

Q.630.7  
I l 6c  
no.1305



UNIVERSITY OF  
ILLINOIS LIBRARY  
AT URBAN - CHAMPAIGN  
AGRICULTURE

**NOTICE:** Return or renew all Library Materials! The *Minimum Fee* for each Lost Book is \$50.00.

The person charging this material is responsible for its return to the library from which it was withdrawn on or before the **Latest Date** stamped below.

Theft, mutilation, and underlining of books are reasons for disciplinary action and may result in dismissal from the University.  
To renew call Telephone Center, 333-8400

UNIVERSITY OF ILLINOIS LIBRARY AT URBANA-CHAMPAIGN

FEB 02 1999  
April 17, 2003

PL630.7  
Ill6c  
no. 1305

UNIVERSITY OF ILLINOIS  
AGRICULTURE LIBRARY



# Illinois Drainage Law

Including Soil Erosion  
and Sedimentation Control,  
State Permit Requirements  
for Construction in Streams  
or Floodways, and Federal  
Wetlands Provisions

By D. L. Uchtmann and David Rolf

College of Agriculture  
University of Illinois at Urbana-Champaign  
Cooperative Extension Service • Circular 1305

The authors would like to acknowledge the assistance of Mary Perlstein, a practicing attorney in Champaign, Illinois, for her legal review of this manuscript, and Keith A. Goldberg, a research assistant in agricultural law, for his helpful suggestions. The authors would also like to acknowledge the valuable assistance of Harry D. Slawter, assistant state conservationist, Soil Conservation Service, regarding the discussion of wetlands, and of H. W. Hanna, for his legal review of the manuscript.

Cover photo: A well-maintained drainage ditch.

Edited by Mary E. Theis and Alison Fong Weingartner

Designed by Krista L. Sunderland

Urbana, Illinois

December 1991

Issued in furtherance of Cooperative Extension Work, Acts of May 8 and June 30, 1914, in cooperation with the U.S. Department of Agriculture, Donald L. Uchtman, *Director*, Cooperative Extension Service, University of Illinois at Urbana-Champaign. The Illinois Cooperative Extension Service provides equal opportunities in programs and employment.

3M—12-91—Andromeda—MET/AFW

Printed on recycled paper.

# Illinois Drainage Law

Including Soil Erosion  
and Sedimentation Control,  
State Permit Requirements  
for Construction in Streams  
or Floodways, and Federal  
Wetlands Provisions

This circular was written by Donald L. Uchtmann, professor of agricultural law and Extension specialist, and by David Rolf, attorney and past research assistant in agricultural law.

College of Agriculture  
University of Illinois at Urbana-Champaign  
Cooperative Extension Service • Circular 1305

AGRICULTURE LIBRARY  
MAR 25 1992  
UNIVERSITY OF ILLINOIS



Q. 630.7  
I 262  
no. 1305

Regue

## ■ Contents

<b>Preface</b> .....	v
<b>Part I. Illinois Rules of Drainage</b> .....	1
Laws of Natural Drainage .....	1
Statutory Enlargement of Rules of Natural Drainage .....	7
<b>Part II. Illinois Laws on Drainage Districts</b> .....	14
Organization of Districts .....	16
Organization of Outlet, Mutual, and User Districts .....	17
Important Rules Laid Down by the Courts .....	18
Powers and Duties of Commissioners .....	19
Drainage Record .....	22
Owners' and Districts' Rights and Duties Concerning Ditches and Drains .....	22
<b>Part III. The Wetland Provisions of the Food     Security Act of 1985, as Amended</b> .....	25
Prior Converted Cropland .....	28
Wetland .....	29
Farmed Wetland .....	29
Converted Wetland .....	30
Artificial Wetland .....	30
<b>Part IV. Illinois Soil Erosion     and Sedimentation Control</b> .....	33
Soil and Water Conservation District Guidelines for Erosion and Sediment Control .....	33
Enforcement of the Guidelines .....	34
<b>Part V. Illinois Permits for Construction     in Streams or Floodways</b> .....	36
<b>Glossary</b> .....	37



## ■ Preface



**Illinois wetland. The remaining wetlands in Illinois have important ecological and hydrologic value. Federal policy now discourages conversion of wetlands to farmland.**

This circular describes the drainage law that is applicable to the entire state of Illinois and to drainage districts. It also summarizes related laws, such as the guidelines for erosion and sediment control and the permit requirements for construction in streams or floodways. Its purpose is to inform landowners, drainage district commissioners, land improvement contractors, and other interested people of general legal principles related to drainage and the construction of drainage improvements. With this general information, they are better able to recognize opportunities for improving drainage or situations where their drainage rights have been unlawfully impaired. Helpful background information is also provided about drainage disputes and about the creation or activation of a drainage district; however, in these situations, the assistance of a practicing attorney will be needed.

Since the passage of the wetland provision of the Food Security Act of 1985, the federal government has also influenced drainage decisions. As a result of this act, landowners need to know not only which actions are permitted or precluded by state drainage law but also which actions might jeopardize their rights to participate in programs of the U.S. Department of Agriculture (USDA). The wetland provisions in federal law and their potential impact on farm drainage activity are described in Part III of this circular.

Technical terms and legal terms commonly encountered in drainage law are defined in the glossary for convenient reference. These terms appear in italics in the text.



## ■ Part I

# Illinois Rules of Drainage

## Laws of Natural Drainage

**Basic law recognizes natural differences in levels of lands.** The basic principle of the law of natural drainage is that *landowners* take whatever advantages or inconveniences of drainage nature places upon their land. What these advantages or inconveniences are ultimately depends on the level of one's property in relation to the land around it.<sup>1</sup>

**A landowner must receive surface water flowing naturally from higher ground.** One of the most important principles of Illinois drainage law is that the owners of lower ground, known as a *servient tenement*, are bound to receive surface water that naturally flows onto it from higher ground, known as the *dominant tenement* (Figure 1).<sup>2</sup>

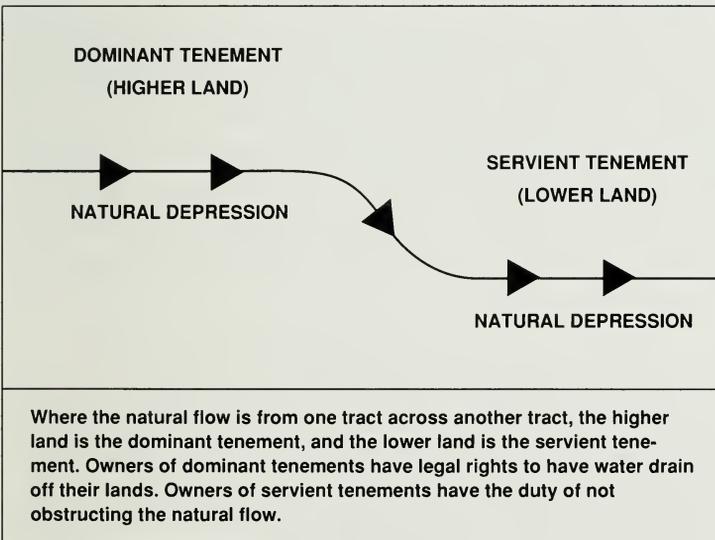


Figure 1.  
Dominant and  
servient  
tenements.

This rule means that owners of farms that are lower than adjoining farms must take the water that flows through natural depressions onto their land. Likewise, unless a city has adopted a system of artificial drainage, owners of lots that are lower than adjoining lots must receive the water

coming from the higher lots. It also means that a railroad or a highway embankment must be built with openings of sufficient capacity and in appropriate locations to accommodate water that would naturally flow across the right-of-way in a *state of nature*.

Whether or not the rule applies to diffused water, which does not flow in a defined channel, is debatable. Although it appears that the Illinois rule on natural drainage includes diffused surface water, the Illinois courts have not yet made their final determination of this question.<sup>3</sup>

**A landowner may collect surface water, discharge it, and hasten its flow to lower ground.** If the law had limited the right of the owner to drain higher land just as it had been drained in a state of nature, the law would have been of little real advantage, for the improvement of land necessarily changes the amount of water drained and the speed of its flow. The law, however, does not so limit the rights of landowners.

In an early case, the court held that in the interest of *good husbandry* landowners could drain their ponds or collect surface water that would naturally be held in pools and hasten its flow by digging artificial ditches.<sup>4</sup> But they could do so only if the water was discharged on lower land at the place where it would have flowed if the ponds or pools had been filled with dirt and the water forced out into natural channels of drainage.

All lands lying within a natural *basin*, therefore, may be drained into a watercourse—whether a stream or a mere depression—that drains this basin, and the owners of lower lands cannot object to this increased flow. The water can be carried by artificial ditches or by tile lines,<sup>5</sup> but either must drain only the natural basin,<sup>6</sup> and the water must enter the lower land where it would have in a state of nature.<sup>7</sup> The courts have also held that the substitution of tile for surface drainage does not amount to an abandonment of natural drainage rights on the part of the owner.<sup>8</sup>

2 | In one court case, the natural course of drainage through land that drained onto the right-of-way of a railroad was an

"oxbow loop."<sup>9</sup> When it rained, the water entered through a rocky gorge and deposited sand and debris on a farmer's land at the end of a long meander. The landowner proposed cutting a ditch straight through the loop and discharging the water on the railroad's right-of-way at the same point where the loop had discharged the water. The effect of the shortcut was to hasten greatly the speed of the flow against the railroad embankment and to cast sand and debris on it. The Illinois Supreme Court held that the landowner had a right to improve drainage by straightening the "oxbow" in these circumstances. But if the flow is increased unreasonably by changes unrelated to good husbandry, the owner of the higher ground may be liable for damage to lower land.<sup>10</sup>

**A landowner may drain surface waters into watercourses.**

Owners of higher ground can drain their land within a natural basin into a natural watercourse flowing through this land. As a practical matter, their right to drain into a stream is not often questioned, because draining into a creek or stream with ample banks does no actual harm. But even if such drainage does damage to lower ground, owners of higher ground have a legal right to drain into the stream so long as they do not cut through a natural divide but simply hasten the flow of water from the basin into the creek.

According to this rule, overflow waters from a creek or small stream are surface waters; therefore, owners of lower land are bound to receive them. Furthermore, owners of a stream bank have the right to improve it,<sup>11</sup> so long as the improvements do not impair drainage.

**Urban landowners cannot increase drainage flows unreasonably.** As the emphasis in Illinois shifted from agricultural to urban development, the good-husbandry doctrine was applied in situations where land was not to be used for agricultural development. Unfortunately, this nineteenth-century doctrine was not easily adapted to urban applications. In response to this defect, in 1974 the Illinois Supreme Court adopted a limitation for *reasonable use*, which was the first significant modification of Illinois natural drainage law since the nineteenth century.

In the case of *Templeton v. Huss*, the defendants owned the dominant estate, which they subdivided and developed.<sup>12</sup> The plaintiff owned the servient estate, a parcel of farmland. Recognizing that natural drainage could be substantially altered by urban development, the court held that the developer of the subdivision was liable for damages to the lower land if the houses and streets interfered so much with natural seepage that the amount and velocity of water running off the developer's land were *unreasonably* increased.

Although this case involved a drainage problem created by urbanization, the court's reasoning could easily be applied to future controversies over rural drainage: increased flow has to be consistent with the policy of reasonableness of use, which led initially to the good-husbandry exception.<sup>13</sup>

However, the criteria of the good-husbandry exception still appear to be applicable in agricultural situations.<sup>14</sup> Courts have not expressly indicated that the *Templeton* case altered the good-husbandry exception, and if it has not, all the prior good-husbandry case law still applies. The importance of this interpretation is that in a rural setting, diversion from another watershed or discharge other than at the point of natural drainage may be essential for a servient landowner to recover damages or obtain other relief.

**A landowner has no right to obstruct the flow of surface water.** The owner of lower land obviously has no right to build a dam, levee, or other artificial structure that will interfere with the drainage of higher land, according to the *civil law* as it is applied in Illinois. An amendment to the drainage code provides that willful and intentional interference by an owner of lower land is considered a petty offense and is subject to a fine.<sup>15</sup> The construction of artificial impoundments or the temporary interruption of the flow of water by such impoundments is permitted.<sup>16</sup> But the owner of higher land cannot compel the owner of lower ground to remove natural obstructions, such as shrubs, weeds, brushwood, cornstalks, or other crop residues, that may accumulate and impair natural drainage. However, in some circumstances the owner of the higher land has the right to enter the servient tract to make reasonable repairs and clean out

the water course.<sup>17</sup> Before resorting to such self-help, the landowner should seek legal counsel.

**Easements of drainage or of obstruction.** When landowners are harmed by other owners and fail to enforce their rights, the harmful practices may themselves become rights, known as easements. An *easement* is an acquired right to cross or to use another's property. For example, if owners of higher ground fail to take action when owners of lower land dam or obstruct the flow of surface water, the owners of the lower ground may acquire a right to maintain the dam or obstruction by what is known as *prescription* or *prescriptive use*. The period of use recognized in Illinois is twenty years.<sup>18</sup> The owners of lower land may also acquire the right to have no surface water drain on their land from higher ground when the water has been diverted from the lower ground for the prescriptive period.

By this same process, owners of higher ground may acquire the right to change the place where their surface water enters lower ground or to maintain other artificial conditions not permitted under the rules of natural drainage.<sup>19</sup>

Whether an owner has acquired such a right is a difficult question. Any right to drainage so acquired may be less desirable than drainage through a natural channel. In theory, those who hold an easement are strictly limited to the benefits they had while they were acquiring the easement, whereas drainage through a natural depression or channel may be materially improved within interpretations placed on the civil-law rule by Illinois courts.

Drainage easements cannot be acquired against the public; for example, they cannot be acquired against a highway or school district.<sup>20</sup>

**Summary of the rules of natural drainage.** Under Illinois law, private landowners have certain rights to improve the drainage on their land. They can

- Widen, deepen, and clean natural depressions that carry their surface water;
- Straighten out channels on their own property and

- accelerate the movement of surface water so long as they do not change the natural point of entry on lower land or unreasonably increase the flow onto servient tenements;
- Drain ponds or standing water in the direction of their overflow;
  - Fill up ponds or low places where water may stand, and force water out into natural drainage channels;
  - Tile their property to expedite the flow of water so long as they do not unreasonably increase the flow, change the point of entry on lower land, bring in water from another watershed, or connect their tile to the tile of other owners without consent;
  - Expedite the flow of surface waters through natural lines of drainage by either open or closed *drains* into a water-course or stream;
  - Construct grass waterways, check dams, terraces, or other soil-conservation structures, so long as their drainage waters still come within the rules explained earlier and in the discussion of the statutory enlargement of the rules of natural drainage on pages 7–12.

Public highway authorities have the same rights and duties as private owners. They may, in addition, change the natural drainage when the change is necessary and in the public interest and when compensation is made for any taken or damaged property.<sup>21</sup>

Because of the effect on surrounding lands, landowners must not

- Dam or obstruct a natural channel so that the escape of surface water from higher land is retarded or so that the channel is shifted;
- Divert water to lands that do not naturally receive this drainage;
- Change the point of entry of surface water on lower land;
- Bring in water from another watershed that would not have flowed across lower land in a state of nature;
- Pollute any waters that pass from their land through the

property of others—whether surface or underground waters, streams, or diffused waters;

- Connect their own tile with another owner's tile lines or with highway tile lines without consent;
- Dam up or impound large bodies of water that escape and cause serious damage to lower lands owned by others, even though such waters may escape through natural channels;
- Accelerate the flow of water unreasonably, or with malicious intent to the material damage of lower land owned by others, even though the flow is accelerated through natural channels.



Installing drainage tile. Drainage tile is used extensively in central Illinois to remove excess water from farmland.

## Statutory Enlargement of Rules of Natural Drainage

### Right to extend a tile drain across the land of others.

Besides codifying the rules of natural drainage, the Illinois Drainage Code provides that owners may extend their tile drains across the land of others when this extension is necessary to perfect their drainage and when it meets certain conditions imposed by law.<sup>22</sup> It also sets up the court procedure for securing this drainage.<sup>23</sup>

The procedure is predicated on the assumption that the following conditions have been met:

- Other owners have refused consent;
- Owners seeking to extend their drainage will do so at their own expense;
- The extension is needed for a proper outlet;
- The water carried by the drain will empty into a natural watercourse, highway ditch, or other outlet that the owner has a right to use;
- The highway commissioners have consented if a highway drain is to be used;
- The constructed extension will be an ample and properly made covered drain;
- Damages incurred by owners across whose property the extension is constructed are paid;
- A bond with approved security, covering costs and damages, is filed;
- A plat showing the course of the proposed construction and where it will discharge is filed.

A landowner will need to retain legal counsel to initiate the court procedure. If the circuit court finds for the plaintiff—the owner seeking to improve drainage—and if all conditions in the law are met, the owner can proceed to construct the drain. This owner may abandon the construction of the drain even after a favorable judgment but must pay the costs of the trial. If construction is abandoned, suit for the same purpose cannot be brought until five years after the date of judgment.

Owners who build such a drain and their successors in title must keep the drain in good repair so that it will not injure the property through which it passes. To meet this obligation, the owners may enter the lands where the drains are located at any time, but the law provides triple damages for willful harm to servient lands,<sup>24</sup> for example, intentionally driving on rows of corn rather than between them to get to a repair site.

**Drains constructed by mutual license or agreement.** The second early law enlarging a landowner's drainage rights legalized drains constructed by mutual license, consent, or agreement. Because each drain must be a *mutual drain* constructed for the mutual benefit of all the lands affected by it (Figure 2), the *code* specifies a ditch, covered drain, or levee has been constructed by mutual license, consent, or agreement, either separately or jointly, by the owners of adjoining lands when it makes

a continuous line across the lands of such owners, or when the owner of adjoining land is permitted to connect a ditch, covered drain or levee with another already so constructed, or when the owner of lower land connects a ditch or covered drain to a ditch or covered drain constructed by the owner or owners of upperlands, or when the owner of land protected by a levee has contributed to the cost of the construction, enlargement or reconstruction of a levee upon other land.<sup>25</sup>

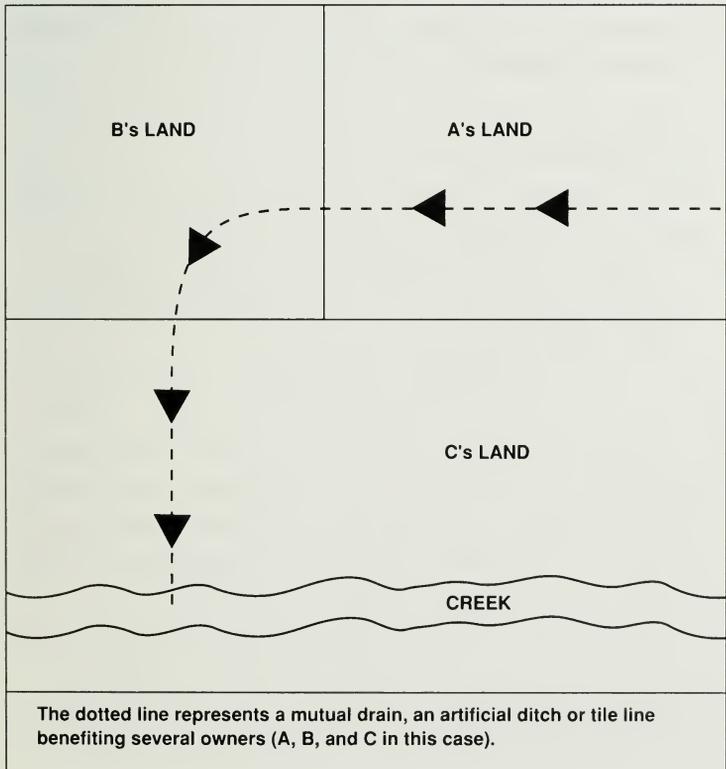


Figure 2.  
Mutual drain.

A mutual drain also arises when a single tract benefited by a ditch or covered drain is divided into two or more tracts.

The courts interpreting these provisions have added the following rules:

- This act has no relation to ditches authorized by *drainage districts* (see pages 14 to 23);<sup>26</sup>
- A written document is not essential for proving consent or agreement;<sup>27</sup>
- Licenses revoked before this act took effect will not be revived by it, but what constitutes a revocation is not always clear;<sup>28</sup>
- The intent of the act is to enlarge the natural rights of drainage between adjoining landowners and to protect the drains involved;<sup>29</sup>
- Highways and highway commissioners are included in the act in the same way as are landowners;<sup>30</sup>
- Owners have a right to maintain a mutual *drainage system* as it was originally established;<sup>31</sup>
- Drains that come under this act create a perpetual easement on the premises involved;<sup>32</sup>
- The act applies to existing and future drains that meet the criteria for mutuality, agreement, or consent;<sup>33</sup>
- The rules of natural drainage are not affected except insofar as the mutual drain itself enlarges or alters the rights of the owners involved.<sup>34</sup>

Three rules are important to mutual drains: one party to the drain cannot legally authorize connection by an outside owner unless all parties to the drain consent;<sup>35</sup> none of the interested parties can close a drain or interfere with the flow of water through it without the consent of all parties;<sup>36</sup> and an interested party may, at his or her own expense, enter the lands of others to repair the drain.<sup>37</sup>

One question frequently asked is whether one or more parties to a mutual drainage system may connect additional lateral tiles on their land to it and thus increase the flow through the system. There is apparently no court case

specifically addressing this question, but the court's decision in the case of *Mackey v. Wrench* may be helpful even though that case addressed a different question.<sup>38</sup>

Interpreting the mutual drainage sections of the code, the court stated:

Under these sections the owners of lands who have established and constructed a system of drainage for their mutual benefit possess a right to have such system of drainage maintained as established.

[An owner] may have the right under the doctrine announced in the case of *Peck v. Herrington* to improve and drain his own field in the course of good husbandry, even if by doing so he increases the flow of water upon his neighbor's land in a natural waterway or depression, but he has no right in doing so to disturb in any way the flow of waters which would pass off his premises through an outlet provided by a mutual system of drainage.<sup>39</sup>

This language appears to preclude increasing the flow through such a system, as well as directing the flow away from the system, particularly if the increase is beyond the capacity of the present system.

If a member of a mutual drainage system wants to add lateral connections to the system, that member should secure consent from the other members. An agreement providing for the nature of and the responsibilities for the improvements should be reached in writing. Legal counsel should be consulted in the drafting of any such agreement. Any such agreement should also be recorded with the Recorder of Deeds.

**Appropriate action can be taken to enforce these rules.**

Court action can be maintained to compel a disconnection or the closing of the unlawful connection, and damages can be collected. A court *injunction* can be sought to remove the obstruction or to prevent interference when landowners enter the lands of others in order to make repairs at their own expense.

In the absence of an agreement for maintenance, an owner in a mutual drainage system may either petition for the

organization of a district by *user* (see page 18) or pay for the work. The mutual agreement, however, may include upkeep and maintenance responsibilities, or it may be that such a right has accrued by prescriptive use. Only the particular facts in each case determine if either condition exists.

**Summary of statutory enlargements.** The statutory enlargements of the civil-law rules of natural drainage may permit landowners to extend a tile drain across the property of others when the extension is necessary to secure a proper outlet if they follow the procedure and meet the conditions outlined in the statute; to connect to a drain along the highway with the consent of the highway commissioners; and to prevent owners of lower ground from interfering with the flow of water through a mutual drain, or from destroying or impairing such drains.

In addition to these specific statutory enlargements of the civil-law rules, an owner may create rights by contract or by prescriptive use. But in spite of enlargement by court interpretation, statutes, and contracts between owners, and the acquisition of rights by prescriptive use, thousands of Illinois landowners would have remained comparatively helpless in securing adequate drainage or flood control had not comprehensive drainage laws been adopted by the legislature providing for establishment of drainage districts.

Before making decisions about drainage, however, landowners should also be aware of the significant effects of the wetland provisions of federal law. These provisions are discussed in Part III of this circular.

## Notes

<sup>1</sup>This drainage rule, known as the civil-law principle of natural drainage, applies to all Illinois farmland, regardless of whether or not it is in a drainage district. Iowa and Kentucky, like Illinois, base their drainage laws on the civil law, but Missouri, Wisconsin, and Indiana follow another legal concept known as the common-enemy rule. Theoretically, under the common-enemy rule, water is regarded as a common enemy, and landowners are given unrestricted legal rights to deal with surface water coming onto their land. Actually, the courts that follow this concept have developed limitations and exceptions to the rule to alleviate otherwise unjust results.

- <sup>3</sup>H.P. FARNHAM, THE LAW OF WATERS AND WATER RIGHTS (1904).
- <sup>4</sup>Peck v. Herrington, 109 Ill. 611 (1884).
- <sup>5</sup>Counties with populations of over 250 thousand may require that a person installing drain tile record a diagram showing the location, size, and depth of the tile with the County Recorder of Deeds. Ill. Rev. Stat. ch. 42, Sec. 2-13 (1989).
- <sup>6</sup>Dayton v. Rutherford, 128 Ill. 271, 21 N.E. 198 (1889).
- <sup>7</sup>Fenton & Thompson R. Co. v. Adams, 221 Ill. 201, 77 N.E. 531 (1906).
- <sup>8</sup>Lambert v. Alcorn, 144 Ill. 313, 33 N.E. 53 (1893).
- <sup>9</sup>Fenton & Thompson R. Co. v. Adams, 221 Ill. 201, 77 N.E. 531 (1906).
- <sup>10</sup>Templeton v. Huss, 57 Ill. 2d 134, 311 N.E. 2d 141 (1974).
- <sup>11</sup>Lambert v. Alcorn, 144 Ill. 213, 33 N.E. 53 (1893).
- <sup>12</sup>Templeton v. Huss, 57 Ill. 2d 134, 311 N.E. 2d 141 (1974).
- <sup>13</sup>*Id.* at 141, 311 N.E. 2d at 146.
- <sup>14</sup>See Callahan v. Rickey, 93 Ill. App. 3d 916, 418 N.E. 2d 167 (1981).
- <sup>15</sup>Ill. Rev. Stat. ch. 42, Sec. 2-12 (1989).
- <sup>16</sup>*Id.*
- <sup>17</sup>Wessels v. Colebank, 174 Ill. 618, 51 N.E. 639 (1898).
- <sup>18</sup>Ill. Rev. Stat. ch. 110, Sec. 13-101 (1989).
- <sup>19</sup>Saelens v. Pollentier, 7 Ill. 2d 556, 131 N.E. 2d 479 (1956).
- <sup>20</sup>Clare v. Bell, 378 Ill. 128, 37 N.E. 2d 812 (1941).
- <sup>21</sup>Baughman v. Heinselman, 180 Ill. 251, 54 N.E. 313 (1899).
- <sup>22</sup>The codification section reads: "Land may be drained in the general course of natural drainage by either open or covered drains. When such a drain is entirely upon the land of the owner constructing the drain, he [or she] shall not be liable in damages therefor." Ill. Rev. Stat. ch. 421, Sec. 2-1 (1989).
- <sup>23</sup>Ill. Rev. Stat. ch. 42, Subsection 2-2 to 2-7 (1989).
- <sup>24</sup>Ill. Rev. Stat. ch. 42, Sec. 2-6 (1989).
- <sup>25</sup>Ill. Rev. Stat. ch. 42, Sec. 2-8 (1989).
- <sup>26</sup>Snyder v. Baker, 221 Ill. 608, 77 N.E. 1117 (1906).
- <sup>27</sup>Dorman v. Droll, 215 Ill. 262, 74 N.E. 152 (1905).
- <sup>28</sup>McIntyre v. Harty, 236 Ill. 629, 86 N.E. 581 (1909).
- <sup>29</sup>Cox v. Deverick, 272 Ill. 46, 111 N.E. 560 (1916).
- <sup>30</sup>Dunn v. Youmans, 224 Ill. 34, 79 N.E. 321 (1906).
- <sup>31</sup>Mackey v. Wrench, 134 Ill. App. 587 (1907).
- <sup>32</sup>Wessels v. Colebank, 174 Ill. 618, 51 N.E. 639 (1898).
- <sup>33</sup>McIntyre v. Harty, 236 Ill. 629, 86 N.E. 581 (1909).
- <sup>34</sup>Knudson v. Neal, 320 Ill. 136, 150 N.E. 626 (1926).
- <sup>35</sup>Ill. Rev. Stat. ch. 42, Sec. 2-9 (1989).
- <sup>36</sup>Ill. Rev. Stat. ch. 42, Sec. 2-10 (1989).
- <sup>37</sup>Ill. Rev. Stat. ch. 42, Sec. 2-11 (1989).
- <sup>38</sup>Mackey v. Wrench, 134 Ill. App. 587, (1907).
- <sup>39</sup>*Id.* at 590.

## ■ Part II

# Illinois Laws on Drainage Districts

Natural drainage rules do not adequately meet the needs of landowners in many parts of the state—particularly in the flat prairie areas and in river bottoms, where both drainage and flood protection are needed.

To cover the inadequacies of the natural drainage rules and to give landowners a means of securing proper drainage, the legislature in 1879 passed two laws, the Levee Act and the Farm Drainage Act. These laws provided for drainage districts based on a system of assessments that permitted the districts to include only lands benefited. This principle was not changed by the drainage code that went into effect on January 1, 1956.

The courts hold that if people have adequate drainage under natural drainage rules, they do not receive the benefit of a drainage district, and their land cannot be included in a drainage district against their wishes.<sup>1</sup> In other words, before a drainage district can get jurisdiction over a tract of land, it must appear that the owners of this land have imperfect natural drainage. The mere fact that the ditches of a drainage district carry off water that originates on this land does not mean, in a legal sense, that the owners are necessarily benefited by the drainage district. Land may not be included in a drainage district nor be assessed by the district against the owners' will unless it can be shown that the property will be materially benefited by the district systems.

The primary purpose of the drainage code is to provide landowners with a legal organization that can be used to force uncooperative owners into the district and to secure adequate drainage or flood protection for the lands lying within it. Landowners within the district must pay assessments and submit to the exercise of *eminent domain* and certain other powers of the district if their lands will be benefited. At one time, Illinois contained over 1,500 drain-

age districts, comprising a total of 5,454,000 acres.<sup>2</sup> Many of these districts have become inactive over the years. To activate a district so that repairs or new improvements can be constructed, new drainage commissioners must be appointed or elected. Landowners wishing to reactivate a drainage district should seek the assistance of an attorney in the general geographical area. This attorney should be knowledgeable about drainage law.

As a result of court interpretation of the constitutional provision on drainage,<sup>3</sup> important principles have been established that influence the organization and operation of all drainage districts. These principles must be kept in mind throughout succeeding sections dealing with the details of the organization and operation of drainage districts:

- Assessments can be levied only against benefited land;
- Assessments on land cannot exceed the benefits that the land will receive;<sup>4</sup>
- Assessments are not limited to land alone but may be levied against improvements, providing that there are benefits;<sup>5</sup>
- “Benefits”—the estimated value of the proposed drainage works to a particular property—are not limited to “agricultural or sanitary” benefits, but may include other kinds, such as those occurring to a railroad or manufacturing concern; therefore, assessments may be levied against such property;<sup>6</sup>
- Landowners are entitled to a court hearing on the question of benefits before they can be compelled to pay drainage assessments;<sup>7</sup>
- Drainage districts are public corporations charged with specific governmental functions and, if necessary, may acquire rights in land by instituting eminent domain proceedings and paying just compensation to the owners;<sup>8</sup>
- Drainage districts are dependent solely upon statute, and the statutory requirements must be satisfied to make their organization legal.<sup>9</sup>

## Organization of Districts

The primary method for organizing a drainage district is a petition signed either by 20 percent of the adults owning more than one-fourth of the land in the proposed district or by more than 25 percent of the adults owning a majority of the land in the proposed district.<sup>10</sup> The petition is filed in the circuit court of the county in which most of the proposed district lies.<sup>11</sup> A petition must include

- The name of the proposed district;
- A statement showing the necessity of the district;
- A description of the proposed work;
- A general description of the lands that will be affected and the names of the owners;
- A description of the boundaries and approximate number of acres;
- A request for the organization of the district and appointment of commissioners.<sup>12</sup>

Provision is made for giving a notice and holding a court hearing on the petition.<sup>13</sup> A hearing must occur so that anyone affected may appear and contest the necessity or utility of all or any part of the proposed work.<sup>14</sup> After the hearing, the court determines whether the petition has been signed by enough people owning the prescribed amount of land and whether the petition meets other legal requirements.<sup>15</sup>

The law also provides for an alternate method of organization. Proceedings are instituted upon a petition signed by at least 10 percent of the adults who own at least one-fifth of the land in the proposed district. After the notice and hearing on the petition, a referendum is held. If a majority of those voting on the question vote in favor of the organization of the proposed district, the court shall proceed with organization of the district.<sup>16</sup>

Petitions must be carefully prepared. Failure to state correctly and logically what is needed, the omission of material requirements, the inclusion of territory already in another district, and other irregularities will render a petition

ineffective. Legal assistance in preparation of the petition is indispensable.

If the court approves the petition, the appropriate authority appoints three temporary commissioners, who must subscribe to and file an oath.<sup>17</sup> One commissioner must be elected chairman. Two or more commissioners constitute a *quorum*.

The specific duties of the temporary commissioners include examining the land with regard to the feasibility of the project and the costs and benefits involved. A *registered professional engineer* must be employed for this task unless the court excuses the use of one. The commissioners must also prepare a report on their findings and file it with the court. The law also provides for a hearing on the report.<sup>18</sup>

After the hearing, the court may

- Confirm the report and enter the prescribed order declaring the district organized;
- Modify the report and confirm it;
- Order the commissioners to review and modify the report before it is confirmed;
- Find that the district should not be organized because the benefits do not exceed the costs.<sup>19</sup>

## **Organization of Outlet, Mutual, and User Districts**

**The organization of outlet districts follows usual procedures.** Outlet districts must benefit land already in two or more drainage districts as well as land not in such districts. Their purpose is to deepen and widen the natural outlets for collected waters, not to construct original drainage or levee works.<sup>20</sup>

**The organization of mutual drainage districts.** Once all the landowners in an area have signed a mutual agreement, a notary public or anyone authorized by law to administer oaths has acknowledged the agreement, and it has been placed in the drainage record, a mutual drainage district is formed.<sup>21</sup>

The mutual agreement may cover these or other points: the location and character of work to be done, the adjustment of damage, the amount of assessment to be levied, the assessment against each tract, how the work shall be done, and the designation of the original commissioners.

When no contract for construction is awarded to a mutual district or when the court feels it was organized to prevent the inclusion of its lands in a district by petition, the lands in the mutual district may be included in a district by petition.

**The organization of user districts.** When two or more property owners have connecting artificial drains that were established by a mutual agreement between or among the owners, or where the property is divided among different owners after the drain was constructed, and when the present owners cannot agree on the repair or maintenance of the system, any one of these owners may petition the court to have the lands thus connected organized as a *user drainage district*.<sup>22</sup> If the facts support the petition, the court proceeds with organization as in any other district.

The drainage code also includes provisions for abandoning work and dissolving districts,<sup>23</sup> consolidating districts,<sup>24</sup> annexing and detaching lands,<sup>25</sup> and organizing subdistricts.<sup>26</sup>

### **Important Rules Laid Down by the Courts**

Many controversies have arisen over the organization of drainage districts. Illinois courts have, as a result, developed certain rules. Among the more important ones are these:

- Signatures may be withdrawn or added to a petition at any time before the court takes action on the petition, but after action has been taken, a signature may be withdrawn only with the consent of the majority of the other petitioners unless it can be shown that the signature was secured through fraud or misrepresentation;<sup>27</sup>
- The preliminary order of the court must contain a definite statement of the findings that the court made on the questions it must consider;<sup>28</sup>
- An order is ineffective if the court does not acquire jurisdiction by following the statutory requirements in

detail or if material errors or omissions in the petition remain uncorrected;<sup>29</sup>

- A drainage district cannot be organized to correspond with the boundaries of a township or other political unit except in the unlikely event that this unit constitutes a natural watershed and contains lands that can be efficiently connected by a continuous line of ditches or drains.<sup>30</sup>

## **Powers and Duties of Commissioners**

Once a district is organized, the temporary commissioners become permanent commissioners until the first Tuesday in September following its organization. Then three commissioners are appointed by the appropriate authority to handle the affairs of the drainage district.<sup>31</sup> The commissioners serve three-year staggered terms. Provision is made for allowing a majority of the adults owning a majority of the land area to designate by petition who shall be appointed.<sup>32</sup> A procedure is included for dispensing with two of the appointed commissioners after the initial work is completed.<sup>33</sup> In some drainage districts, commissioners are elected rather than appointed. The Drainage Code also provides that certain districts can change from the appointment to the election of commissioners and vice versa. As a general rule, one must own land in the district to be appointed or elected; however, this requirement can be waived in certain circumstances.

Commissioners generally have the power and duty to do all that is necessary to accomplish the purposes of the law. These powers and duties are the following:

- To go upon the land, employ necessary assistance, and adopt a plan or system of drainage;
- To obtain the necessary lands and right-of-way by agreement or, if necessary, by eminent-domain proceedings;
- In the corporate name of the district, to enter into contracts, sue and be sued, plead and be impleaded, and to do all that may be necessary to accomplish the purposes of this act;

Drainage ditch.  
Occasional  
cleaning of  
drainage ditches  
is an important  
maintenance  
responsibility  
of drainage  
commissioners.

- To compromise suits and controversies and employ necessary agents, attorneys, and engineers;
- To carry out specific provisions of the law relative to making various types of assessments, employing a treasurer, employing other assistance, annexing lands, borrowing funds, enforcing payment of assessments, and consolidating and dissolving districts;



- To let contracts for the surveying, laying, constructing, repairing, altering, enlarging, cleaning, protecting, and maintaining of any drain, ditch, levee, or other work;
- To let contracts by bid if the work to be done is the construction of the principal work and the cost is more than \$5,000;
- To borrow money, without court authority, up to 90 percent of assessments unpaid at the time for the payment of any authorized debts or construction;
- To widen, straighten, deepen, or enlarge any ditch or watercourse, and to remove driftwood and rubbish whether the ditch is in, outside, or below the district;
- To cause railroad companies to construct, rebuild, or enlarge bridges or culverts when necessary;

- To make annual or more frequent reports as required by the court, including an annual financial report;
- To conduct meetings in the county or counties in which the district is located and to conduct an annual meeting in the county in which the district was organized;
- To use public highways for the purposes of work to be done;
- To make annual inspections of the improvements and works of the district and keep them in operation and repair;
- To sell or lease any land owned by the district;
- To own and operate necessary machinery and equipment;
- To construct access roads and level spoil banks;
- To abandon works no longer useful to the district;
- To contract with other public agencies, including the federal government;
- To file a list of active commissioners with the clerk of the circuit court, and a map showing all boundaries and the location of all drainage improvements with the circuit clerk and the county clerk of the county in which the district is organized.



**Balancing drainage and environmental considerations. This drainage ditch remains clear on one side. The trees that have been allowed to grow on the other side provide a habitat for wildlife.**

In performing these duties and powers, the commissioners must use all practical means to protect the environment, including trees, fish, and wildlife habitats. Commissioners must avoid eroding land and polluting land, water, and air.

The appointing authority may for good cause remove any commissioner it appointed and may fill all vacancies. Also, the law provides for a penalty and removal from office of commissioners who refuse or neglect to discharge the duties imposed on them by law.

Also, when petitioned, either by a commissioner or by a landowner, the circuit court may determine the duty of the commissioners toward this landowner.<sup>34</sup>

### **Drainage Record**

Circuit clerks, who act as clerks of the districts in their counties, are required to keep for each of their districts a Drainage Record. It must contain the order organizing the district and orders regarding the levy of assessments, performance of work, or duties of commissioners. It should also contain the maps, plats, and plans of the district; the list of active commissioners; and all assessment rolls, certificates of levy, reports, and other formal records of the district required to be recorded.<sup>35</sup>

### **Owners' and Districts' Rights and Duties Concerning Ditches and Drains**

As a result of statutes, decisions, and the application of common-law rules, an owner has the right to use the water in a drainage district ditch, fish or trap in it, take ice from it, cross it, and move his implements along its banks so long as he does not impair the functioning of the ditch or break down its banks.<sup>36</sup> An owner may also connect with the drains of a district, providing the type of connection is approved by the commissioners.<sup>37</sup>

A district has the right to enjoin—prohibit or restrain by court order—pollution of a ditch; to subject to the jurisdiction of the district the land of anyone who connects a drain or drains to the district's drains; to have criminal charges brought against any person who wrongfully or purposefully

“fills up, cuts, injures, destroys or in any manner impairs the usefulness of any drain.” If the injury is to a levee and causes flooding, the person shall be deemed guilty of a Class 3 felony; and besides being fined, this person may be imprisoned for a term of two to five years. The commissioners can also recover damages to their works from this person.<sup>38</sup>

Illinois courts have decided that a district is *not* required to fence its ditches or rights-of-way. Neither is it required to construct farm bridges across its ditches, but the cost of a bridge may be considered in determining damages to particular property.<sup>39</sup> Older districts, however, may have some bridge maintenance responsibility.

Before a farmer and a drainage district decide to make drainage improvements, they should also consider the effects these improvements will have on the farmer's participation in USDA programs. The wetland provisions of federal law are discussed in the next part of this circular.

## Notes

<sup>1</sup>Commissioners of Sangamon and Drummer Drainage District v. Houston, 284 Ill. 406, 120 N.E. 253 (1918).

<sup>2</sup>Survey by the Illinois Tax Commission.

<sup>3</sup>In 1878, the first amendment was made in the 1870 constitution to provide that districts could levy special assessments on property benefited through the exercise of its power to “construct and maintain levees, drains and ditches, and keep in repair all drains, ditches and levees heretofore constructed under the laws of this state.” As a result, districts were able to finance their operations. No similar provision is included in the 1970 Illinois constitution. Apparently, the drafters thought that the new constitutional provision granting the state the power to raise revenue in any manner unless otherwise limited was adequate, when read in conjunction with the statutory provisions giving drainage districts the power to levy assessments.

<sup>4</sup>Sny Island Levee Drainage District v. Meyer, 27 Ill. 2d 530, 190 N.E. 2d 356 (1963).

<sup>5</sup>Marshall v. Commissioners of Upper Cache Drainage District, 313 Ill. 11, 144 N.E. 3213 (1924).

<sup>6</sup>Illinois Cent. R. Co. v. Commissioners of East Lake Fork Drainage District, 129 Ill. 417, 21 N.E. 925 (1889).

<sup>7</sup>People *ex rel.* Wheeler v. Harvey, 396 Ill. 600, 72 N.E. 2d 345 (1947).

<sup>8</sup>Hunt Drainage District v. Harness, 317 Ill. 292, 148 N.E. 44 (1925).

<sup>9</sup>Bissell v. Edwards River Drainage District, 259 Ill. 594, 102 N.E. 990 (1913).

<sup>10</sup>Ill. Rev. Stat. ch. 42, Sec. 3-3 (1989).

<sup>11</sup>*Ibid.*

<sup>12</sup>Ill. Rev. Stat. ch. 42, Sec. 3-3 (1989)

<sup>13</sup>*Id.* Subsection 3-4 to 3-6.

<sup>14</sup>*Id.* Sec. 3-7.

<sup>15</sup>*Id.* Sec. 3-8.

<sup>16</sup>*Id.* Sec. 3-26.

<sup>17</sup>*Id.* Sec. 3-9 to 3-10.

<sup>18</sup>Ill. Rev. Stat. ch. 42, Subsection 3-12 to 3-15 (1989).

<sup>19</sup>*Id.* Subsection 3-21 to 3-23.

<sup>20</sup>*Id.* Subsection 3-28 to 3-30.

<sup>21</sup>*Id.* Sec. 3-31.

<sup>22</sup>Ill. Rev. Stat. ch. 42, Sec. 3-27 (1989).

<sup>23</sup>*Id.* Subsection 10-1 to 10-11.

<sup>24</sup>*Id.* Subsection 9-1 to 9-9.

<sup>25</sup>*Id.* Subsection 8-1 to 8-22.

<sup>26</sup>*Id.* Subsection 7-1 to 7-12.

<sup>27</sup>*Snedeker v. Drainage District*, 124 Ill. App. 380, 98 N.E. 1096 (1907).

<sup>28</sup>*Maulding v. Skillet Fork River Outlet Union Drainage District*, 313 Ill. 216, 145 N.E. 227 (1924).

<sup>29</sup>*Okaw Valley Outlet Drainage District v. Springman*, 345 Ill. 400, 178 N.E. 64 (1931).

<sup>30</sup>*Klinger v. People ex rel. Conkle*, 130 Ill. 509, 22 N.E. 600 (1889).

<sup>31</sup>Ill. Rev. Stat. ch. 42, Sec. 4-1 (1989).

<sup>32</sup>*Id.* Sec. 4-2.

<sup>33</sup>*Id.* Sec. 4-9.

<sup>34</sup>Ill. Rev. Stat. ch. 42, Sec. 4-12 et seq. (1989).

<sup>35</sup>Ill. Rev. Stat. ch. 42, Sec. 4-35 (1989).

<sup>36</sup>*Id.* Sec. 12-4.

<sup>37</sup>*Id.* Sec. 12-1.

<sup>38</sup>*Id.* Sec. 12-7. *See* Ill. Rev. Stat. ch. 38, Sec. 1005-8-1 (1989) for the nature of criminal penalties.

<sup>39</sup>Ill. Rev. Stat. ch. 42, Sec. 12-5 (1989).

## ■ Part III

# The Wetland Provisions of the Food Security Act of 1985, as Amended

*Note: The exact definition of "wetland" continues to be refined through administrative rulemaking. The reader should be aware that further changes could still take place.*

In addition to Illinois farm drainage law, farmers need to know how federal law affects their ability to alter or improve drainage on their land. Farmers must comply with the wetland provisions of the Food Security Act of 1985<sup>1</sup>, as amended by the Food, Agriculture, Conservation, and Trade Act of 1990, to remain eligible for USDA program benefits. Under these provisions, any person that clears, drains, dredges, levels, or alters a wetland after December 23, 1985, to plant an annual crop, will become ineligible for USDA program benefits on all land owned or operated.<sup>2</sup> Farmers who participate in USDA programs must

- Know where and what kinds of wetlands are on their farmland;
- Know what management options exist for these wetlands in order to comply with the wetland provisions of the act;
- Contact the local Soil Conservation Service (SCS) office if they plan to alter or improve drainage on their wetlands.

The wetland provisions of the act are intended to help protect U.S. wetlands.<sup>3</sup> Generally, a wetland is an area of wet soil that will support a prevalence of water-loving plants.<sup>4</sup> Wetlands are usually uncropped areas with cattails, willow, or other plants that grow well in wet soils or water. A wetland may also be a wet area in a field where smartweed, yellow nutsedge, and similar plants grow.

Wetlands benefit the environment in many ways.<sup>5</sup> They catch sediment, nutrients, and pesticides that are part of runoff water. Wetlands filter the water, and their water-loving plants use nutrients in the water and remove many of the pesticides.

Wetlands not only improve water quality, but they also recharge groundwater supplies in some areas and help reduce downstream flooding by storing water. Aside from their importance to people, wetlands form a part of the ecosystem. Migrating waterfowl use wetlands for food, cover, and nesting habitat as do a variety of other animals.

The wetland provisions of the act are important to anyone who uses any of the following programs<sup>6</sup> of the USDA, such as the Agricultural Stabilization and Conservation Service (ASCS), the Soil Conservation Service (SCS), the Farmers Home Administration (FmHA), and the Federal Crop Insurance Corporation (FCIC):

- Commodity Loans and Purchases (ASCS)
- Cotton Production Stabilization (ASCS)
- Emergency Loans (FmHA)
- Farm Operating Loans (FmHA)
- Farm Ownership Loans (FmHA)
- Feed Grain Production Stabilization (ASCS)
- Storage Facilities Equipment Loans (ASCS)
- Wheat Production Stabilization (ASCS)
- National Wool Act Payment (ASCS)
- Beekeeper Indemnity Payments (ASCS)
- Rice Production Stabilization (ASCS)
- Federal Crop Insurance (FCIC)
- Soil and Water Loans (FmHA)
- Loans to Indian Tribes and Tribal Corporations (FmHA)
- Conservation Reserve Program (ASCS)
- Agriculture Conservation Program (ASCS)
- Watershed Protection and Flood Prevention (SCS)
- Great Plains Conservation Program (SCS)
- Disaster Assistance (ASCS)
- Agricultural Water Quality Incentives Program (ASCS)
- Environmental Easement Program (ASCS)
- Emergency Conservation Program (ASCS)
- Agricultural Credits Act Payments (ASCS)
- Payments for Storage of Agricultural Commodities (ASCS)

To remain eligible for these USDA programs, farmers must not alter or improve drainage on certain wetland areas to plant annual crops.<sup>7</sup> If a person alters or improves drainage on these wetlands, the wetlands become “converted wetlands.”<sup>8</sup> A “converted wetland” means wetland that has been drained, dredged, filled, leveled, or otherwise manipulated to make the land suitable for planting crops.<sup>9</sup> Essentially, wetlands are considered converted if physical manipulation has altered natural wetland characteristics to the point of making crop production possible. Many common practices, such as pushing back the edges of woods, squaring-up fields, or clearing existing drainage paths may cause a wetland to be converted. Any person who plants annual crops on a converted wetland will become ineligible for USDA benefits.<sup>10</sup>

To avoid converting protected wetlands, farmers need to be able to identify the types of wetland on their land. Identifying these wetlands may not be obvious because affected farmland may not always look like a wetland. A wetland may be any size and need not look like a swamp. As a practical matter, a wetland consists of any poorly drained soil.

The SCS has conducted a wetland inventory so that farmers will know whether their farms have wet areas that are affected by the act’s requirements.<sup>11</sup> The SCS uses the National Wetland Inventory Map, soil survey maps, aerial color slides, and aerial photographs to inventory wet areas in a county. Using the criteria of the act,<sup>12</sup> wet areas on farms are identified as wetlands on the inventory

- If they occur on wet, hydric soils;
- If allowed to be in their natural state, they would grow the kinds of plants that like wet soils; or
- If cropped, they have surface water that has drowned out the crop planted there in most years or has caused the area to be farmed around or planted at a different time.

The final goal of the inventory is to outline the wet area on a base map. The base map is then used by the SCS to produce individual aerial maps for farmers with wet areas affected by the act. These maps will show where and what kinds of wet areas remain on farmland (Figure 3).

Figure 3.  
Aerial map  
showing  
different  
wetlands on a  
farm.



The SCS field offices in the various counties will distribute the maps along with other wetland information in one of several ways. Some counties will hold meetings to acquaint farmers with the definitions and management options in the wetland provisions of the act. Other counties will mail the maps and other information to farmers who have wetlands on their farms. The SCS goal is to help farmers identify the wetlands on their farms and to help these farmers understand their management options regarding these areas so that they can comply with the act and remain eligible for USDA benefits. All farmers who traditionally participate in USDA programs will receive a wetland determination for their property.

The SCS has identified several types of wetlands, including "prior converted" cropland, wetland, farmed wetland, converted wetland, and artificial wetland.<sup>13</sup> The SCS has also specified management options for these wet areas.<sup>14</sup>

### **Prior Converted Cropland**

These "PC" areas were cleared, drained, or filled and cropped before December 23, 1985, and have been maintained as cropland. Typically, much of Illinois cropland on poorly

drained soil is drained and is "prior converted" cropland. PC may be farmed and maintained or improved in any way, as long as it continues to be used for growing corn, soybeans, wheat, or similar crops in rotation. If cropping is discontinued or if no attempt is made to maintain the area as cropland for at least five consecutive years, the area will be considered abandoned. An abandoned area will then be reclassified as a wetland if water-loving plants return to the site.

## **Wetland**

Marked "W" on the map, these areas consist of predominantly wet soil that can support many water-loving plants, such as cattails, willow trees, sedges, rushes, and some smartweeds. Wetlands may be used to produce crops during dry periods if the current vegetation is not trees or shrubs and if it has not been cleared since December 23, 1985. Before doing any drainage work on or near a wetland, farmers should consult their local SCS field office if the work could affect the hydrology of the wetland area marked on the map. Wetlands with a cropping history may also be enrolled in the Wetland Reserve Program (WRP) under a long-term or permanent easement. Under the program, farmers may improve the natural wetlands characteristics of their wetland resources in exchange for government payments. An example of such an improvement would be planting trees or shrubs.

## **Farmed Wetland**

Marked "FW" on the map, a farmed wetland consists of cropland that was cleared, drained or filled, and cropped before December 23, 1985. FW is saturated or has enough ponded water so that in most years, the area is too wet to plant or harvest, or yields are significantly reduced. FW may be farmed as it was before December 23, 1985. Farmers may also maintain the degree of drainage that existed before this date; however, no drainage improvements may be made. Before doing any drainage work on or near a farmed wetland, farmers should check with their local SCS field office if the work could affect the hydrology of the wetland area marked on the map. FW may also be enrolled in the WRP described above in "Wetland."

## Converted Wetland

Converted wetland, marked "CW" on the map, consists of wetlands that were drained or altered after December 23, 1985, to allow crop production. Except for the options described below, planting crops on CW will make a farmer ineligible for USDA benefits.

For wetlands converted between December 23, 1985, and November 28, 1990, farmers may:

- Restore the wetland to its original condition. Operators may farm it when weather permits, if the original vegetation was *not* trees or shrubs;
- Use the area to produce forages or other crops that are not annually planted;
- Seek minimal effect exemption to offset the loss of wetland values. The exemption would allow operators to farm the area in exchange for developing a wetland of similar value to the one converted, in a cropland field.

For wetlands converted after November 28, 1990, farmers may:

- Restore the wetland to its original condition. Once restored, operators may farm it when weather permits, if the original vegetation are *not* trees or shrubs;
- Use the area for some purpose other than pasture, forages, or annually tilled crops. Acceptable uses include fish production; production of trees, vineyards, or shrubs; building or road construction; or other similar activities.

## Artificial Wetland

Artificial wetland—"AW" on the map—is a wetland made by humans on an area that was not a wetland naturally. Typical examples of AW are ponds, lakes, mine sinks, irrigation seeps, or water trapped by man-made levees or dikes. AW may be altered for use as cropland without restriction.

Use and management of each type of wetland is linked to a farmer's eligibility for USDA benefits. Farmers applying for these benefits must certify in writing on Form AD-1026 that

they have not converted any wetlands after November 28, 1990, and they will not produce crops on converted wetlands during the crop year in which they are seeking such benefits unless this production is exempt.<sup>15</sup> If farmers have questions or disagree with the SCS determination regarding a particular wet area on their land, they should contact the local SCS field office.

Farmers can appeal the SCS technical determination of wet areas on their land. In each case, they must supply in writing why they feel the SCS did not properly apply the criteria for identifying wetlands. The district conservationist will then reevaluate the area based on evidence the farmer supplies and will change the determination if the SCS misinterpreted the technical criteria in identifying a particular area.

If the district conservationist finds that the SCS correctly identified the wet area, farmers may formally appeal the technical decision.<sup>16</sup> Farmers should seek legal counsel if they decide a formal appeal is necessary. The SCS aims to resolve disputes informally at the local level whenever possible. Changes in the law itself should be dealt with through the political process. The 1990 Farm Bill, for example, has modified some of the provisions of the 1985 act.

## Notes

<sup>1</sup>16 U.S.C. § 3821 et. seq. (Supp. V 1987).

<sup>2</sup>16 U.S.C. § 3821 (Supp. V 1987).

<sup>3</sup>See Federal Regulations on Highly Erodible Land and Wetland Conservation, 7 C.F.R. § 12.1(b)(4) (1989).

<sup>4</sup>16 U.S.C. § 3801(a)(16) (Supp. V 1987).

<sup>5</sup>SCS *Fact Sheet*, April 1991.

<sup>6</sup>See Proposed Rule, Highly Erodible Land and Wetland Conservation, 7 C.F.R. Part 12, as published in the Federal Register, vol. 56, No. 433, March 5, 1991.

<sup>7</sup>See 16 U.S.C. § 3821 (Supp. V 1987).

<sup>8</sup>16 U.S.C. § 3801(4) (Supp. V 1987).

<sup>9</sup>*Id.*

<sup>10</sup>There are exceptions to the wetland provisions. See 7 C.F.R. § 12.5(d) (1989). No person will become ineligible for USDA benefits under the act by cropping:

- 1) converted wetland if the wetland was converted or conversion was started before December 23, 1985, with an exemption granted by ASCS; or

- 2) a wetland created by an artificial lake, pond or by excavating or diking non-wetland to collect and retain water; or
- 3) a wet area created by a water delivery system, irrigation, irrigation system, or application of water for irrigation; or
- 4) wetland where cropping is possible due to a natural condition, such as drought, and without action by the farmer that destroys a natural wetland characteristic; or
- 5) converted wetland if the SCS determines that such action will only minimally affect the hydrological and biological aspect of the wetland; or
- 6) wetlands converted by third persons not related to the person applying for USDA program benefits, if such conversion was not part of a plan to avoid compliance with the wetlands provisions of the Act.

Loans made before December 23, 1985, will also not be affected by the wetland provisions. 7 C.F.R. § 12.5(e) (1989).

<sup>11</sup>Information about the wetland inventory comes from the text of the slide presentation (SCS—Champaign, Illinois). This information was also updated by the SCS.

<sup>12</sup>See 7 C.F.R. § 12.31 (1989).

<sup>13</sup>SCS *Fact Sheets*, April 1991. These fact sheets are used by the SCS to present information contained in the wetland provisions of the Food Security Act of 1985 and applicable federal regulations.

<sup>14</sup>*Id.*

<sup>15</sup>7 C.F.R. § 12.7(a)(2). For exemptions, see 7 C.F.R. § 12.5(d), *supra*, n.11.

<sup>16</sup>7 C.F.R. § 12.12 (1989).

## ■ Part IV

# Illinois Soil Erosion and Sedimentation Control

## Soil and Water Conservation District Guidelines for Erosion and Sediment Control

On April 18, 1980, the Illinois Department of Agriculture adopted guidelines<sup>1</sup> for erosion and sediment control as mandated by the Illinois Soil and Water Conservation Districts Act.<sup>2</sup> These guidelines phase in increasingly stringent soil-loss limits. Individual soil and water conservation districts have adopted similar guidelines, which must be at least as stringent as those of the state. The guidelines provide a mechanism for encouraging landowners and occupiers of land to reduce erosion. When erosion is reduced, drainage ditches and tile and other *drainage structures* are less likely to be damaged by siltation.



Sediment clogging a culvert. Erosion can clog culverts, deposit silt in waterways, and otherwise hamper drainage systems. Good soil conservation practices help protect drainage systems.

The soil-loss guidelines are based upon the concept of “T-value”: the average annual tons of soil loss per acre “a given soil may experience and still maintain its productivity over an extended period.” Both physical and economic factors

Figure 4. Illinois guidelines for achieving tolerable annual soil loss (T).

Dateline	Soil Loss Goals	
	≤5 percent slope	>5 percent slope
	----- tons per acre per year -----	
January 1, 1983	4 to 20 (4 T or less)	4 to 20 (4 T or less)
January 1, 1988	1 to 5 (T or less)	2 to 10 (2 T or less)
January 1, 1994		1.5 to 7.5 (1.5 T or less)
January 1, 2000		1 to 5 (T or less)
Note: Ranges are indicated because soil types differ.		

are considered."<sup>3</sup> For most Illinois soils, the T-value will be between two and five tons of annual soil loss per acre. These soil losses are estimated with the *Universal Soil Loss Equation*. The goal of the guidelines is "T by 2000," that is, to reduce soil loss from every acre to its T-value or less by the year 2000. The state guidelines call for reaching this goal according to the timetable in Figure 4.<sup>4</sup>

Some soil and water conservation districts may have adopted more stringent soil-loss limits or a more stringent timetable.

The guidelines anticipate that T-value will be attained by the adoption or installation of conservation tillage systems, grassed waterways, terraces, or the seeding of permanent vegetative cover. It is also anticipated that state cost-sharing moneys will be available to landowners to help defray the costs of these practices or structures.

### Enforcement of the Guidelines

Educational and financial incentives are used to obtain compliance with the guidelines, but any person who believes a serious problem with erosion and sediment exists may file a *complaint*. A complaint is generally filed with the soil and water conservation district in which the problem land is located and should contain the following information:

- The name and address of the person or persons filing the complaint;
- The date the alleged violation was observed;
- The location by legal description or metes and bounds of the land being damaged by sediment;
- A description of the nature and extent of the damage being done;
- The names and addresses of landowners and occupiers, if known, and the location by legal description or by metes and bounds of land believed to be the source of excessive sediment;
- The signature of the person or persons filing the complaint and the date filed.<sup>5</sup>

Upon receiving a complaint, the soil and water conservation district must notify the landowner involved; conduct an investigation; determine whether a violation of the guidelines exists; and, if it does, give the landowner or occupier a Notice of Violation. The soil and water conservation district must attempt to get the individual to comply with the guidelines; but if this attempt fails, the Illinois Soil and Water Conservation District Act does not provide for fines or other enforcement tools, except those that may exist under other legislation, such as the Illinois Environmental Protection Act and its water pollution rules and regulations.

Although the current program lacks a vigorous enforcement mechanism, contacts by the soil and water conservation districts with individual landowners sometimes produce voluntary compliance. Similarly, if erosion from property owned by the highway authority is causing sedimentation problems for adjacent landowners, they might benefit from district contacts with the highway authority.

## Notes

<sup>1</sup>Rules and Regulations Relating to the Soil and Water Conservation District Act, 4 Ill. Admin. Reg. 88 (May 2, 1980).

<sup>2</sup>Ill. Rev. Stat. ch. 96 1/2, Sec. 7101 *et seq.* (1989).

<sup>3</sup>Rule 3.1 (I), 4 Ill. Admin. Reg. 93 (May 2, 1980).

<sup>4</sup>Rule 4.1, 4 Ill. Admin. Reg. 94 (May 2, 1980).

<sup>5</sup>Rule 12.1, 4 Ill. Admin. Reg. 109 (May 2, 1980).

## ■ Part V

# Illinois Permits for Construction in Streams or Floodways

Illinois statutes require a permit from the Division of Water Resources in the Department of Transportation for construction by highway authorities, by drainage districts, or by individuals when this construction is located in any stream or floodway draining more than one square mile in an urban area or ten square miles in a rural area. According to Illinois Revised Statutes, Chapter 19, Section 78 (1989), specifically exempted from the rules are field tile systems, tile outlet structures, terraces, water and sediment control basins, grade stabilization structures, and grassed waterways that do not obstruct flows. In addition, most of the maintenance and repair of existing structures is excluded. The law applies to any person, corporation, unit of local government, or state agency.

The permit application includes the name of the applicant; the location of the site; a description of the project; a statement of the purpose of the construction; a list of potentially affected properties; and a discussion of the impact of the project upon endangered species, parks, historical sites, public recreational areas, and areas designated as natural areas by the Illinois Department of Conservation.

Construction usually will be approved if it does not adversely affect any public body of water, obstruct navigability, result in actual or potential flood damage, or harm endangered species, historical sites, public recreational areas, or designated *natural areas*.

The Illinois Department of Transportation (IDOT), the U.S. Army Corps of Engineers, the Illinois Environmental Protection Agency, the U.S. Fish and Wildlife Service, and the Illinois Department of Conservation have developed a joint permit application form. Many categories of minor work are now covered by nationwide permits of the U.S. Army Corps of Engineers and comparable statewide permits of the IDOT.

## ■ Glossary

**Basin.** A natural depression that holds water. Water cannot flow out of a basin without artificial aid.

**Civil law.** A written code of laws that originated in Rome and is now used in many countries. It is to be distinguished from English common law, which is based on statutes and court decisions. (Louisiana is the only state with predominantly civil law, but Illinois and some other states have adopted natural drainage rules like those in the civil law.)

**Code.** The product of codification, which is the rearrangement under one general title and in one place of all the laws on a particular subject.

**Complaint.** A written statement that is filed with a court and that asks for relief from some injustice described in the complaint. The filing of a complaint formally initiates a lawsuit.

**Ditch.** An artificially constructed open drain or a natural drain that has been artificially improved.

**Dominant land or tenement.** Property so situated that its owners have rights on adjacent property, such as a right-of-way or a right of natural drainage. The adjacent land is the servient land or tenement.

**Drain.** A ditch and any water course or conduit, whether open, covered, or enclosed, natural or artificial, or partly natural and partly artificial, by which waters coming or falling upon a property are carried away.

**Drainage district.** A special district created by petition or referendum and court approval. It has the power to construct and maintain drainage improvements and to pay for the improvements with assessments on the land within the district boundaries. An assessment on the land cannot be greater in value than the benefits of the drainage improvements.

**Drainage structures.** Structures other than drains, levees, and pumping plants intended to promote or aid drainage.

Such structures may be independent from other drainage work or may be a part of or incidental to it. The term includes, but is not restricted to, catchbasins, bulkheads, spillways, flumes, drop boxes, pipe outlets, junction boxes, and structures, whose primary purpose is to prevent the erosion of soil into a district drain.

**Drainage system.** A system of drains, drainage structures, levees, and pumping plants that drains land or protects it from overflow.

**Easement.** An acquired right to cross or use another's property.

**Eminent domain.** The right of the government to take private property through condemnation proceedings. Just compensation must be paid, and the taking must be for a public purpose.

**Good husbandry.** Generally accepted agricultural practices found in good farm management.

**Injunction.** A legal writ or command issued by a court and directed to a particular person or corporation, requiring that the person or corporation do or refrain from doing certain acts.

**Landowner or owner.** The owner of a real property. This term refers to an owner of an undivided interest, a life tenant, a remainderman, or a trustee under an active trust, but not to a mortgagee, a trustee under a trust deed in the nature of a mortgage, a lien holder, or a lessee.

**Mutual drain.** Drainage agreed to and of benefit to all persons involved. (See "The organization of mutual drainage districts," page 17, and "Drains constructed by mutual license or agreement," page 9.)

**Natural area.** Land that retains its natural or primeval character or land that has floral, faunal, ecological, geological, or archaeological features of special value.

**Prescription or prescriptive use.** Long continued use of another's property to benefit your own property, for ex-

ample, obstructing a waterway so that the water backs up on a neighbor's land rather than flows across one's own field. If the prescriptive use is long enough (typically twenty years in Illinois), a legal right may be created to continue the conduct.

**Quorum.** A majority of those entitled to act. An official board cannot do business unless a quorum is present.

**Reasonable use.** Use of land to improve drainage such that the benefits of the improved drainage outweigh the disadvantages to lands receiving additional flow.

**Registered professional engineer.** A professional engineer registered under the provisions of The Illinois Professional Engineering Act and any act amending that act.

**Servient land or tenement.** See *Dominant land or tenement*.

**State of nature.** The natural lay of the land and the natural drainage pattern over this land.

**Tenement.** Land, real estate. This term is generally used, however, to describe real estate having permanent improvements.

**Universal Soil Loss Equation.** A formula including such factors as the steepness and length of a slope. This formula is used to estimate the average soil loss from a tract of land.

**User.** A person or persons who have made continuous use of a roadway, drain, or other artificial structure for some minimum period of time.

**User drainage district.** A drainage district that is organized to contain land continuously drained by connected artificial drains for some minimum period of time.

















UNIVERSITY OF ILLINOIS-URBANA



3 0112 027484713