

Please be advised that the Barry County Board of Commissioners has scheduled a Special Board of Commissioners meeting on July 29, 2025 at 9:00 a.m. for the purpose of:

AGENDA
for a Special Meeting of the Barry County Board of Commissioners
July 29, 2025; 9:00 a.m.;
Commission Chambers for more information
go to: www.barrycounty.org

1. Call To Order at 9:00 a.m.
2. Pledge of Allegiance
3. Limited Public Comment (for items on the agenda; 3 minutes per person)
4. Presentations:
 1. Douglas R. Kelly, Attorney at Law, Clark Hill /Jim Dull - Drain Code 101
 - History
 - Statutes
 - Maintenance
 - Improvements
 - 425/433
 - Environmental
 - Apportionments/Assessments
 - Construction/Bidding
 - Financing
 - Lake Levels
5. Limited Public Comment (3 minutes per person)
6. Commissioner Comments
7. Adjournment

David Jackson, Chair
Barry County Board of Commissioners

Unless otherwise posted in accordance with the Open Meetings Act, Board of Commissioners meetings are held at the Barry County Courthouse, Commissioners Chambers, 220 W. State St., Hastings, MI 49058. Questions regarding the meeting may be addressed to Eric Zuzga, Barry County Administrator, Barry County Courthouse, 220 W. State St., Hastings, MI 49058; (269) 945-1284.

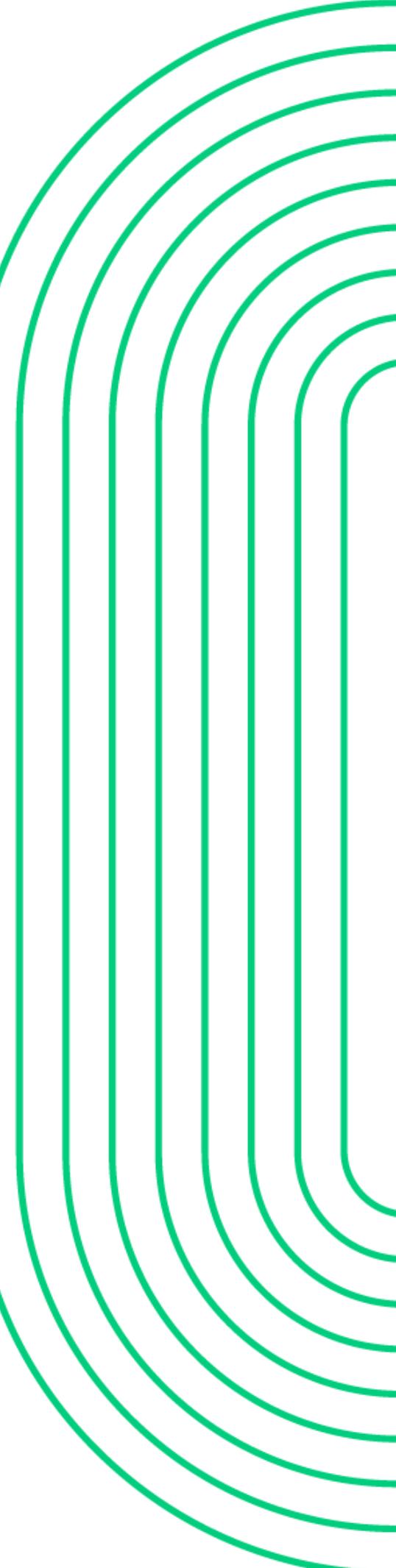
Meetings of the Barry County Board of Commissioners are open to all without regard to race, sex, color, age, national origin, religion, height, weight, marital status, political affiliation, sexual orientation, gender identity or disability. Barry County will provide necessary reasonable auxiliary aids and services, such as signers for the hearing impaired and audio tapes of printed materials being considered at the meeting/hearing, to individuals with disabilities at the meeting/hearing upon four (4) business days notice to the County. Individuals with disabilities requiring auxiliary aids or services should contact the County by writing or calling: Eric Zuzga, County Administrator, Barry County, 220 W. State St., Hastings, MI 49058; 269-945-1284.

Only members of the Barry County Board of Commissioners shall be given the floor to speak during any Board meeting, except 1) Anyone who desires to speak under Limited Public Comment; 2) County officials and/or personnel may speak with the consent of the Chairperson; 3) Any person, with the consent of the Chairperson and/or a majority of the Board; 4) Public comment shall be limited to no more than three minutes per individual and at the times designated as stated above, except where extended privileges are granted by the Chairperson.

Drain Commissioner Roles

And Procedures

Barry County Board of Commissioners



“The Drain Code of 1956 is an exceedingly complex statute, the provisions of which apparently are known by few in the profession and understood by far fewer”

Justice Stephen Markman

Elba Township v. Gratiot County Drain Commissioner

493 Mich 265, 269 (2013)



Michigan Drain Code of 1956

Fundamentals

- Establishes the office county drain/water resources commissioners
- Formalizes the powers and duties of the county drain commissioner, including:
 - Create Drainage Districts
 - Manage stormwater including flood control and water quality
 - Assess cost of drain improvement/maintenance
 - Oversee construction and maintenance

History Michigan Drains and Statutes

Early Settlement

- First Drainage Laws Originated over 200 years ago (when Michigan was a territory)
- Surveyor General Edward Tiffin Report of 1816
 - “... The intermediate space between the swamps and lakes, which is probably nearly one half of the country, is, with a very few exceptions, a poor, barren, sandy land, on which scarcely any vegetation grows, except very small scrubby oaks. ... The abandonment of colonization is urged as being dangerous and unnecessary.”
- Lewis Cass – Governor of Michigan Territory for 18 years
 - Urged President to reassess and send surveyors back to Michigan
 - 1819 Surveyors returned

History Michigan Drains and Statutes

Statutes and Procedures

- First Drainage Laws Originated over 200 years ago (when Michigan was a territory)
- 1819: Authorized highway supervisors to construct drains to protect the roadways
- 1827: Established procedure to resolve land drainage conflict between property owners
- 1839: Michigan codifies the territorial drain writs as State statutes
- 1846: Drain laws justified on the basis of public health
- 1847: 3 Drain Commissioners appointed in Lenawee County
- 1850: Swamp Land Act
 - U.S. federal law that granted swamp and overflowed lands to states, enabling them to reclaim and develop these areas
- 1875 Great Flood of 1875 – Lansing lost every bridge over the Grand and Red Cedar Rivers

History Michigan Drains and Statutes

Swamp Land Act of 1850

- Federal effort to make swamp and overflowed land suitable for agriculture
- Granted wetlands to the states, who could then transfer them to individuals who drained the land
- 14 states participated, including Michigan, Arkansas, California, Florida, Illinois, Indiana, Ohio, and Wisconsin.
 - Between 55 and 64 million acres transferred under the act.
- **6,000,000 acres transferred in Michigan**
 - 29,552 acres in St. Clair County
 - 10,000+ acres in Livingston County
 - 12,800+ acres in Shiawassee & Clinton Counties
 - Barry County included in transfer of land – Blackman's swamp



History Michigan Drains and Statutes

Michigan Statutes

- 1857: County level commissioner structure introduced maintenance of authorized drains for the first time
- 1897: Township DC abolished and authority was consolidated at the county level
- 1923: Drainage district introduced and last major codification of the late 1800 and early 1900 period

History Michigan Drains and Statutes

Michigan Drain Code of 1956

- 1923 code reorganized 19 chapters
- Increasing complexity of drainage needs required a recodification
- Over 200 amendments since the 1956 codification
- Despite many attempts, no major recodification of the Drain Code since 1956
 - Perhaps because Code solves land use problems
 - And no one has introduced a better process







History Michigan Drains and Statutes

Additional Statutes and Authority

- Anderson-Rockwell Environmental Protection Act of 1970
- Clean Water Act (CWA) of 1972
 - Enacted over President Nixon's Veto
- Other Michigan Statutes
 - Inland Lakes and Streams Act (1972)
 - Soil Erosion and Sedimentation Control Act (1972)
 - Goemaere-Anderson Wetlands Protection Act(1979)
- Natural Resources and Environmental Protection Act (NREPA)
 - Passed to shelter the various environmental laws (1995)

History Michigan Drains and Statutes

Statutory Roles of Drain Commissioner

- County Enforcing Agency for Soil and Sedimentation Control (Part 91)
- Delegated Authority for inland lake levels (Part 307)
- County Parks and Recreation Commission
- County Board of Public Works
- Lake Improvement Boards (Part 309)
- Land Division and Plats

Michigan Drain Code

Drainage Districts

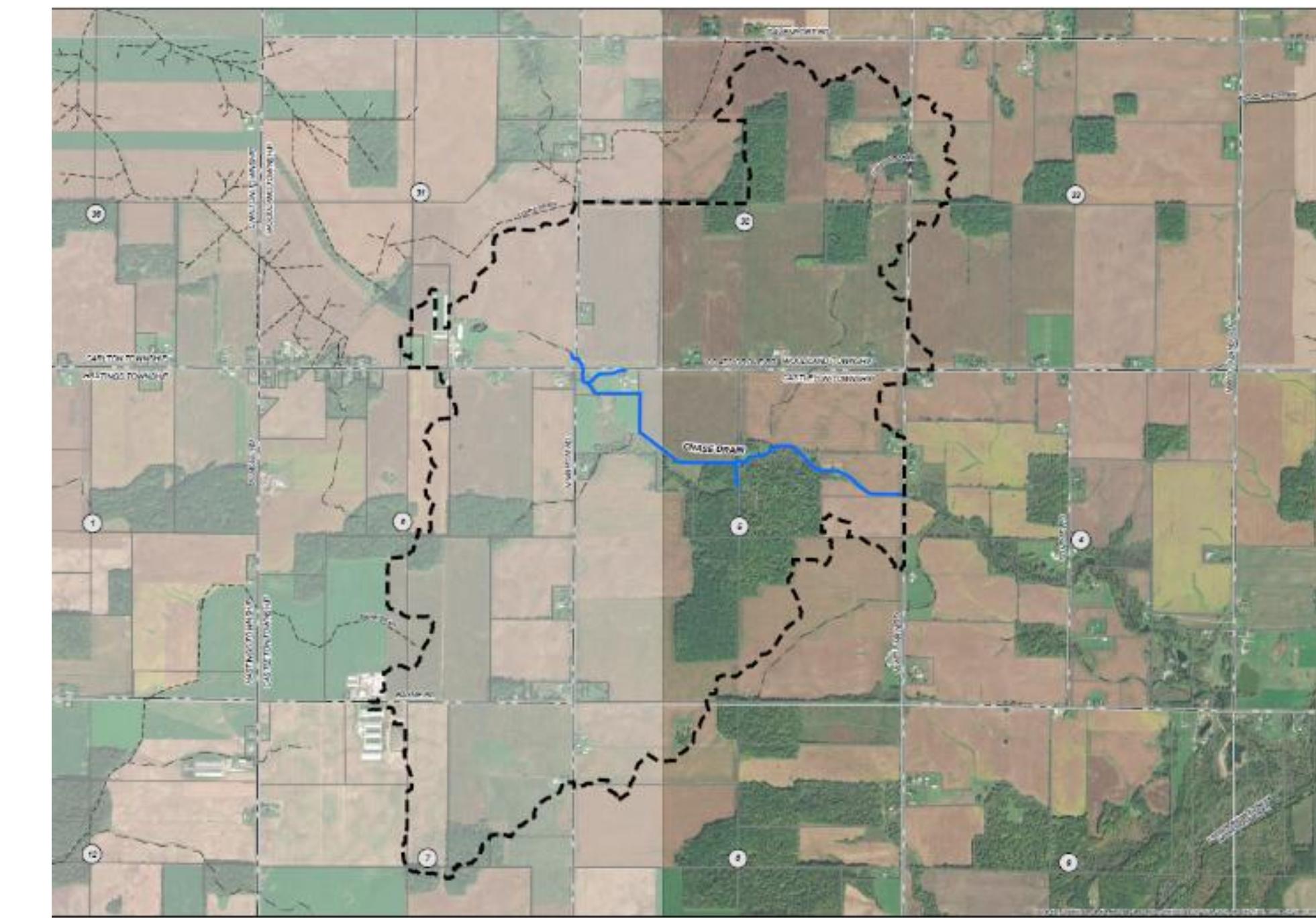
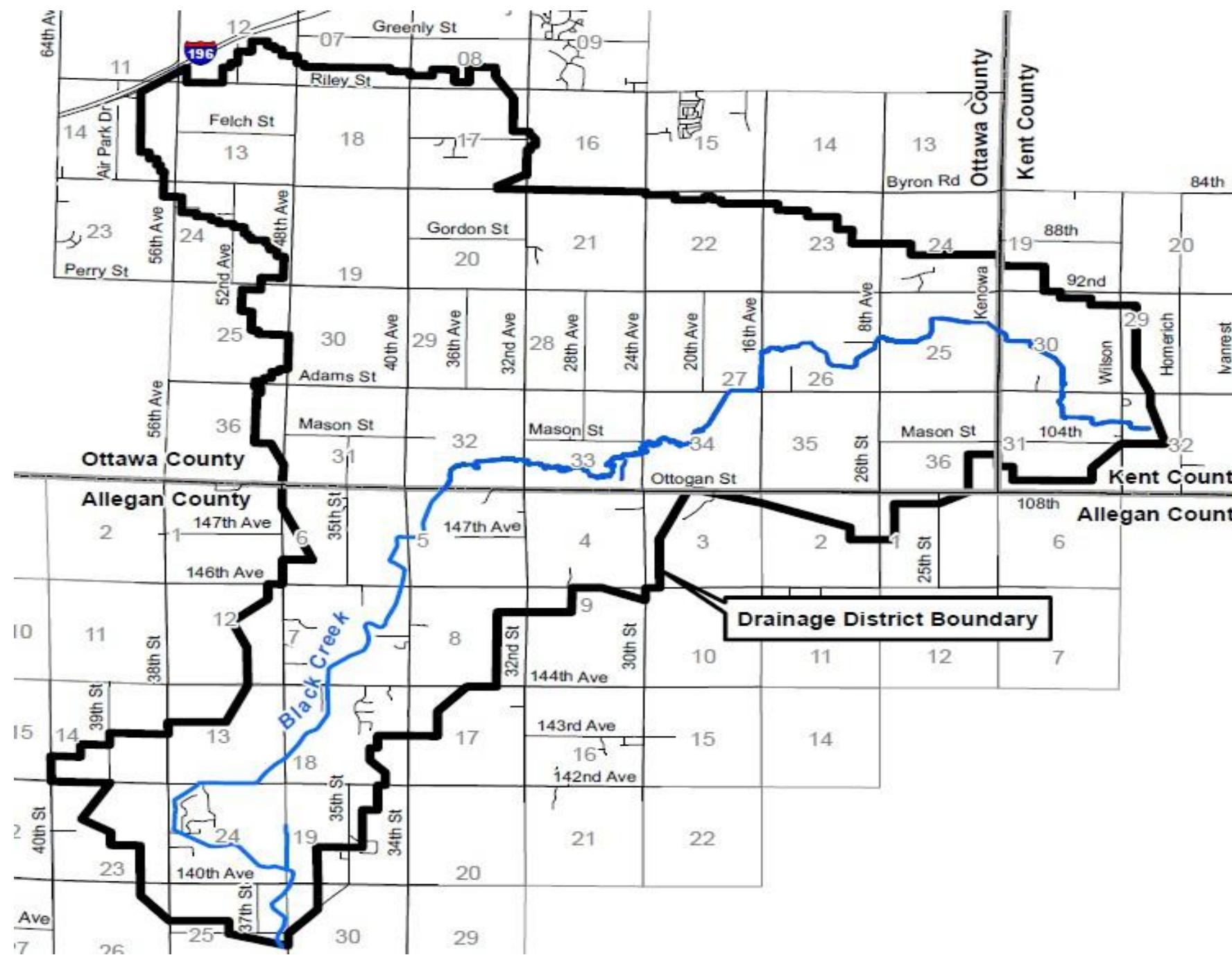
What is a Drainage District?

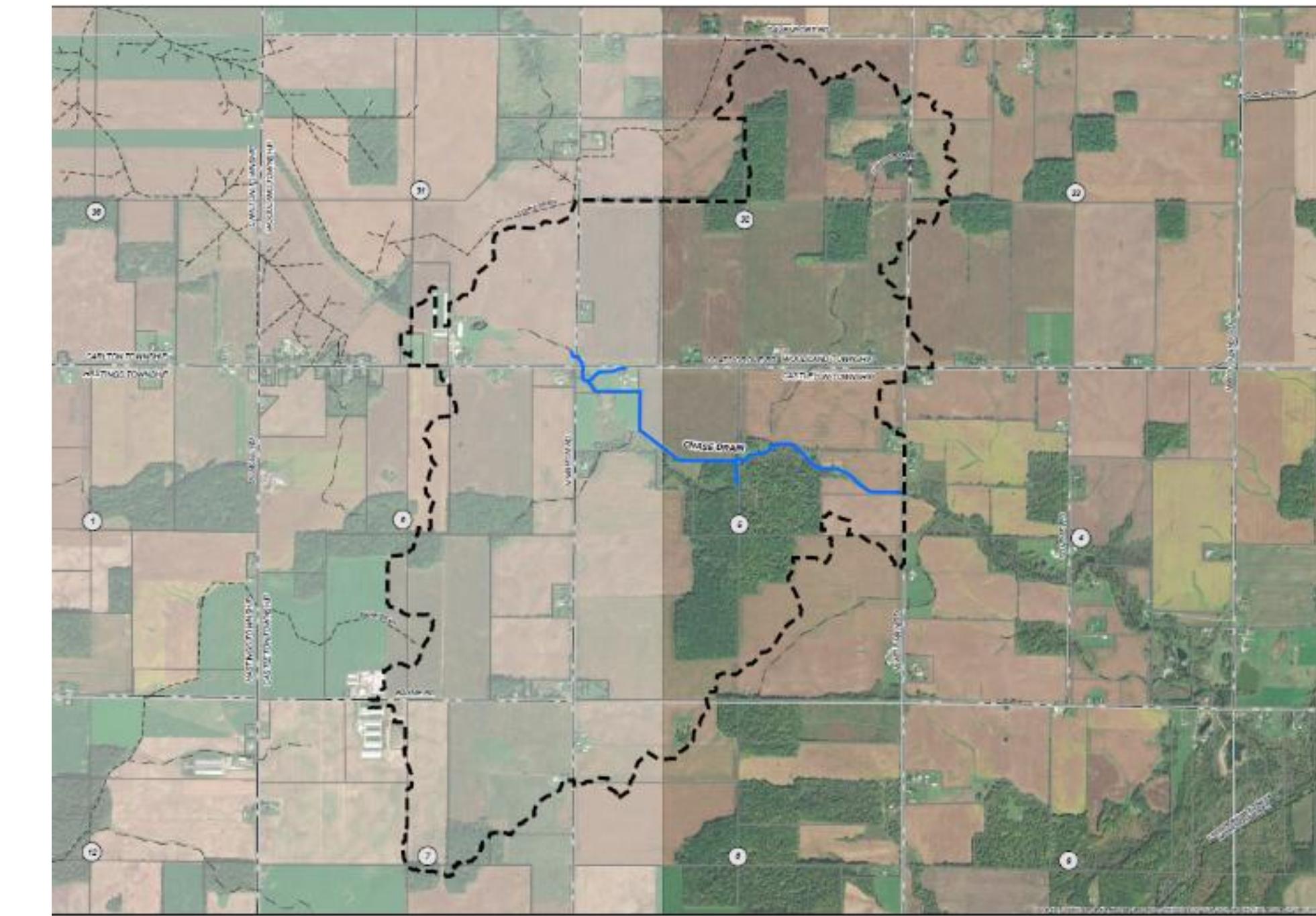
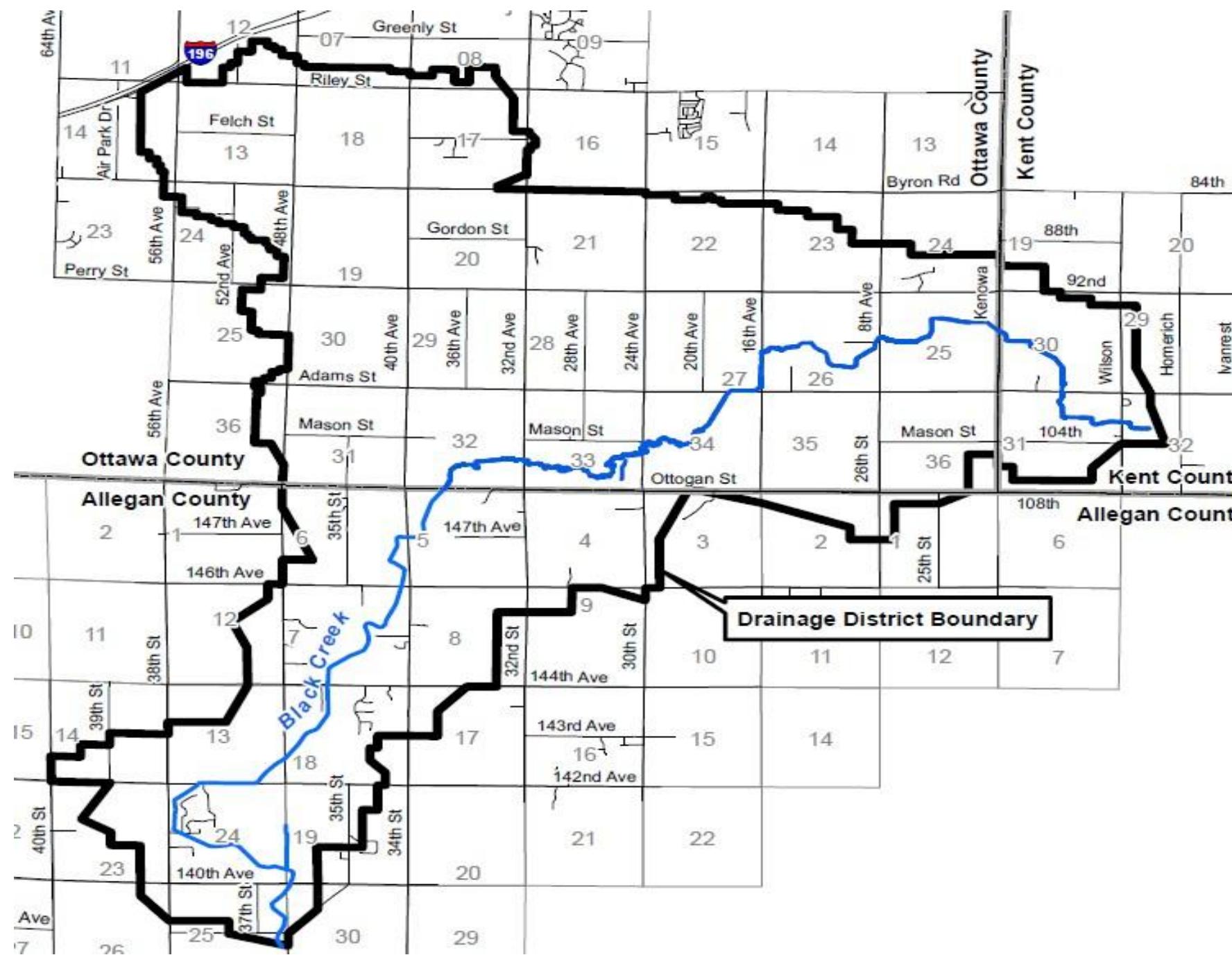
- Made up of lands that contribute to a drain – Similar to a watershed
- Also acts a “Special Assessment District”
- Each drainage district is an independent public body corporate with the powers to:
 - Sue and be sued
 - Acquire property rights by arms length or by eminent domain
 - Borrow money and finance projects
 - Levy special assessments

Michigan Drain Code

Drainage Districts







XXX



Michigan Drain Code

Non-Petitioned Maintenance

- Drain Commissioners may expend up to \$10,000 (+CPI annual adjustment) per mile of established drain each year for maintenance and repair purposes without a petition.
 - Recently increased from \$5,000
- 'Maintenance and repair' refers to "physical, on-site repair or maintenance". (MI OAG 6375, 1986).
- Maintenance limitations do not include consultants such as engineering, legal, wetlands, etc.
- Municipal resolutions can authorize Drain Commissioner to exceed the \$10,000 per mile/per year cap. The municipality must be affected by more than 20% of the cost (This is calculated by adding the at-large percentage AND the percentages from the private properties within the municipal boundaries).

Michigan Drain Code

Non-Petitioned Maintenance

- Section 196(10) of the Drain Code provides that the maintenance limitations do not apply if a public corporation (including townships, cities, villages, road commission, and MDOT) performs work and does not charge the drainage district.
- For example, the recent Watson Drain/M43 enclosure project was overseen by the Drain Commissioner, but was bid and contracted by MDOT and paid for entirely by MDOT. The Drainage District was not charged.

Michigan Drain Code

Drain Establishment and Improvement

- Petitions to improve a drain may be filed by:
 - 5 freeholders liable for an assessment
 - Municipalities
 - Road Commissions
 - EGLE (in special circumstances)

Michigan Drain Code

Drain Establishment and Improvement

- Board of Determination – appointed by Drain Commissioner
 - Comprised of 3 disinterested landowners
 - Decides Necessity or No Necessity for Drain Improvement
 - Public Health, Convenience or Welfare is the test
 - Adding / Deleting Lands
 - Disqualified Drain Commissioner due to owning land in the Drainage District
 - Petition sent to Board Chair who appoints BOD

Petition

Easement
Acquisition

Bid of Project

Necessity

Petition

Financing

Design

Day of Review
of
Apportionments

Construction



Michigan Drain Code

Section 425 / 433 Agreements

- Sections 425 and 433 of the Michigan Drain Code
- Used in lieu of a petition for:
 - New developments
 - Plats/Site Condos
 - Adding to existing developments
- Allows for new drain and drainage district to be established
-

Michigan Drain Code

Section 425 / 433 Agreements

- Developer pays all costs for engineering, construction etc.
- Developer must have control of or own entire proposed district
- Plans/Specifications/Maps
- Easements given to Drainage District or Drain Commissioner
- Engineers certificate
 - Only adequate outlet
 - No detriment to downstream facilities

Michigan Drain Code

Apportionments

- Drain assessments are based on an apportionment of benefits derived. This means that the Drain Commissioner gives each property and governmental entity a percentage of the benefit of a drain or drain project.
- Many factors are considered
- The assessment levied is the percentage multiplied by the project cost.
- The apportionment must always equal 100% of the cost.

Michigan Drain Code

Apportionments

- The assessment to counties is based on the benefit to county roads. The county may pass on a portion of the assessment to the road commission, if desired.
- The assessment to MDOT is based on engineering calculations in the MDOT administrative rules (“14a calcs”). These calculations are based on runoff from state highways and specific special benefits constructed for the state highways.

Michigan Drain Code

Apportionments

- The assessment for cities, townships, and villages “at large” is based on public health. There is no specific formula for at-large percentages, which can vary depending on the project.
- Typically 10% by number of townships divided by acreage
- The assessment for properties in the Drainage District are based on “benefits derived.” There is no definition of “benefit” in the Drain Code.
- Drain Commissioners often use the following factors in determining benefit to properties: acreage, zoning or property use, proximity to work performed, runoff, and flooding relief.

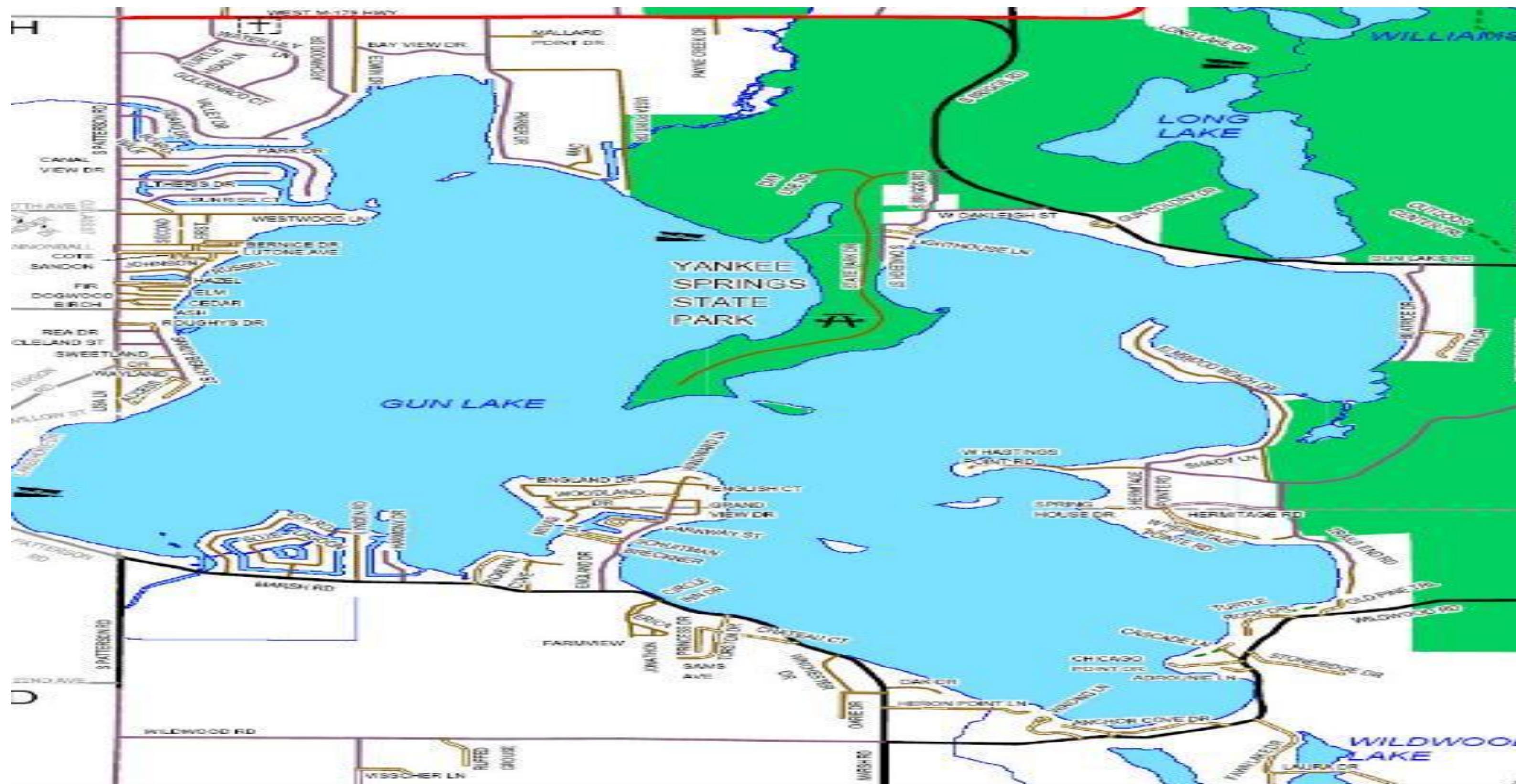
Michigan Drain Code

Apportionments

- Once the apportionments are determined, the Drain Commissioner holds a “Day of Review of Apportionments” where all property owners and public corporations can review their apportionment.
- “The owner of any land in the drainage district or any city, township, village, district or county having control of any highway which may feel aggrieved by the apportionment of benefits so made by the commissioner, may, within 10 days after the day of review of such apportionments, appeal therefrom and for such purpose make an application to the probate court of the proper county for the appointment of a board of review, by filing with said probate court a notice of appeal...” (MCL 280.155).
- If an appeal is filed, the Probate Court sets a Board of Review to determine whether there is a manifest error or inequality in the apportionments (MCL 280.157).

Michigan Drain Code

Lake Levels



Michigan Drain Code

Establishing Lake Levels

- Action to establish a legal level(s) can be initiated by:
 - Petition to the County Board of Commissioners of two-thirds of the owners of land abutting the lake.
 - Motion of the County Board of Commissioners. Before proceeding on a motion or a petition to establish a legal level, the County Board of Commissioners may require the preparation of a preliminary study to determine the feasibility of establishing and maintaining a legal level(s) of the lake. The county may require a cash payment of up to \$10,000 to cover the cost of the preliminary study.
- Upon a finding by the County Board, based on the preliminary study, that it is feasible to proceed, directs the prosecutor or other legal counsel to petition the circuit court for a proceeding for determination.

Michigan Drain Code

Establishing Lake Levels

- The County Board of Commissioners may, by resolution, determine that the cost of a project to establish and maintain a lake level be defrayed by a special assessment district of benefited property owners, political subdivisions and state-owned lands.
- The assessment district boundaries are presented to and confirmed by the circuit court.
- The Drain Commissioner, or other authority delegated by the County Board, needs to hire the expertise to gather data and to conduct lake level studies necessary to provide the circuit court with sufficient information on which to base its lake level determination.

Michigan Drain Code

Establishing Lake Levels

- Circuit Court acts on petition.
- Sets a hearing date.
- Directs the prosecuting attorney or drain commissioner to make proper notification by newspaper and first class mail to persons in the tentative special assessment district, the Department of Environmental Quality, and the Department of Natural Resources.
- The Circuit Court holds a hearing so that evidence may be presented and testimony taken to assist in determining the legal level(s).
- The Circuit Court issues an order determining the level (or levels) to be established and maintained, and confirms the proposed special assessment district boundaries within 60 days following the lake level determination.

Michigan Drain Code

Environmental

- Permitting
 - Part 31 – Floodplains
 - Part 91 – Soil Erosion
 - Part 301 – Inland Lakes and Streams
 - Part 303 – Wetlands
- Drain Exemptions
 - Drains

Michigan Drain Code

Environmental Part 301 Permit required to:

- dredge or fill bottomlands;
- construct, enlarge, extend, remove, or place a structure on bottomland;
- erect, maintain, or operate a marina;
- create, enlarge, or diminish an inland lake or stream;
- structurally interfere with the natural flow of an inland lake or stream;
- construct, dredge, commence, extend, or enlarge an artificial canal, channel, ditch, lagoon, pond, lake, or similar waterway where the purpose is ultimate connection with an existing inland lake or stream, or where any part of the artificial waterway is located within 500 feet of the ordinary high water mark of an existing inland lake or stream; and
- connect any natural or artificially constructed waterway, canal, channel, ditch, lagoon, pond, lake, or wetland with an existing inland lake or stream for navigation or any other purpose

Michigan Drain Code

Environmental Part 303 Permit required to:

- Deposit or permit the placing of fill material into a wetland.
- Dredge, remove, or permit the removal of soil or minerals from a wetland.
- Construct, operate, or maintain any use or development in a wetland.
- Drain surface water from a wetland.

Michigan Drain Code

Environmental Exemptions

- Maintenance of a drain's location, depth, and bottom width, along with its appurtenant structures, is exempt if it restores the drain's original function and capacity as constructed or modified before July 1, 2014. This includes sediment removal to original contours, reshaping side slopes, bank stabilization, and culvert replacement within certain limits.
- Construction and maintenance of minor drainage structures and facilities
- Emergency reconstruction of recently damaged parts of a drain

Michigan Drain Code

Construction and Bidding

- The Michigan Drain Code requires Public advertising of bids for improvement projects
- Michigan's Attorney General has opined that this applies only to 'construction' of new drains, not to maintenance of existing drains. (MI OAG 2603, 1944).
- Pursuant to Section 221, the Barry County Drain Commissioner maintains a list of prequalified bidders.

Michigan Drain Code

Financing

Calculating Project Costs – MCL 208.261 – “Computation of Costs”

- Within 10 days after the letting of contracts . . . the commissioner shall make a computation of the entire cost of such drain, which shall include:
 - all the expense of laying out and designating the drainage district, which item of expense shall include the entire cost of the survey;
 - the expense of locating, establishing and constructing the drain;
 - the fees and expenses of special commissioners;
 - the compensation to be paid the board of review;
 - the cost of construction of bridges and culverts;
 - the contracts for the construction of the drain, or other work to be done on said drain;
 - the estimated cost of an appeal in case the apportionment made by the commissioner shall not be sustained;



Michigan Drain Code

Financing

Calculating Project Costs – MCL 208.261 – “Computation of Costs”

- the estimated cost of an appeal in case the apportionment made by the commissioner shall not be sustained;
- the estimated cost of inspection;
- the cost of publishing all notices required;
- all fees of the probate judge;
- attorney fees for legal services in connection with the drain; and
- interest on bonds for the first year, if bonds are to be issued, and he shall add the whole into a gross sum and add thereto not less than 10% nor more than 15%, at the discretion of the drain commissioner, of said gross sum to cover contingent expenses, and the entire sum so ascertained shall be deemed to be the cost of construction of such drain.

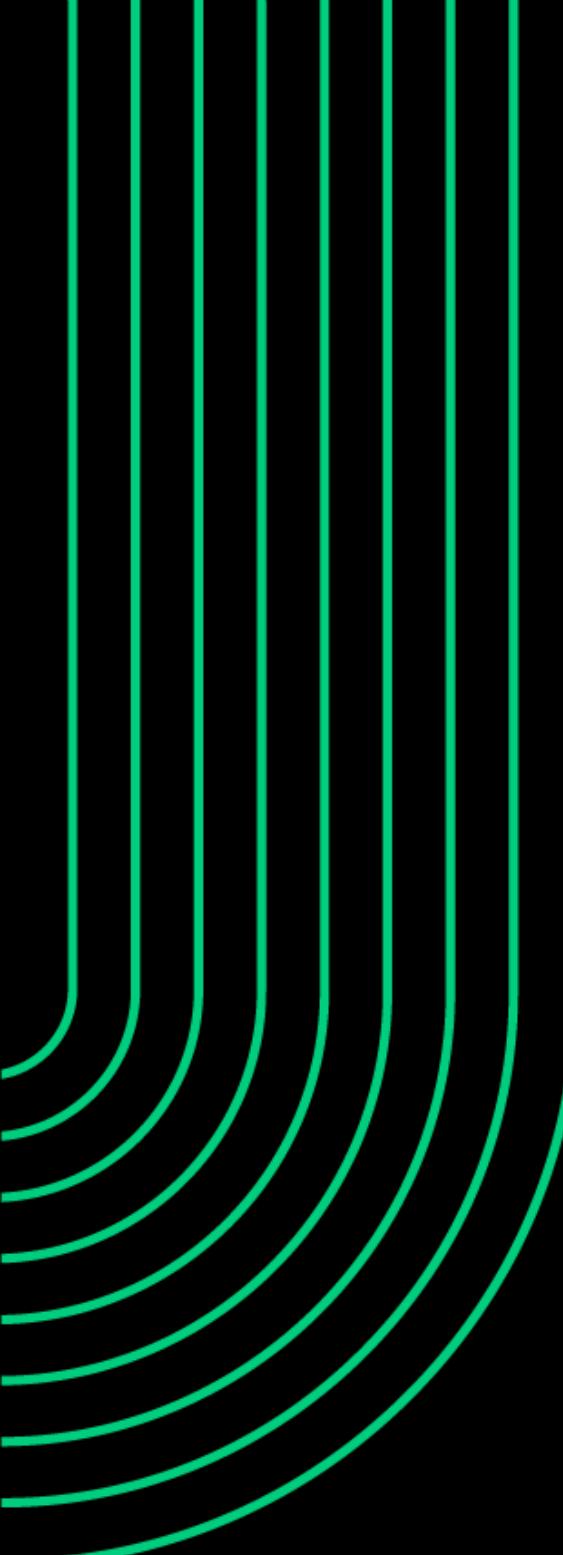


Michigan Drain Code

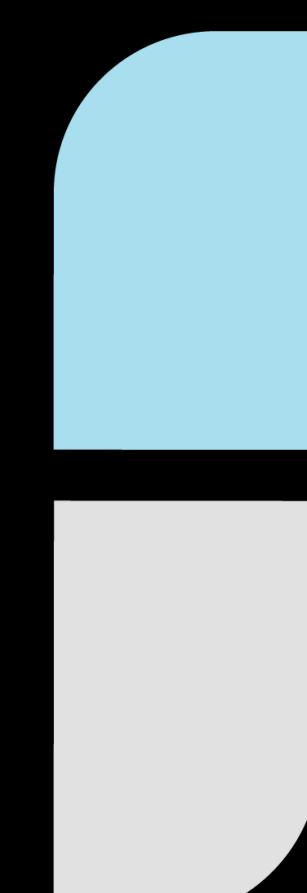
Financing

Once all costs are derived, the Drainage District may proceed with financing

- Bond or Note
- Public bid or private placement
- Full Faith and Credit of County
 - Provides landowners with best interest rate on the borrowing
- Compliance with other securities statutes



Thank You



Legal Disclaimer

The views and opinions expressed in this material represent the view of the authors and not necessarily the official view of Clark Hill PLC. Nothing in this presentation constitutes professional legal advice nor is it intended to be a substitute for professional legal advice.