be certified, corrected and collected in any subsequent year.

(4) All drainage assessments collected by the city, village or town treasurer shall be settled under s. 74.23, 74.25 or 74.30 with the county treasurer of the county in which the drainage board with jurisdiction of the district is located, and the city, village or town treasurer shall obtain and file the proper receipt for the assessments. The county treasurer shall promptly credit the amounts received under this subsection to the drainage districts entitled to the amounts.

**History:** 1979 c. 110 s. 60 (13); 1987 a. 378; 1991 a. 316; 1993 a. 456; 1995 a. 225.

**88.43 Collection of assessments as delinquent taxes.**

(1) If the amounts certified to the town, village or city clerk under s. 88.42 are not collected by the town, village or city treasurer, such treasurer shall return them to the county treasurer, in the same manner and at the same time as delinquent taxes, but separately therefrom. The county treasurer shall collect unpaid drainage assessments under subch. VII of ch. 74.

(4) Unless in conflict with this chapter, the rules of law in chs. 74 and 75 which are applicable to the collection of general taxes apply to the collection of delinquent drainage assessments.

**History:** 1987 a. 378; 1989 a. 56.

**88.44 Contesting validity of assessments.** (1) If an interested person petitions the drainage board for review of the validity of any order assessing benefits or costs, correcting omitted assessments, reassessing benefits or apportioning benefits upon division of a parcel, the drainage board shall fix a time and place of hearing and require all interested persons to show cause why the assessment should be modified. The order to show cause shall be served as provided in s. 801.11 upon such persons as the court directs.

(2) Any person objecting to the validation of the assessment shall, on or before the day fixed for the hearing, file a written statement of the person's objections with the drainage board. The drainage board shall hear the objections at the time fixed for the hearing and shall enter an order directing all necessary amendments and curing all defects in the former proceedings or shall render valid and binding the former order.

(3) No drainage assessment is void or voidable for irregularity in the proceedings unless it is shown that the assessment is inequitable.

(4) An interested person shall submit a petition under sub. (1) and obtain either the decision of the drainage board under this section or a denial of the petition for a hearing before seeking judicial review of the drainage board's order levying an assessment.

**History:** 1991 a. 316; 1993 a. 456.

**88.45 Procedure upon discovering omitted assessments.** (1) Upon learning of an omission to assess benefits or to assess costs or to award damages to any lands in a district, the board shall issue an order making the assessments or awards that the board considers just.

(2) No omission to assess benefits or to assess for costs or to award damages to any lands in a district renders any assessment in the district voidable.

(3) This section is retroactive.

**History:** 1993 a. 456.

**88.46 Reassessment of benefits.** (1) At any time after the expiration of 5 years from the order of the board assessing benefits in a drainage district, owners of land in the district may petition the drainage board for a reassessment of benefits on the ground that the original assessment of benefits is inequitable and unjust. The petition shall be signed by at least one-tenth of the owners of land within the district or by the owners of at least one-tenth of the lands within the district.

(2) Upon receipt of a petition meeting the requirements of sub. (1), the board shall either schedule a hearing on the matter to be held within 60 days after receiving the petition or issue an order denying the petition within 60 days after receiving the petition. If it appears to the board that the original assessment of benefits throughout the drainage district was uniformly low or substantially so, by reason of the application of a substandard evaluation or other cause, the board shall issue an order adjusting all benefits in the district so as to correct the inequities and injustices.

(4) A reassessment under this section supersedes all prior assessments of benefits, subject in every case to s. 88.02.

**History:** 1979 c. 110 s. 60 (11); 1993 a. 456.

**88.47 Apportionment of assessments when assessed parcel is divided.** If any tract of land which has been assessed

benefits as a unit subsequently is divided into smaller parcels, the board shall issue an order to apportion the assessment, and any unpaid assessment for costs based thereon, among the several divisions in a manner that is equitable.

**History:** 1977 c. 449; 1993 a. 456.

#### **88.48 Assessment of county and municipal lands.**

(1) Lands owned by a county, town, village or city may be assessed benefits, awarded damages and assessed for costs the same as other lands within the district. Notice of hearing on the report assessing benefits against such lands shall be served on the clerk of the county, town, village or city in the same manner as upon resident landowners.

(2) As assessments for costs levied against any city, village or town become due, the board shall certify the assessments to the clerk of the city, village or town, and the clerk shall place them upon the next tax roll. If the assessments exceed one-fourth of one per cent of the assessed value of the property in the city, village or town for the last previous assessed valuation, the assessments shall be paid in installments of one-fourth of one per cent of the valuation for each year until paid unless the drainage board orders them paid in smaller amounts.

**History:** 1993 a. 456.

A town sanitary district is subject to assessment by a drainage board. *State ex rel. Town of Norway v. Racine County Drainage Board*, 220 Wis. 2d 595, 583 N.W.2d 437 (Ct. App. 1998).

#### **88.49 Assessment of one district by another; judgment against district.**

If one district, by order of the drainage board, has assessed another district for special benefits, or if a money judgment has been rendered against any district, the board shall assess upon the lands of the district that is liable a sum that is sufficient to pay the assessment or judgment. The drainage board may order that the assessment be payable in installments.

**History:** 1993 a. 456.

#### **88.50 When state lands subject to assessment; right-of-way across state lands.**

(1) Agricultural lands owned by the state are subject to assessment in drainage proceedings. Other lands owned by the state are not subject to such assessment. Whenever the state acquires lands against which drainage assessments have been made and which no longer will be subject to assessment, the state shall pay the district all unpaid assessments against such lands, whether due or not. The secretary of the board then shall remove the lands from the district's assessment roll. Acquisition of such lands by the state shall not be construed as prohibiting maintenance of existing drains.

(2) No drain may be constructed on lands owned by the state or on lands on which the state exercises management control by easement, lease or otherwise, without the written permission of the agency responsible for the lands. The agency shall grant such permission upon application made to it, unless it finds after notice and public hearing thereon that the proposed drain will be injurious to the use of the property for the purposes for which it was acquired by the agency. Any administrative decision on the application, or any findings or order of the agency after public hearing, made hereunder shall be subject to review under ch. 227.

**History:** 1993 a. 490.

### SUBCHAPTER V

#### BORROWING MONEY; REFINANCING; COMPROMISE OF DEBTS

**88.54 Borrowing money.** (1) At any time after the filing of a petition for organization of a drainage district but before the court issues an order organizing the drainage district, the drainage board may, with the consent of the court, borrow money in the name of the proposed drainage district to defray the expenses of organization.

(2) The board may borrow money in an amount not exceeding the then unpaid assessments for costs, for the purpose of paying any or all obligations of a drainage district or for refunding existing notes or bonds. The board may secure the indebtedness by notes or bonds of the district, bearing interest at a rate approved by the board and running not beyond one year after the due date of the last installment of the assessments on account of which the money was borrowed. The notes and bonds constitute a lien upon all confirmed assessments for costs that are unpaid at the time the notes are given or bonds issued. Board members are not personally liable on the notes or bonds.

(3) If the board desires to borrow money upon the notes or bonds of a drainage district to be paid during a series of years and after the lapse of a period of not more than 3 years, the board shall first publish a class 2 notice, under ch. 985, to invite proposals to furnish the money desired at the most favorable rate of interest or, if notes or bonds are issued at a specific rate of interest approved by the board, proposals to purchase the notes or bonds at the best premium. If the advertisement is made without success and if the board is unable to sell the notes or bonds at par or above, the board may sell the notes or bonds at private sale at the best price it can obtain for them.

(4) If at any time the board finds that a district does not have or will not have sufficient funds on hand to pay any lawful indebtedness of the district when the indebtedness becomes due, or if any extraordinary emergency requires borrowing, the board may borrow money to pay the indebtedness or meet the emergency. If the amount to be borrowed does not exceed \$8,000 and the loan does not run beyond one year, the board may borrow the money without holding a hearing. In other cases, s. 88.065 applies. When necessary, additional assessments to pay the loans shall be made under s. 88.23.

(6) Except in the case of refunding bonds, no evidence of indebtedness of a district running for more than one year is valid unless approved by the attorney general and unless it bears a statement showing the approval.

(7) The board shall keep a record of all bonds and notes issued on behalf of a district. Such record shall show with respect to each bond and note the number, series, date, principal, rate of interest and date of maturity thereof, the date when interest is due thereon and any payments made. If a bond or note is refunded it shall be marked "Refunded by No. ....". The board shall execute all bonds or notes it offers to the public that mature after more than one year as provided in s. 67.08 (1) and may register these bonds or notes under s. 67.09.

**History:** 1983 a. 24; 1987 a. 275; 1991 a. 316; 1993 a. 456.

**88.55 Refunding district obligations.** (1) The drainage board may refund bonds of the district and issue new bonds of the district payable over a term determined by the board. The aggregate principal amount of the new bonds shall not exceed the aggregate principal amount of the refunded bonds and the unpaid accrued interest on them. The new bonds shall bear interest at a rate approved by the board.

(2) When bonds of the district have been refunded or are about to be refunded under sub. (1), the board may, on petition of one or more landowners or of the board, extend the time in which to pay assessments for construction to September 1 next preceding the due date of a like portion of the refunding bonds which are liens thereon. In such event, the face of all unpaid past due assessments so extended, together with all interest, penalties and charges, shall be a lien on the lands against which the assessments were originally made. The board may make all orders and do all other things necessary to carry into effect the extension of time.

**History:** 1993 a. 456.

#### **88.56 Compromise and discharge of obligations.**

(1) Whenever a drainage district is unable to pay its bonds and notes in full, the board may enter into a written compromise agreement with the owners of not less than 70% of its obligations.

When such agreement has been signed by members of the board and the owners of 70% of such obligations, all creditors of the district are subject to such agreement to the same extent as those signing the agreement, and their claims shall be treated in all respects as if they had executed such agreement.

(2) Whenever a drainage district is unable to pay its obligations in full, the board may file with the court a petition for an order approving a settlement of claims and directing an equitable distribution of net assets among the creditors of the district. Such petition shall list the available assets of the district, the obligations of the district, the owners of such obligations and their names and addresses or, if unknown, a statement of that fact, and shall state whether a compromise agreement has been executed under sub. (1). If such agreement has been executed, a copy thereof shall be attached to the petition.

(3) Upon receiving a petition under sub. (2), the court shall enter an order fixing a time not less than 4 months nor more than 6 months after receipt of the petition within which creditors shall present their claims for examination and allowance. The order shall also fix a time and place for hearing on claims and publication and notice shall be given under s. 88.05 (1) (b) to all creditors of the district whose names and addresses are known.

(4) The court shall receive, examine and adjust all claims and demands against the district. At the time set for hearing on claims, any claim may be allowed which is accompanied by a statement of account verified by affidavit and to which no objection is received, except that no claim shall be allowed until the court is satisfied that it is just.

(5) The court shall make a statement embracing a list of the claims presented against the district and those presented as a set-off. Such statement shall show how much was allowed and how much disallowed in each case, together with the final balance, whether in favor of the creditor or the district. Such statement shall be filed by the judge and shall stand as the judgment of the court. The court may make an order directing that the available balance of the funds of the district, after costs are paid, be distributed among the district's creditors as equity requires and discharging the district from further liability on its obligations.

(6) All claims against a district which are not filed within the time limited by this section are barred.

History: 1993 a. 456.

**88.61 Laying out drains, assessment of benefits and award of damages in existing drainage district.** After the organization of a drainage district and the construction of drains under the procedures in ss. 88.35 and 88.36, if the drainage board proposes to construct additional drains in the existing drainage district, it shall prepare reports, assess benefits and damages, conduct a hearing and determine costs and benefits substantially as provided under ss. 88.35 and 88.36.

History: 1993 a. 456.

NOTE: 1993 Wis. Act 456, which creates this section, contains extensive explanatory notes.

## SUBCHAPTER VI

### CONSTRUCTION, MAINTENANCE AND IMPROVEMENT OF DRAINS

**88.62 Conditions relative to doing of work.** (1) The drainage board may authorize the drainage district to do its own work or the board may enter into contracts to have the work done. The board may advertise for bids and shall do so in all cases where the work to be done will cost in excess of \$10,000. When the board is required to advertise for bids, the board shall publish a class 2 notice, under ch. 985, and other notices that the board considers appropriate, and the work shall be let to the lowest responsible bidder unless in the board's opinion the bid is unreasonably high and a lower bid can be obtained. The board may continue the

letting of the work from time to time, and may reject any or all bids.

(2) Before the board or its contractor may enter on lands for the construction of any drain on the lands, any damages awarded to the owners of the lands in excess of assessments against the lands for the cost of construction must have been paid or tendered. If the owner is unknown or the board for any other reason cannot safely pay the owner, it may deposit the net damages in an escrow account for the benefit of the owner or other party who is entitled to the damages, to be paid or distributed when payment can be made to the owner or other party or released after 5 years, whichever occurs first. Notwithstanding ch. 177, any funds not claimed in 5 years may be retained by the drainage board for the benefit of the drainage district for which the funds are held, after the board publishes a class 2 notice under ch. 985 and mails notice to the last-known address of each owner or other party regarding the existence of the unclaimed funds. The payment has the same effect as a tender to and acceptance of damages by the person entitled to the damages.

(3) (a) If drainage work is undertaken in navigable waters, the drainage board shall obtain a permit under s. 30.20 or 88.31 or ch. 31, as directed by the department of natural resources, except as provided in par. (b).

(b) If drainage work is undertaken in navigable waters located in the Duck Creek Drainage District, the board for that district shall obtain a permit under s. 30.20 or ch. 31, as directed by the department of natural resources.

History: 1987 a. 275; 1991 a. 316; 1993 a. 456; 1999 a. 9.

**88.63 Maintenance and repair of drains. (1g)** In this section "maintenance and repair" refers to the restoration of a drain or any part thereof as nearly as practicable to the same condition as when originally constructed or subsequently improved, including resloping of open ditches and leveling of spoil banks or excavated materials, and such routine operations as from time to time may be required to remove obstructions and preserve the efficiency of the drains. The terms do not include any substantial or material alteration, enlargement or extension of the drainage system of the district.

(1m) It is the duty of the drainage board to maintain in good condition the drains in all districts under the board's jurisdiction and to repair such drains when necessary. The board shall have all drains under its jurisdiction inspected annually to determine the need for maintenance and repair work. The board shall apportion the cost of such inspection to the various districts involved and the cost shall be paid out of any funds of the district available for maintenance and repair. The board may hire an inspector or authorize one or more owners of land in the drainage district to make the inspection or members of the board may themselves make the inspection.

(2) The board shall establish a fund for the payment of costs of maintenance and repair. Whenever the amount of the fund falls below an amount equivalent to 5% of the confirmed benefits currently in effect in the district, the board shall levy an additional assessment under s. 88.23 for maintenance and repair. Assessments for costs of maintenance and repair shall be apportioned on the basis of the confirmed benefits then in effect in the district but may be made notwithstanding the fact that assessments of benefits in the district may have been exhausted by previous assessments for other costs. Assessments for costs of maintenance and repair, including costs incurred and per diems earned by board members under sub. (1m), are not limited by the extent of unexhausted assessments of benefits in the district and shall not be counted in determining whether there are unexhausted assessments of benefits against which assessments for costs other than those authorized by this section may be made.

(4) The drainage board may use the funds assessed for maintenance and repair to pay for the costs of undertaking or defending a lawsuit involving the board, a board member or a drainage dis-

tract or for representing an owner of land in a drainage district as provided in s. 88.21 (13). The board shall allocate the costs to individual drainage districts in an equitable manner.

**History:** 1993 a. 456; 2001 a. 103.

Chapter 30 applies to navigable ditches that were originally navigable streams. If a navigable ditch was originally nonnavigable or had no previous stream history, the department's jurisdiction depends upon the facts of each situation. Section 31.33 applies to nonnavigable artificial waterways insofar as is necessary to protect navigable waters and owners of flooded waters. 63 Atty. Gen. 493.

#### **88.64 Assessment against municipalities for enlargement or maintenance of drains. (1)** In this section:

(a) "Enlarge" means to increase the capacity of a drain to convey water, including adding facilities such as pumps or lift stations, by performing any necessary construction.

(b) "Municipality" means a city, village or town.

(2) A drainage board may assess a municipality with territory upstream from any drain for any costs of enlarging or maintaining the drain that are attributable to increased water flow from land within the municipality. If the drainage board assesses a portion of the costs of enlarging or maintaining a drain against a municipality, the drainage board shall use the procedure under this section.

(3) The drainage board shall obtain a report prepared by a professional engineer who is selected from the list specified in s. 88.21 (5). The report shall include all of the following:

(a) The construction and costs that are necessary to restore the drain so that it conveys the same amount of water as when most recently constructed or enlarged.

(b) The construction and costs that are necessary to enlarge the drain to convey the flow of water from any land in the drainage district or upstream from the drainage district that has been newly drained since the drain was most recently constructed or enlarged.

(c) The construction and costs that are necessary to enlarge the drain to convey the flow of surface water from upstream sources that represents an increase in flow since the drain was most recently constructed or enlarged.

(d) Of the increased flow identified in par. (c), the amount of that flow that is attributable to each municipality with territory in the watershed above the drain, based proportionally on all of the following:

1. The increased flow into the drain from impermeable surfaces such as roads, parking lots or roofs since the drain was most recently constructed or enlarged, whether or not the impermeable surfaces are within the watershed.

2. The increased flow into the drain from the discharge of wastewater from a sewage treatment plant since the drain was most recently constructed or enlarged, whether or not the source of the wastewater is within the watershed.

(e) The maintenance costs that are attributable to the flow of surface water from upstream sources that represents an increase in flow since the drain was most recently constructed or enlarged.

(4) Upon completion of the report under sub. (3), the drainage board shall set a time and place for a hearing on the report and shall give the notice under s. 88.05 (2) (b) to the persons specified in s. 88.05 (4) (c) and to the clerk of each municipality identified in the report as responsible for a portion of the costs of enlarging or maintaining the drain. At the hearing on the report, the drainage board shall hear all objections to the report by any aggrieved person. Representatives of a municipality may introduce evidence that tends to establish a different allocation of costs. If the drainage board finds that the report requires modification or amendment, it shall modify or amend the report as the facts warrant.

(5) At the conclusion of the hearing and after completion of the final report, the drainage board shall issue an order directing each municipality to pay the portion of the cost of enlarging or maintaining the drain as determined in the report. If the drainage board orders or allows landowners in the drainage district to pay for the costs of enlarging or maintaining the drain in installments, the drainage board shall permit a municipality to pay the assess-

ment in installments. The drainage board shall mail the order to the clerk of each municipality by certified mail.

(6) Any municipality affected by the order may, within 120 days after receipt of the order under sub. (5), request the state drainage engineer to review the final report and order of the drainage board. The state drainage engineer shall complete the review of the final report and order within 120 days after receiving the request from the municipality. The state drainage engineer shall issue a report on whether the drainage board order complies with the report prepared under sub. (3), including a recommendation that the drainage board affirm, modify and affirm or reverse the order. The state drainage engineer shall mail a copy of the report and recommendation to the drainage board and to each municipality that is subject to an order under sub. (5). Upon receiving the state drainage engineer's report and recommendation, the drainage board shall promptly issue an order to affirm, modify and affirm or reverse its previous order and mail the order by certified mail to the clerk of each municipality affected by the order and the state drainage engineer. The municipalities that request the state drainage engineer to review the report and order shall jointly pay the actual and necessary costs of the review and the payment shall be credited to the appropriation under s. 20.115 (7) (ga).

(7) A municipality affected by a drainage board order issued under sub. (5) or (6) may seek review of the order under s. 88.09, except that a municipality may commence the action within 120 days after receiving the order.

(8) If a municipality pays the costs assessed by an order issued under sub. (5) or (6), it shall pay the costs or make the first payment of the costs on the February 15 following adoption by the municipality of its next annual budget after the order is issued.

**History:** 1993 a. 456.

**NOTE:** 1993 Wis. Act 456, which creates this section, contains extensive explanatory notes.

#### **88.66 Construction and repair of drains crossing railroad right-of-way. (1)** If necessary for proper drainage, the board may lay out and construct drains across any railway right-of-way within a district. As soon as the drain has been constructed up to such right-of-way, the railway company shall open its right-of-way and permit such drain to cross the same.

(2) Every district whose drains cross the right-of-way of a railway company is liable to such company for the reasonable cost of opening its right-of-way and also for the cost of the culverts and bridges made necessary by such drain. The drainage board shall include such costs in its cost of construction, as set forth in its report of benefits and damages, and shall award them as damages to the railway company. The bridge or culvert shall be designed by the district's engineer and the design submitted to the railway company for approval. If a dispute arises as to the adequacy of the design, either party may submit the dispute to the office of the commissioner of railroads by filing with the office a statement as to the facts involved and the nature of the dispute. The office shall investigate and determine the matter in controversy in accordance with ch. 195, and any order it makes in such proceeding has the same effect as an order in any other proceeding properly brought under ch. 195.

(3) (a) Whenever the cleaning out, deepening or reconstruction of a drain crossing a railway right-of-way requires the lowering of a culvert through such right-of-way in order to provide effective drainage, the drainage board shall proceed as provided in subs. (4) to (7). Except as provided in par. (b), the expenses involved in such lowering shall be borne by the drainage district or as provided by mutual agreement between the railway company and the drainage board.

(b) Whenever a railroad is being constructed or reconstructed across a drainage district's drain, or a culvert in such drain is being replaced, the railway company shall consult with the drainage board having jurisdiction of such district for the purpose of determining the depth at which such drain was laid out. If any culvert or similar opening in a railway right-of-way is installed at a grade

higher than the depth at which such drain was laid out, the expenses involved in any future lowering of the culvert pursuant to par. (a) shall be borne by the railway company unless the company was misled by the drainage board as to the proper grade at which to install the culvert. This paragraph applies only to work done after June 13, 1964.

(4) Whenever it becomes necessary to open a railway right-of-way in order to permit cleaning out or repairing any district drain, the board shall ascertain the reasonable cost thereof and, except as otherwise provided in sub. (3), shall award such cost as damages to the railway company in the board's report when assessing the cost of repairs.

(5) Upon receiving 30 days' notice in writing, any railway company across whose right-of-way any drainage district drain is laid out shall open its right-of-way to permit the board and its contractors, agents or employees to construct, clean out or repair such drain.

(6) If the railway company fails to open its right-of-way as required by this section, the board may at any time after the expiration of 30 days from the giving of the notice specified in sub. (5) open such right-of-way along the lines of such drains and construct, clean out or repair the same and may recover from the railway company the reasonable expense of opening the right-of-way.

(7) The district constructing, cleaning out or repairing a drain across the right-of-way of a railway company shall so prosecute the work as not to delay traffic upon such railway for longer than is absolutely necessary.

**History:** 1977 c. 29 s. 1654 (9) (f); 1981 c. 347; 1993 a. 16, 123, 490.

**88.67 Construction and repair of drains crossing utility installations; laying utility installations across drains.** (1) Whenever the construction, reconstruction, clean out or repair of a drain makes necessary the removal or raising of a utility installation in order to permit the passage of a dredge or other machinery or whenever the lowering of an underground utility installation is necessary in order to provide effective drainage, the owner of the utility installation, upon being given 30 days' written notice stating the place where such dredge or machinery will pass or that lowering is necessary to provide effective drainage, shall remove, raise or lower the utility installation as requested by the board. Except as provided in sub. (3), the expenses involved in such removal, raising or lowering shall be borne by the drainage district or as provided by mutual agreement between the drainage board and the owner of the utility installation.

(2) If after the 30 days' notice specified in sub. (1) the owner of the utility installation fails to remove, raise or lower the same, the board may do so and may recover from the owner of the installation the cost of the removal, raising or lowering.

(3) Whenever an underground utility installation is being laid or relaid across a drainage district's drain, the owner of the utility installation shall consult with the drainage board having jurisdiction of such district for the purpose of determining the grade at which such drain was laid out. If an underground utility installation is laid at a grade higher than the grade at which the drain was laid out, the expenses involved in any future lowering of the utility installation shall be borne by the owner of the utility installation unless the owner was misled by the drainage board as to the proper grade at which to lay the utility installation. This subsection applies only to work done after June 13, 1964.

(4) In this section "utility installation" includes any sluice or pipe carrying any gas or liquid, or any wire, conduit or cable used for conducting electricity or for any other purpose, whether or not such installation is owned by a public utility.

**88.68 Construction of drain across public highway; construction of bridges across drains.** (1) Any drain across a public highway shall be constructed according to like

specifications and at the same time as the drain above such highway is constructed.

(2) If the construction of a drain across a public highway makes necessary the construction or reconstruction of a bridge, the drainage board and the officers in charge of maintenance of the highway shall try to agree on the best method of constructing or reconstructing the bridge. If they are unable to agree, the matter shall be submitted to arbitration under ch. 788. If it is determined to reconstruct or add to the bridge, the district shall pay the costs incident to the reconstruction or addition. If it is determined to construct a new bridge, the drainage district shall pay to the unit of government responsible for the maintenance of the highway a sum that is considered equivalent to the value of the bridge in place at the time of the construction of the drain.

(3) If the unit of government in charge of maintenance of a highway decides to construct a new bridge across a drain, the officers in charge of such construction shall notify the drainage board thereof by registered mail addressed to the secretary of the board. If the board within 10 days after receiving such notice notifies the officers in charge of construction of the bridge that it desires such bridge to be constructed with a certain clear span, the bridge shall be constructed in accordance with the board's order. If the board's order requires the bridge to be built of greater span than is necessary for proper drainage of flood waters, any excess cost resulting from such order shall be paid by the drainage district.

(4) Whenever the cleaning out, deepening or reconstruction of a drain crossing a public highway requires the lowering of a culvert through such highway in order to provide effective drainage, the drainage board may proceed to lower such culvert only after obtaining a permit under s. 86.07 (2). In lieu of issuing a permit, the authority in charge of maintenance of the highway may proceed to do the work itself. Except as provided in s. 86.075, the expenses involved in such lowering shall be borne by the drainage district, or as provided by mutual agreement between the highway authority and the drainage board.

**History:** 1993 a. 456.

**88.69 District liable for damage to land outside its boundaries.** (1) A drainage district is liable for any damages resulting to lands outside its boundaries because of work done within its boundaries. In this subsection "damages" means only such damages as could be recovered against a natural person for like injury resulting from like work. No action shall be taken to collect damages to outside lands until the damages actually have resulted. In cases of construction of new drains, the state may proceed pursuant to ch. 813 to prevent damage or injury to lands owned by the state.

(2) If through the construction of a drain by a higher district a lower drainage district incurs extra expense in providing means to carry off the waters or remove the sediment flowing from the higher district, the higher district is liable for such increased cost. The amount of such increased cost may be agreed upon between the districts or may be recovered in an action at law.

**History:** Sup. Ct. Order, 67 Wis. 2d 585, 774 (1975).

**88.70 Formation of subdistrict to obtain more thorough drainage.** (1) If the owners of land in a part of a drainage district desire a more thorough or different drainage than the drains of the district currently provide or than the planned reconstruction will provide, a majority of the owners may petition the board to have specified lands set aside as a subdistrict of the drainage district in order to permit a more thorough or different drainage.

(2) The board shall fix a time and place of a hearing on the petition and shall cause notice to be given under s. 88.05 (2) (b) to the persons specified in s. 88.05 (4) (b).

(3) If the drainage board is satisfied that the public health or public welfare will be promoted by more thorough or different drainage and that the benefits of the drainage will exceed the cost of construction, the drainage board shall order that a subdistrict of



the drainage district be formed, give it a name or number and fix its boundaries.

(4) After organizing the subdistrict, the board shall prepare a plan and specifications for the more thorough or different drainage, estimate the cost of construction of the drainage, estimate the cost of all additional bridges made necessary because of the drainage, and assess benefits against and award damages to all lands in the subdistrict that are benefited or damaged by the more thorough or different drainage. Assessments and awards shall be made substantially as provided in s. 88.35.

(5) Nothing in this section is intended to relieve owners of lands in the subdistrict of the proportionate share of their obligations to the district in which the subdistrict was formed.

*History:* 1993 a. 456.

#### 88.71 Enlarging or supplementing existing drains.

(1) Whenever the board is petitioned by the owners of one-tenth of the lands in a district to enlarge existing drains or to lay out and construct new drains in such district, or whenever the board is of the opinion that the plan of drainage of the district is or will be insufficient to effect a thorough drainage of such district or any portion thereof, and that enlarged or supplemental drains are required to effect such drainage, the board shall cause to be prepared plans and specifications for the enlargement of existing drains or for the construction of sufficient supplemental drains to complete the drainage of such district.

(1m) If the drainage board is satisfied that the public health or welfare will be promoted by the enlarged or supplemental drains and that the benefits from the drains will exceed the cost of construction, the drainage board shall order the construction of the enlarged or supplemental drains.

(2) The board shall estimate the cost of construction of the enlargements or supplemental drains together with the cost of all additional bridges that the district must build and shall assess the costs against the lands benefited, as provided in ss. 88.35 and 88.36 and in this subsection. The board shall award to each parcel of land the damages caused to the land by the supplemental work and shall assess benefits against the lands benefited by the supplemental work. The benefits shall be apportioned and assessed so that all assessed lands are required to pay a sum total for the construction of the total drainage proportionate to the actual benefits received by the lands from the total drainage.

*History:* 1993 a. 456.

**88.72 Removal of dams or other obstructions in drainage outlets.** (1) The owners of more than one-tenth of the lands within any district may file with the drainage board a petition setting forth:

(a) That the drains constructed within such district do not afford an adequate outlet for drainage;

(b) That it is necessary in order to give an adequate outlet to remove certain dams or other obstructions from waters or streams or to deepen, straighten or widen the same either within or beyond the boundaries of such district; and

(c) That the public health and the public welfare will be promoted by such work and that the navigability of such waters or streams and other public rights therein will not be materially impaired.

(2) Upon receiving a petition under sub. (1), the drainage board shall fix a time and place of a hearing on the petition and shall cause notice of the hearing to be given under s. 88.05 (2) (b) to the persons specified in s. 88.05 (4) (a), to the owner of any dam sought to be removed and to all riparian owners affected by the removal.

(3) At the hearing on the petition, any interested person may appear and contest its sufficiency and the necessity for the work. If the drainage board finds that the petition has the proper number of signers and that to afford an adequate outlet it is necessary to remove dams or other obstructions from waters and streams which

may be navigable, or to straighten, clean out, deepen or widen any waters or streams either within or beyond the limits of the district, the board shall obtain any permit that is required under this chapter or ch. 30 or 31.

(4) Within 30 days after the department of natural resources has issued all of the permits as required under this chapter and chs. 30 and 31, the board shall proceed to estimate the cost of the work, including the expenses of the proceeding together with the damages that will result from the work, and shall, within a reasonable time, award damages to all lands damaged by the work and assess the cost of the work against the lands in the district in proportion to the assessment of benefits then in force.

(5) The drainage board may grant the petition and order the additional work done only if the drainage board is satisfied that:

(a) The intended result can be effectively achieved by additional work at a reasonable cost;

(b) The public welfare will be promoted by such additional work;

(c) The cost of such additional work, when added to all expenses previously incurred by the district will not exceed the total benefits theretofore assessed; and

(d) A petition, which is the same in substance or effect as the current petition, has not previously been denied by the drainage board.

*History:* 1973 c. 336; 1993 a. 456; 1999 a. 9.

#### 88.73 Providing drainage for lands assessed but not adequately drained.

(1) Any person owning lands that have been assessed for costs of construction but which are in need of drainage because of being shut off from access to any district drain or because the slope of the land is such that it is impractical to drain the land into a district drain without crossing the lands of others may file with the drainage board a verified petition stating such facts, including a description of the lands sought to be drained and asking that a drain be laid out from the petitioner's lands to the district drain.

(2) The petitioner and all persons whose lands will be directly affected by the proposed drain may, in writing, waive any or all notices of hearings and may consent to an immediate hearing on the petition, upon which the drainage board may enter an order to construct the drain. The board's order shall include all of the provisions of s. 88.35 (1). If no written waiver or consent is filed by all persons immediately interested, the procedure on a petition under this section shall be substantially as outlined in ss. 88.35 and 88.36.

*History:* 1991 a. 316; 1993 a. 456.

### SUBCHAPTER VII

#### ENLARGEMENT, CONSOLIDATION, DIVISION AND DISSOLUTION OF DRAINAGE DISTRICT

#### 88.77 Annexation of lands upon petition of owners.

(1) If owners of lands adjacent to any drainage district want the lands to be annexed to the district, they may file with the drainage board a petition for annexation. The petition must be signed either by more than one-half of all of the owners of lands in the proposed annex, who shall represent more than one-third of the lands in the proposed annex, or by the owners of more than one-half of the lands in the proposed annex. The petition shall describe the lands sought to be annexed and shall set forth the names of the owners of all of those lands so far as the owners are known. The petition shall be accompanied by a plat showing the original district and the proposed annex.

(2) If the undrained portion of the area proposed to be annexed to the district exceeds 200 acres, the drainage board shall request the report described under s. 88.11 (3) and (5) from the department of agriculture, trade and consumer protection on the annexation.

Within 60 days after the request, the department shall prepare and return a copy of the report and its approval or disapproval, as provided under s. 88.35 (7).

(3) When the drainage board receives the reports required by s. 88.11, the board shall fix a time and place of a hearing on the petition under sub. (1) and shall cause notice of the hearing to be given under s. 88.05 (2) (b) to the persons specified in s. 88.05 (4) (c).

(4) The drainage board shall issue an order annexing the territory to the drainage district if at the hearing the board finds all of the following facts:

(a) That the petition has sufficient signers.

(b) That the lands described in the petition, together with any additional lands recommended by the board for drainage, will be improved by the proposed annexation.

(c) That the public health or public welfare will be promoted by the annexation.

(d) That the cost of construction will not exceed 75% of the benefits to be derived from the proposed work.

(e) That the proposed work will not materially injure or impair fish or wildlife habitat, scenic beauty, the conservation of natural resources or other public rights or interests.

(5) If the board finds the facts stated in sub. (4) (a) to (c) and (e) but finds that the cost of construction will exceed 75% of the benefits to be derived from the proposed work, the board nevertheless shall annex the territory to the drainage district if, within 10 days of the order being issued under sub. (4), the petitioners file with the board a bond with sufficient sureties to be approved by the board and conditioned for the payment of the excess or the petitioners deposit and leave with the board a sum of money that the board determines will cover the excess.

(6) Upon issuance of the order annexing the territory to the drainage district, the drainage board shall proceed as provided under ss. 88.35 and 88.36.

*History:* 1993 a. 456.

**NOTE:** 1993 Wis. Act 456, which substantially affects this section, contains extensive explanatory notes.

**88.78 Annexation of benefited lands.** (1) Whenever any lands outside a drainage district are in fact receiving the benefits of any drain of such district but such fact was not evident or was inadvertently overlooked at the time of organization of the district, such benefited lands may be annexed under the procedure prescribed in this section.

(2) Any owner of land within the district may file with the board a petition to have the benefited lands annexed to the district and assessed benefits and assessed for costs as other lands in the district. The petition shall describe the benefited lands and how they are benefited. Upon the filing of the petition, the drainage district shall issue an order directing that the owners of the benefited lands be notified of the filing and the contents of the petition and requiring the owners to show cause at a fixed time and place, not less than 20 days after the petition is filed, why their lands should not be brought into the district and assessed.

(3) Any owner of lands sought to be annexed may object to the petition at the hearing thereon. If the drainage board is satisfied that any or all of the lands are receiving benefits from any district drain, the drainage board shall so find in writing and shall issue an order requiring that the benefited lands be made a part of the district.

(4) The board shall assess benefits and assess for costs and award damages to each tract of the annexed lands.

*History:* 1993 a. 456.

**88.79 Consolidation of drainage districts in process of organization.** (1) Two or more drainage districts petitioned for or in the process of organization may, upon order of the court, be consolidated to form a single drainage district. The order of consolidation may be issued only after a public hearing as specified in this section.

(2) The consolidation process may be initiated either by the court on its own motion, by recommendation of the board made to the court, or by petition signed by the owners of at least 10% of the lands in each of the districts sought to be consolidated. If such districts are under the jurisdiction of different courts, the proceeding shall be conducted by the court having jurisdiction of the larger area.

(3) The court shall fix a time and place of a hearing on the proposed consolidation and shall cause notice of the hearing to be given under s. 88.05 (1) (b) to the persons specified in s. 88.05 (4) (b). If the court after the hearing is of the opinion that the drainage districts would be benefited by the proposed consolidation, it shall so order, giving a name to the consolidated district.

*History:* 1993 a. 456.

**88.791 Consolidation of existing drainage districts.**

(1) Two or more existing drainage districts may, upon an order issued by the drainage board, be consolidated to form a single drainage district. An order of consolidation may be issued only after a public hearing as specified in this section.

(2) The consolidation process may be initiated by a petition that is signed by the owners of at least 10% of the lands in each of the districts sought to be consolidated.

(3) The drainage board shall fix a time and place of a hearing on the proposed consolidation and shall cause notice of the hearing to be given under s. 88.05 (2) (b) to the persons specified in s. 88.05 (4) (b). If after the hearing the drainage board is of the opinion that the drainage districts would be benefited by the proposed consolidation, it shall so order, giving a name to the consolidated district.

(4) Upon entry of the order of consolidation, the records of the districts so consolidated shall be the records of the consolidated district.

(5) Assessments made against lands in the several districts so consolidated shall remain in full force and the lien thereof is not affected by such consolidation.

(6) After such consolidation, the benefits of the consolidated district may be reassessed to render them just and equitable as a basis for future assessments for costs, subject to s. 88.02.

*History:* 1993 a. 456 ss. 100, 101.

**NOTE:** 1993 Wis. Act 456, which creates this section, contains extensive explanatory notes.

**88.80 Withdrawal of lands from drainage district.**

(1) Any person owning lands within a drainage district may, under an order issued by the drainage board, withdraw the lands from the district if:

(a) All benefits assessed against such lands have been paid; and

(b) The lands to be withdrawn will receive no benefit from the drainage district; and

(c) The drainage district will not be materially injured by the withdrawal of such lands.

(2) The petition for the withdrawal shall be filed with the board. The board shall determine whether all benefits assessed against the land have been paid.

(3) When the petition has been filed, the drainage board shall fix the time and place of a hearing on the petition and shall cause notice of the hearing to be given under s. 88.05 (2) (b) to the persons specified in s. 88.05 (4) (b). If the drainage board finds that the conditions of sub. (1) have been met, it shall issue an order detaching the lands from the district. The drainage board may require the petitioner to pay the expenses connected with the hearing.

*History:* 1993 a. 456.

**88.81 Proceedings to suspend operations of drainage district.** (1) (a) The owners of land representing 90% or more of the confirmed benefits in a drainage district, excluding benefits received by land owned by this state, may file with the drainage board a petition requesting that the board conduct no further pro-

ceedings and incur on behalf of the district no further expense if the petition is filed within 2 years after the order organizing the district is issued under s. 88.34.

(b) The owners of land representing 67% or more of the confirmed benefits in a drainage district, excluding benefits received by land owned by this state, may file with the drainage board a petition requesting that the board conduct no further proceedings and incur on behalf of the district no further expense if the petition is filed at least 2 years after the order organizing the district is issued under s. 88.34.

(bm) Except as provided in par. (bs), the owner of any land in a drainage district may file with the drainage board a petition requesting that the board conduct no further proceedings and incur on behalf of the district no further expense if the petition is filed at least 20 years after the latest assessment for costs against land in the drainage district.

(bs) A state agency, as defined in s. 16.61 (2) (d), may not petition for the suspension of operations of a drainage district.

(c) Upon receipt of a petition, the drainage board shall fix a time and place of a hearing on the petition and shall cause notice of the hearing to be given under s. 88.05 (2) (b) to the persons specified in s. 88.05 (4) (b).

(2) If after the hearing the drainage board finds that the petition is signed by the required number of owners, that notice of the hearing was properly given, and that the conditions of sub. (3) have been met, it shall issue an order directing that no more work be done in or expense incurred on behalf of the district. The order does not dissolve the district or in any way affect existing contracts. The district remains liable for all its debts existing at the time of issuance of the drainage board order suspending operations, and the board shall continue to levy such additional assessments for costs as are necessary to meet existing obligations.

(3) As a condition of issuing the order under sub. (2), the drainage board shall require the petitioners under this section to pay the expenses of the hearing under this section and all expenses, if any, incurred in connection with specific current projects whose completion would be affected by the drainage board order.

(4) An order suspending operations of a drainage district remains in effect until a like application upon like notice requesting that work be continued is heard and determined in favor of petitioners.

**History:** 1977 c. 449; 1983 a. 483; 1993 a. 456.

**88.82 Dissolution of drainage districts.** (1) (a) The owners of land representing 90% or more of the confirmed benefits in a drainage district, excluding benefits received by land owned by this state, may file with a court having jurisdiction on this matter a petition for the dissolution of the district if the petition is signed by those owners and if the petition is filed within 2 years after the order organizing the district is issued under s. 88.34.

(b) The owners of land representing 67% or more of the confirmed benefits in a drainage district, excluding benefits received by land owned by this state, may file with a court having jurisdiction on this matter a petition for the dissolution of the district if the petition is signed by those owners and if the petition is filed at least 2 years after the order organizing the district is issued under s. 88.34.

(bm) Except as provided in par. (bs), the owner of any land in a drainage district may file with the court a petition for the dissolution of the district if the petition is filed at least 20 years after the latest assessment for costs against land in the drainage district.

(bs) A state agency, as defined in s. 16.61 (2) (d), may not petition for the dissolution of a drainage district.

(c) In any county in which all land has been incorporated in cities or villages, the county board of supervisors is authorized to file the petition.

(d) Upon the filing of a petition for dissolution under this section, the court shall fix the time and place of a hearing on the peti-

tion and shall cause notice of the hearing to be given under s. 88.05 (1) (b) to the persons specified under s. 88.05 (4) (b).

(2) No district shall be dissolved until all its debts have been paid unless:

(a) Funds to pay such debts, including any interest thereon, have been deposited with the county treasurer; or

(b) The lands of the district have been assessed to the full amount of the confirmed assessed benefits and such assessments either have been paid in full or tax certificates have been issued for the lands under s. 74.57.

(3) If the court is satisfied upon the hearing that the conditions stated in sub. (2) have been met, that the petition is signed by the required number of owners, and that the public welfare will be promoted by dissolution of the district, it shall enter an order dissolving the drainage district. If the court enters an order dissolving the drainage district, it shall order dissolution of the entire drainage district and may not order dissolution of part of the district.

(4) If the county treasurer has on hand any funds belonging to such dissolved district, the treasurer shall forthwith make distribution thereof among the several landowners in the district in proportion to the last confirmed assessment of benefits in the district. If there is any doubt as to the ownership of such lands, the owners claiming the right to participate in such funds shall make satisfactory proof of ownership to the court.

(5) If the county treasurer has funds on hand belonging to a drainage district which has been inactive for 6 or more years, he or she shall publish in the county, as a class 3 notice, under ch. 985, a notice of intent to file with the court having jurisdiction thereof a petition for dissolution of the drainage district, except that such notice is not required if funds on hand are less than \$100. Ninety days after the last publication provided for in this subsection, the county treasurer shall file such petition together with objections, if any, and if dissolution is ordered, such funds held by the county treasurer shall revert and pass to the county for the benefit of the county. If the funds on hand are less than \$100, such funds shall automatically revert and pass to the county general fund.

(6) Any drains which have been constructed by a drainage district dissolved under this section or under prior law shall remain common waterways for the use of all landowners in the dissolved district. Any such landowner may make repairs thereto at the landowner's own expense. Any person who in any manner obstructs or injures any such drain is liable for all damages caused to any person thereby and in addition may be fined not more than \$100.

(7) In the alternative in any county in which all land has been incorporated in cities or villages if a drainage board is abolished or if a drainage district passes out of existence, any funds being held by the county treasurer shall revert and pass to the county for the benefit of the county.

**History:** 1975 c. 324, 421; 1983 a. 483; 1987 a. 378; 1991 a. 32, 316; 1993 a. 456.

**Cross Reference:** See also ch. NR 301, Wis. adm. code.

**88.83 Transfer of district to city or village jurisdiction.**

(1) The owners of a majority of the land in any drainage district located entirely within the corporate limits of a city or village may petition the drainage board having jurisdiction of the district to transfer jurisdiction thereof to the city or village.

(1m) The owners of a majority of the land lying within the corporate limits of a city or village in any drainage district located partially within the corporate limits of a city or village may petition the drainage board having jurisdiction of the district to transfer jurisdiction of that part of the district located within the city or village to the city or village if the district and the city or village are in agreement regarding the terms of transfer.

(1r) The owners of a majority of the land lying within the limits of a town in any drainage district located partially within the limits of the town may petition the drainage board having jurisdiction of the district to transfer jurisdiction of that part of the district

located within the town to the town if the district and the town are in agreement regarding the terms of transfer. The provisions of subs. (3), (4) and (5) governing the transfer of a drainage district to a city or village are applicable to a transfer under this subsection.

(2) Upon receiving a petition under this section the drainage board shall fix the time and place of the hearing on the petition and shall cause notice of the hearing to be given under s. 88.05 (2) (b) to the persons specified in s. 88.05 (4) (b).

(3) If the drainage board finds upon the hearing that the petition is signed by the owners of a majority of the land in the district, or by a majority of the owners in that part of the district lying within the corporate limits of a city or village, it shall issue an order transferring jurisdiction of the district or part of the district to the city or village. If the order transfers jurisdiction of the entire district, the drainage district shall cease to exist as a district under this chapter and shall automatically come under the jurisdiction of the governing body of the city or village in which the district is located. If the order transfers jurisdiction of only a part of the district, the section transferred shall automatically come under the jurisdiction of the governing body of the city or village in which the district is located. After a transfer, all proceedings with reference to the drainage district or part of the district shall be under the city or village drainage law.

(4) As an alternative, proceedings covered by this section may be initiated by a resolution of the governing body of a city or village. The resolution shall state that the city or village is willing to accept the drain or part of the drain and to administer it under the laws pertaining to the operation of drains by the city or village, and that the public interest requires that the city or village take over the operation of the drain or part of the drain. The resolution shall be published as a class 1 notice under ch. 985. The city or village may petition the drainage board having jurisdiction of the drain to issue an order transferring jurisdiction of the district or part of the district to the city or village. No hearing may be held on the petition until 30 days have elapsed from the date of publication of the notice. A copy of the petition, together with a copy of the resolution, shall be served on the county clerk of the county in which the drain is located, and also upon the board having jurisdiction of the drain. After the hearing the drainage board may issue an order transferring jurisdiction of the drain or part of the drain to the city or village. If an order is issued that transfers jurisdiction of the entire district, the drainage district shall cease to exist as a district under this chapter and shall automatically come under the jurisdiction of the governing body of the city or village in which the district is located. If the order transfers jurisdiction of only a part of the district, the section transferred shall automatically come under the jurisdiction of the governing body of the city or village in which the district is located. After a transfer, all proceedings with reference to the drainage district or part of the district shall be under the city or village drainage law.

(5) Upon entry of the order transferring jurisdiction of such district to such city or village, the county treasurer shall pay to the city or village treasurer of such city or village all moneys in the county treasurer's hands which belong to such drainage district. Upon entry of an order transferring jurisdiction of a part of a district to the city or village in which it is located, the county treasurer shall pay to the city or village treasurer a proportional share of the moneys in the county treasurer's hands which belong to the drainage district based upon assessed benefits transferred less a proportional share of outstanding indebtedness.

**History:** 1979 c. 110 s. 60 (11); 1991 a. 316; 1993 a. 456.

### SUBCHAPTER VIII

#### RIGHTS OF DRAINAGE; PRIVATE DRAINS; MISCELLANEOUS PROVISIONS

**88.87 Road grades not to obstruct natural drainage, landowners not to obstruct highway drainage; remedies.** (1) It is recognized that the construction of highways and railroad grades must inevitably result in some interruption of and changes in the preexisting natural flow of surface waters and that changes in the direction or volume of flow of surface waters are frequently caused by the erection of buildings, dikes and other facilities on privately owned lands adjacent to highways and railroad grades. The legislature finds that it is necessary to control and regulate the construction and drainage of all highways and railroad grades so as to protect property owners from damage to lands caused by unreasonable diversion or retention of surface waters due to a highway or railroad grade construction and to impose correlative duties upon owners and users of land for the purpose of protecting highways and railroad grades from flooding or water damage.

(2) (a) Whenever any county, town, city, village, railroad company or the department of transportation has heretofore constructed and now maintains or hereafter constructs and maintains any highway or railroad grade in or across any marsh, lowland, natural depression, natural watercourse, natural or man-made channel or drainage course, it shall not impede the general flow of surface water or stream water in any unreasonable manner so as to cause either an unnecessary accumulation of waters flooding or water-soaking uplands or an unreasonable accumulation and discharge of surface waters flooding or water-soaking lowlands. All such highways and railroad grades shall be constructed with adequate ditches, culverts, and other facilities as may be feasible, consonant with sound engineering practices, to the end of maintaining as far as practicable the original flow lines of drainage. This paragraph does not apply to highways or railroad grades used to hold and retain water for cranberry or conservation management purposes.

(b) Drainage rights and easements may be purchased or condemned by the public authority or railroad company having control of the highway or railroad grade to aid in the prevention of damage to property owners which might otherwise occur as a result of failure to comply with par. (a).

(c) If a city, village, town, county or railroad company or the department of transportation constructs and maintains a highway or railroad grade not in accordance with par. (a), any property owner damaged by the highway or railroad grade may, within 3 years after the alleged damage occurred, file a claim with the appropriate governmental agency or railroad company. The claim shall consist of a sworn statement of the alleged faulty construction and a description, sufficient to determine the location of the lands, of the lands alleged to have been damaged by flooding or water-soaking. Within 90 days after the filing of the claim, the governmental agency or railroad company shall either correct the cause of the water damage, acquire rights to use the land for drainage or overflow purposes, or deny the claim. If the agency or company denies the claim or fails to take any action within 90 days after the filing of the claim, the property owner may bring an action in inverse condemnation under ch. 32 or sue for such other relief, other than damages, as may be just and equitable.

(d) Failure to give the requisite notice by filing a claim under par. (c) does not bar action on the claim if the city, village, town, county, railroad company or department of transportation had actual notice of the claim within 3 years after the alleged damage occurred and the claimant shows to the satisfaction of the court that the delay or failure to give the requisite notice has not been prejudicial to the defendant city, village, town, county, railroad company or department of transportation.

(3) (a) It is the duty of every owner or user of land who constructs any building, structure or dike or otherwise obstructs the flow of stream water through any watercourse or natural or man-made channel or obstructs the flow of surface water through

any natural or man-made channel, natural depression or natural draw through which surface waters naturally flow:

1. To provide and at all times maintain a sufficient drainage system to protect a downstream highway or railroad grade from water damage or flooding caused by such obstruction, by directing the flow of surface waters into existing highway or railroad drainage systems; and

2. To protect an upstream highway or railroad grade from water damage or flooding caused by such obstruction, by permitting the flow of such water away from the highway or railroad grade substantially as freely as if the obstruction had not been created.

(b) Whoever fails or neglects to comply with a duty imposed by par. (a) is liable for all damages to the highway or railroad grade caused by such failure or neglect. The authority in charge of maintenance of the highway or the railroad company which constructed or maintains the railroad grade may bring an action to recover such damages. An action under this paragraph shall be commenced within the time provided by s. 893.59 or be barred.

(c) The authorities in charge of maintenance of highways or railroad companies maintaining railroad grades and their agents and employees may enter any lands for the purpose of removing an obstruction in a watercourse or highway drainage ditch which is in violation of par. (a) and which is flooding or causing damage to a highway under its jurisdiction.

(4) If a railway company fails to comply with sub. (2), any person aggrieved thereby may file a complaint with the office of the commissioner of railroads setting forth the facts. The office shall investigate and determine the matter in controversy in accordance with ch. 195, and any order it makes in such proceeding has the same effect as an order in any other proceeding properly brought under ch. 195.

**History:** 1977 c. 29 s. 1654 (8) (c), (9) (f); 1979 c. 323; 1981 c. 347; 1993 a. 16, 123, 456.

Sub. (2) (c) requirements are mandatory conditions precedent to bringing an action under this section. *Van v. Town of Manitowoc Rapids*, 150 Wis. 2d 929, 442 N.W.2d 557 (Ct. App. 1989).

This statute preempts common law claims; the claims period under sub. (2) (c) begins to run when the damage is first discovered and is not extended if damage continues. *Pruim v. Town of Ashford*, 168 Wis. 2d 114, 483 N.W.2d 242 (Ct. App. 1992).

Despite a finding that a railroad was not responsible for increased water flow that resulted in flooding, an order to the railroad to install a drainage pipe was proper. *Soo Line Railroad v. Commissioner of Transportation*, 170 Wis. 2d 543, 489 N.W.2d 672 (Ct. App. 1992).

Sub. (2) (a) imposes a duty on railroads to refrain from impeding water flow. The railroad commissioner may act prospectively under sub. (4) to prevent flooding. Sub. (2) (c) applies when there has been actual damage, but does not require actual damage for the commissioner to act under sub. (4). *Chicago & North Western Transportation Co. v. Commissioner of Railroads*, 204 Wis. 2d 1, 553 N.W.2d 845 (Ct. App. 1996).

This section does not impose on a circuit court a positive duty to grant injunctive relief under specified conditions, but provides an alternative remedy to an action for damages under ch. 32. The common law preference for legal over equitable relief applies. As such, to obtain an injunction it must be shown that the injunction is necessary to prevent future harm to the property and there is no adequate legal remedy. *Kohlbeck v. Reliance Construction Company, Inc.* 2002 WI App 142, \_\_\_ Wis. 2d \_\_\_, 647 N.W.2d 277.

Parties who can state a claim against DOT under both ss. 32.10 and 88.87 may choose to file suit in either Dane County or the county in which the property lies. *Kohlbeck v. Reliance Construction Company, Inc.* 2002 WI App 142, \_\_\_ Wis. 2d \_\_\_, 647 N.W.2d 277.

### 88.88 Railroad to construct ditch or sluiceway across right-of-way.

(1) Whenever the owner of land desires to drain the same by a blind or open ditch and, to properly drain such land, a connecting ditch or sluiceway should be constructed across the right-of-way of a railway company, such owner shall file with the depot agent of such company nearest to such land a written petition stating the kind of ditch proposed to be built and requesting the company to construct a ditch or sluiceway across its right-of-way which will conform thereto. Within 60 days after the filing of such petition, the railway company shall construct such ditch or sluiceway. The petitioner shall pay the cost of such construction and shall assume all expenses in connection with maintaining such ditch or sluiceway on the railroad's right-of-way.

(2) If the railway company fails to comply with sub. (1), the person aggrieved thereby may file a complaint with the office of

the commissioner of railroads setting forth the facts. The office shall investigate and determine the matter in controversy in accordance with ch. 195, and any order it makes in such proceeding has the same effect as an order in any other proceeding properly brought under ch. 195.

**History:** 1977 c. 29 s. 1654 (9) (f); 1981 c. 347; 1993 a. 16, 123, 490.

### 88.89 Roads not to obstruct natural watercourse.

(1) Whenever any embankment, grade, culvert or bridge, including the approaches to the culvert or bridge, built or maintained by any person across a natural watercourse or natural draw obstructs the watercourse or draw so that waters therein are set back or diverted upon any lands in a drainage district, the person who built the embankment, grade, culvert or bridge shall enlarge the waterway through the embankment, grade, culvert or bridge and the approaches thereto so that it will not set back or divert waters upon lands in the district.

(2) The drainage board or the owner of any land upon which water is set back or diverted by the obstruction described in sub. (1) may serve notice upon the owner or maintainer of the embankment, grade, culvert or bridge to enlarge the opening for the waterway or to make new openings in order to permit the water to pass without being set back or diverted onto the lands of the district. If the owner of or person maintaining the embankment, grade, culvert or bridge fails to comply with the directive of the notice within 60 days after receiving the notice, the drainage board on its own behalf, or on petition of the injured landowner, may conduct a hearing under sub. (3).

(3) Upon receipt of a petition under sub. (2), the drainage board shall fix the time and place of a hearing on the petition and shall issue an order to the owner or maintainer of the embankment, grade, culvert or bridge to show cause why an order directing the work to be done should not be issued. At least 10 days before the time fixed for the hearing on the petition, the order to show cause shall be served on the owner or maintainer, or on both if both are named in the petition, as prescribed in s. 801.11 for the service of a summons.

(4) If the drainage board is satisfied that the embankment, grade, bridge or culvert so obstructs the watercourse or draw that it causes water to be set back or diverted upon lands in the drainage district, the drainage board shall issue an order to the owner or maintainer of the embankment, grade, bridge or culvert to enlarge the waterway or construct a new waterway through the embankment, grade, bridge or culvert, as the facts warrant. The period of time that the embankment, grade, bridge or culvert has been in existence is no defense to a proceeding under this section.

(5) Any person who fails to comply with an order issued under this section is liable to the injured party for all damages caused by the failure.

**History:** Sup. Ct. Order, 67 Wis. 2d 585, 774 (1975); 1977 c. 449; 1993 a. 456; 1995 a. 225.

### 88.90 Removal of obstructions from natural watercourses.

(1) Whenever any natural watercourse becomes obstructed so that the natural flow of water along the same is retarded by the negligent action of the owner, occupant or person in charge of the land on which the obstruction is located, the owner or occupant of any lands damaged by such obstruction may request the removal thereof by giving notice in writing to such owner, occupant or person in charge of the land on which the obstruction is located.

(2) If the obstruction is not removed within 6 days after receipt of such notice and if the obstruction is located in a village or town, the owner or occupant of the damaged lands may make complaint to the village or town board, filing at the same time a copy of the notice. The village trustees or town supervisors, after viewing the watercourse and upon being satisfied that the complaint is just, shall make recommendations in writing to the owner or occupant of the lands where the obstruction is located, for the removal of such obstruction. If such recommendations are not followed

within a reasonable time, the village or town board shall order the obstruction removed. The cost of view and of removal shall be charged and assessed against the lands from which the obstruction was removed and shall be collected as other special assessments are collected.

(3) Whenever any natural watercourse becomes obstructed through natural causes, the owner or occupant of any lands damaged by the effect which the obstruction has upon the flow of the water may go upon the land where the obstruction is located and remove it at that person's own expense. Such person is not guilty of trespass for entry upon the land but is liable for damage caused to crops or structures. The rights and privileges conferred by this subsection also extend to the agents or employees of the person causing the obstruction to be removed.

(4) This section does not in any manner limit the scope of s. 88.87.

**History:** 1991 a. 316; 1995 a. 315.

Before proceeding under sub. (3), one must obtain a permit to remove materials from the bed of a navigable waterway under s. 30.20. *State v. Dwyer*, 91 Wis. 2d 440, 283 N.W.2d 448 (Ct. App. 1979).

### 88.91 Penalty for placing obstruction in ditches.

(1) Except as authorized by s. 88.93, no person shall place any kind of obstruction to the free flow of water, including any soil willfully deposited, in any drainage ditch, constructed under any drainage law of this state or lawfully constructed by any other person, without first obtaining the written consent of the drainage board or other person or authority in charge of such ditch.

(2) Any person violating this section may be fined not more than \$100 and in addition is liable to the drainage district and to all persons whose ditches or lands are injured by such obstruction for all damages caused by the obstruction.

**History:** 1975 c. 108.

**Cross Reference:** See also ch. NR 301, Wis. adm. code.

### 88.92 Private drains not to be connected with district drains.

(1) Except as provided in s. 88.93 no person may connect any drain with a district drain, extend any drain that connects with a district drain or remove any spoil bank except under written plans and specifications approved by the drainage board and under any conditions imposed by the drainage board. The drainage board may issue an order directing the removal or modification of a drain connected or extended in violation of this section or issue an order directing the restoration of any spoil bank removed in violation of this section, including violations that occurred before May 13, 1994.

(2) (a) In this subsection, "damages" includes the 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 annexed to the district and an assessment for connection of the drain under s. 88.405 had been levied.

(b) Any person who violates sub. (1) is liable to the district for all damages caused by the violation.

(3) The board shall preserve a copy of any plans and specifications approved under sub. (1).

**History:** 1993 a. 456.

### 88.93 Right to take water from drainage ditch.

Any owner of lands which are located in or which adjoin a drainage district and which border on a drainage ditch may take water from such ditch for use in flooding lands for cranberry culture or for irrigation, if such water is taken from the ditch in such a manner as not to injure the ditch and the taking thereof does not materially defeat the purposes of such drainage and, in case the water is to be used for irrigation, the permit required under s. 30.18 (2) (a) 2. has been obtained.

**History:** 1985 a. 60.

**88.94 Drains for individual landowners.** (1) Whenever any owner of agricultural lands desires to install drainage upon not more than 80 acres of such land, the owner may present a petition to the drainage board or, if there is no drainage board in the county, to the town supervisors of the town in which such land is located. Such petition shall set forth that:

(a) The petitioner desires to install drainage upon agricultural lands owned by the petitioner;

(b) Because of the contour of the land there is no suitable outlet on lands owned by the petitioner;

(c) The proposed drain will promote the general welfare and health of the community;

(d) It is impractical for the petitioner to drain the land without crossing the lands of others; and

(e) It is desired that a drain be laid out to a suitable natural outlet, specifying the course of the drain and location of the proposed outlet and ownership of lands through which such proposed drain would be laid.

(2) After receiving the petition the drainage board or supervisors of the town shall promptly fix the time and place of a hearing on the petition and shall give notice of the hearing under s. 88.05 (2) (b) to the owners and occupants of all lands through or along which the drain may pass and to the persons specified in s. 88.05 (4) (a).

(3) At the time and place fixed for hearing, the drainage board or town supervisors shall meet and hear all interested persons wishing to appear for or against the petition. If the board or supervisors decide that the facts set out in the application are true, that a drain is necessary and that the benefits will exceed the cost of construction, they shall by order lay out a drain through which applicant's lands may be drained as a public drain. Otherwise, they shall deny the application. An order laying out a drain shall specify the benefits and damages to lands of others through which such drain will be laid out and shall provide that the drain may not be constructed until the excess of damages over benefits, if any, has been paid to the landowners entitled thereto. The order also shall contain a description of the location of the drain and specifications therefor. Lands of others shall not be assessed for costs even though benefited by the drain.

(4) Within 10 days after the making of an order laying out a drain, the board or supervisors shall cause a copy of the order to be sent by registered mail to each owner through whose lands the drain will pass, but failure to mail the copy within 10 days does not render the order void. Such order is final unless appealed from to the circuit court within 30 days after the mailing of the copy thereof as provided in this subsection.

(5) Within 30 days after the time for appeal from the order has expired or after the order is confirmed on appeal, the board or supervisors shall cause a copy of the order to be recorded with the register of deeds of the county in which the lands are located. Thereupon, the drain becomes a public drain and the applicant may proceed with construction after having paid any excess of damages over benefits as specified in the order.

(6) This section does not authorize entry upon lands of another without the consent of the owner thereof during any time when there is any growing crop on such land, and no order issued under this section is effective to authorize such entry.

(7) This section does not apply to the installation or construction of a drain across the right-of-way of any railroad company, proceedings for which shall be as provided in s. 88.88.

(8) Expenses incurred by the drainage board under this section shall be paid by the petitioner.

**History:** 1991 a. 316; 1993 a. 301, 456, 490.