

Illinois Water Use Law

Who Regulates the State's Waters?

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Simple Answer - No Comprehensive Regulation!

- No Comprehensive Statute
- No Statewide Statute
- No Comprehensive Regulatory Review for Water Development Projects
- No legal way to perfect a water use right

Question Is - Why Not in Illinois??

- No real need?
- Too political?
- Too expensive?
- Lack of adequate regulatory tools?

No Real Need?? What About

- U. of I Water Law Study by Cribbet in 1958?
- 1967 State Water Plan?
- Coal Slurry Pipelines
- Synthetic Fuel projects – coal gasification
- Federal Reservoir on Little Wabash/ Lake Marion/ Middle Fork Vermillion/
- Kaskaskia River withdrawals
- New Technology – Super Conducting Super Collider/Future Gen/Fish Hatchery
- Growth of Irrigation – Kankakee County/Mason County and more
- City of Normal and Decatur GW Pumping expansion
- 1988-1989 Drought
- Natural Gas combined cycle/peaking power Plants
- Mega livestock facilities
- Ethanol Plants
- Fracking (hydraulic fracturing)

What Do We Need in Illinois??

- What regulatory powers are needed?
- Who needs these powers?
- Where do we need these powers?
- What data do we need for decision making?
- What regulations do we need?
 - i.e. - regulatory tools

Basic Questions of Water Law

- Do you own property?
- Do you have a statute?
- Do you have to get a permit?
- Are there priorities or restrictions to use?
(or exemptions)

MAJOR SOURCES (types) of LAW

- Constitutions
- Common Law - Court Decisions
- Statutes and Ordinances
- Administrative Rules and Regulations
- Others such as:
 - Treaties
 - Compacts
 - Executive Orders

Definitions - Water Law

- Defies precise definition!! Somewhat “*Mystic.*”
 - Overlaps other legal fields such as:
 - Environmental law
 - Natural resources law
 - Real property law
 - Tort law
 - Land use law **and Drainage Law**
- General definition
 - “Water law is the doctrine on which we rely to provide enough water for those who need it.”
- Water law deals with “water rights” of various kinds.
 - A legal right is the assurance that an activity will be protected by the legal system.
 - Fundamental issue - are the social and economic gains produced by water use worth the costs of ecosystem change?

What Laws Do We Have?

- Common Law Riparian Rights
- “Rivers, Lakes and Streams Act”
- “Water Authorities Act”
- “Water Use Act of 1983”
- Municipal Code and Special Districts
- “Level of Lake Michigan Act” and “Great Lakes Compact”
- “Kaskaskia River Watershed and Basin Act”

“Riparian Rights” - “Rule of Reasonable Use”

- Evans v. Merriweather, 4 Ill. 492 (1842)
 - following a drought, Evans diverted **all** of the stream to his mill
- Court stated:
 - “The property in the water.. by virtue of riparian ownership, is in its nature **usufructuary...**”
 - “There may be, and there must be, of that which is common to all, a **reasonable use.**”
 - The wants of man in regard to water are either:
 - **natural** - are absolutely necessary to be supplied, in order to his existence.
 - **artificial** - such only as, by supplying them, his comfort and propriety are increased.
 - After all natural wants along a natural water course are satisfied, the riparian proprietors may use the remaining water for artificial uses....but no more than their **just proportion.**

ILLINOIS' COMMON LAW ON GROUNDWATER

- **Edwards v. Haeger (1899)**
 - adopted English common law absolute ownership doctrine
- **Behrens v. Scharringhausen (1959)**
 - “...in a proper case Supreme Court might announce a doctrine of reasonable use..”
- **Lee v. City of Pontiac (1981)**
 - challenged the Court to overrule *Edwards* and reject the absolute ownership doctrine.
- **Water Use Act of 1983**
 - statutorily rejects the absolute ownership doctrine and adopts the rule of reasonable use for groundwater as defined in *Evans v. Merriweather*.
- **Bridgeman v. Sanitary District of Decatur (1987)**
 - affirmed that Water Use Act of 1983 unified water law in Illinois

Guidelines and Principles for the Use and Management of Water in Illinois under the “Rule of Reasonable Use”

- “Absolute Ownership Doctrine” is dead!
- Groundwater rights of landowners are “usufructuary.”
- Seniority in use does not increase right.
- Wasteful or malicious uses are unreasonable.
- The lowering of the water table or artesian pressure which reduces or eliminates the use of a neighbors well is not necessarily unreasonable.
- Priority in times of shortage are natural wants (i.e. domestic use). Any remaining water may be used for artificial wants according to their “just proportion.”
- The right to transport water for use off of overlying land does not exist without statutory authority. You cannot sell water to your neighbor!

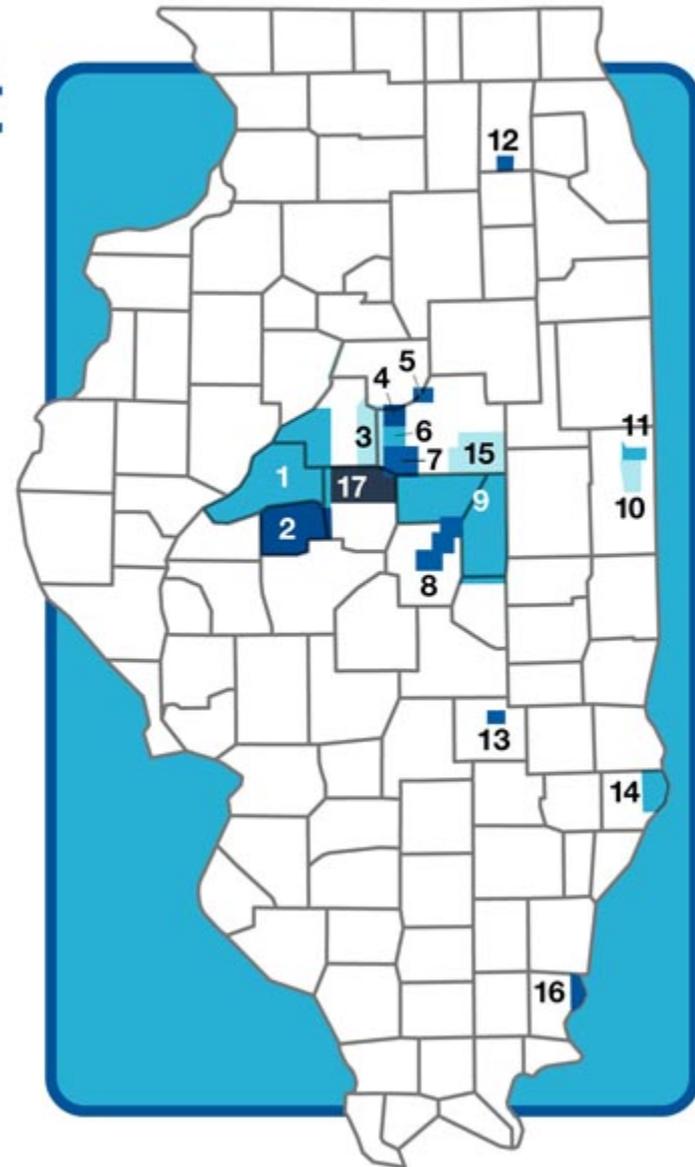
“Water Authorities Act”

- Passed in 1951 to build Lake Sarah
- Special Purpose Unit of Local Government
 - organized through voter referendum
 - governed by 3 trustees appointed by County Board
- Board’s water management powers/regulations
 - inspection, registration of wells or withdrawal facilities
 - permits for additional wells of withdrawal facilities
 - regulate water use during a shortage with limits and priorities
 - levy taxes, sell bonds, sell water, build water supplies
- Exempts agricultural, irrigation & domestic use

Water Authorities Act

- Regional water authorities
- Broad Powers
- Regulation

- 1 - Imperial Valley
- 2 - Menard County
- 3 - Mackinaw Valley
- 4 - Danvers Township
- 5 - Hudson Township
- 6 - Allin Township
- 7 - Mount Hope
- 8 - Mahomet Aquifer
- 9 - Mahomet Valley
- 10 - Blount Township
- 11 - South Ross Township
- 12 - Sugar Grove Township
- 13 - Effingham (near Effingham PWS)
- 14 - Russell-Allison (2+ Townships)
- 15 - SE McLean County (8 Townships)
- 16 - Shawnee/Gallatin Co. (3 Townships)
- 17 - Northern Logan Co. (8 Townships)



“Water Use Act of 1983”

- Public Notice of Planned Withdrawals (>100,000gpd)
 - conflict resolution/impact analysis by SWS+SGS
- Groundwater emergency restrictions
 - high capacity wells register with County SWCD
 - IDOA guidelines for well construction (adequacy stds.)
 - complaints, investigations & restrictions to protect impacted wells
 - district wide restrictions to preserve adequate water supply
 - applies only to Kankakee, Iroquois, Tazewell & McLean Counties
- Unified Illinois’ groundwater and surface water law
- **Mandatory water use reporting to SWS added in 2009**

Municipal Code and Special Districts

- Authority to sell water and develop any water sources including outside of corporate limits (with condemnation powers)
- also River Conservancy Districts and Water Authorities have water development powers

“Rivers, Lakes and Streams Act”

- DNR/OWR - Core Regulatory Authority
- Passed in 1911
- Authorizes
 - Public Waters Protection
 - Floodway Construction Permits
 - Dam Safety Permits

Public Waters (State) of Illinois

- Only 8% (2,500 miles) are public (total of 33,000 miles of streams)
- Broad powers to protect all public rights
 - Navigation
 - Encroachments
 - “Natural Conditions”
 - Non-riparian Water Use
 - for industrial manufacturing
 - public utility purposes
 - 40 year permit by statute



Level of Lake Michigan Act [615 ILCS 50]

- Passed in response to the 1967 United States Supreme Court Decree
- IDNR/OWR given job to allocate Lake Michigan water
- Domestic use has priority. Act directs that a goal of the allocation program is to reduce deep aquifer withdrawals
- Currently 210 allocations serving a population of 7 million people
- Water supply planning for the Six County N.E. Illinois region
- Water Conservation requirements
- and Great Lakes Compact – 8 States, Illinois exempt 34% of law

Basic Questions - Overview

- Who owns groundwater?
 - “There may be, and there must be, of that which is common to all, a **reasonable use**.” Property rights are only a “**usufruct**.”
- What is reasonable use?
 - Rules for shortages: “natural, artificial, just proportion.”
- Who regulates groundwater and surface water?
 - Statewide -> no one
 - Public Waters -> DNR Office of Water Resources
 - Locally -> Water Authorities
- What if your well impacts others?
 - No direct duty under law.
- Rules regarding exportation outside of aquifer/watershed?
 - Statutory law provides for it. No common law against it.

Holes in Illinois Water Law

- Instream Flow Protection - Statewide
- Drought and emergency management
- Groundwater development - domestic well impacts
- Recreational stream access
- Codification of water quantity laws
- Future needs for Public Water Systems (smart growth)
- “data” - hydrology, geology, mapping & models
- State versus Local control and “protectionism”

Illinois Water Use Law

Questions ??

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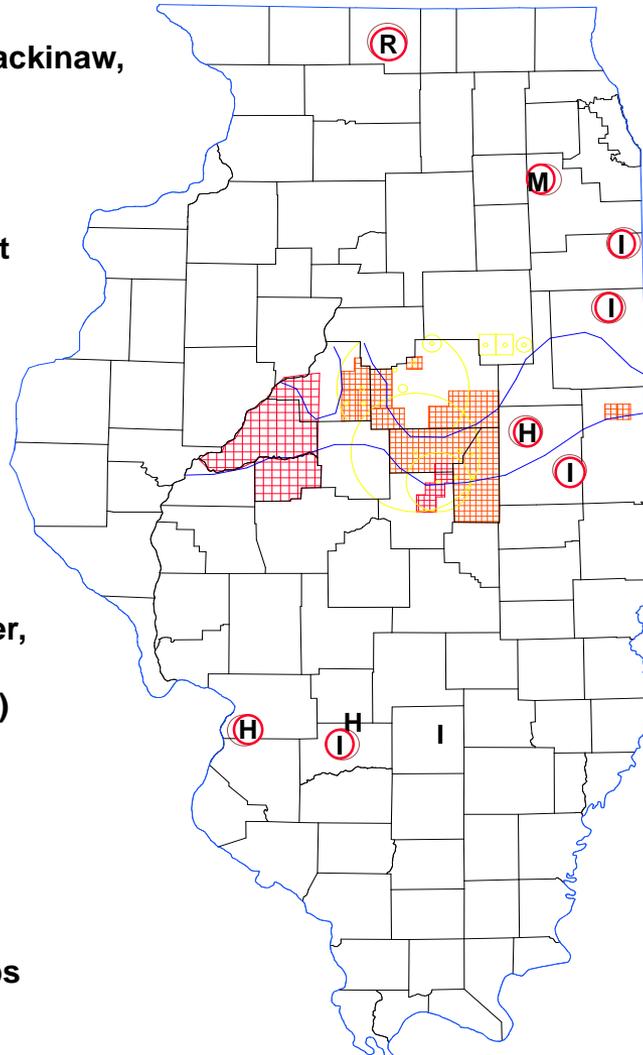
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Water Development Conflicts

Water Authorities as of 1998

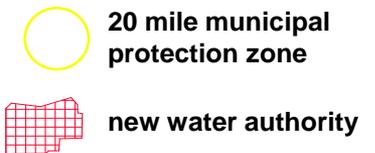
- 1) Mackinaw Valley Water Authority
(seven townships - Deer Creek, Mackinaw, Little, Mackinaw, Hittle, Boynton, Hopedale & Tremont)
- 2) Mahomet Aquifer (Decatur) Water Authority
- 3) Piatt & De Witt Counties (Mahomet Valley Water Authority)
- 4) Imperial Valley Water - Mason Co.
Plus 4 townships in Tazewell Co. (Spring Lake, Malone, Cinnincinnati & Sand Prairie)
- 5) Danvers Township
- 6) Allin Township
- 7) Hudson Township
- 8) Mount Hope & Funks Grove
- 9) S-E Logan (Arrowsmith, Bellflower, Cheney's Grove, Dawson
East 1/2 of Downs, West & Empire)
- 10) Menard County
- 11) Blount Township
- 12) South Ross Township

Lake Sarah near Effingham PWS
 Sugar Grove Township - Kane Co.
 Lawrence County Area - 2+ Townships



Municipalities 20/10 mile limit

- 1) Normal - 20 miles
- 2) Clinton - 20 miles
- 3) Gridley - 4 miles
- 4) Fairbury - 2 townships
- 5) Minier - 1 township
- 6) Hopedale - 2 townships
- 7) Mackinaw - 1 township
- 8) Chatsworth - 2 miles
- 9) Argenta - 2 miles
- 10) Cisco
- 11) Hudson
- 12) Weldon
- 13) Monticello
- 14) De Land - 10 miles
- 15) Carlock
- 16) Danvers
- 17) Forrest - 2 townships



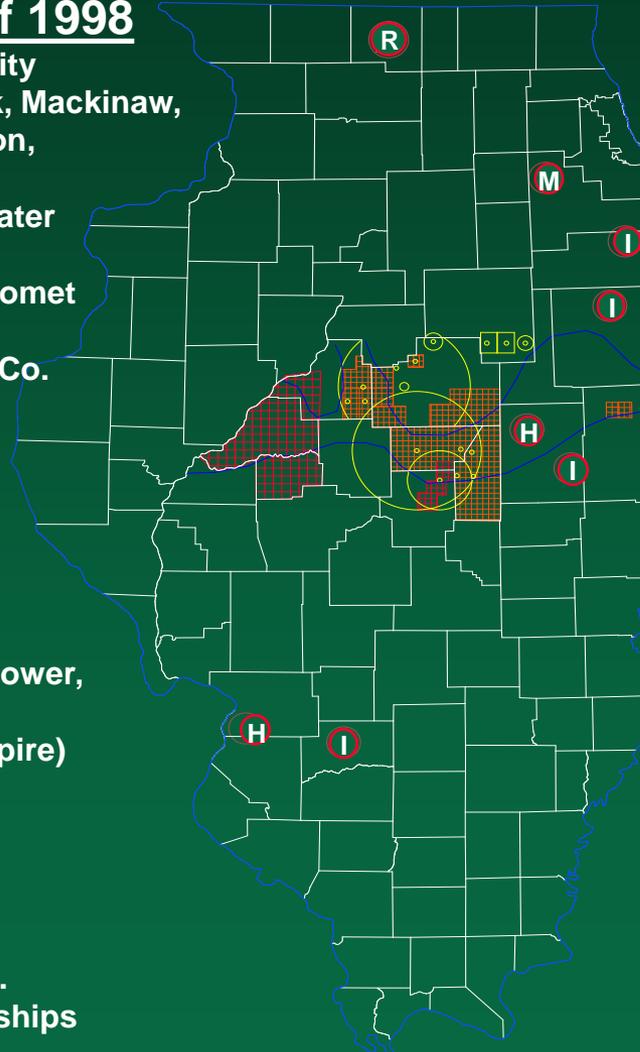
R - water rights
 M - municipal
 I - irrigation
 H - historical

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-  20 mile municipal protection zone
-  new water authority

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What About Our Neighbors?

- **Iowa** - statewide for surface and groundwater
 - 25,000 gpd threshold
- **Minnesota** - statewide for surface and groundwater
 - 10,000 gpd threshold including use fees
- **Kentucky** - statewide for surface and groundwater
- **Wisconsin** *** - 100,000 gpd and 1 mgd-2 mgd threshold for diversions and loss
- **Indiana** *** - 100,000 gpd restricted areas up to 1 mgd permits
- **Missouri** - registration only
- **Michigan** *** - 2 mgd regulation (*** Great Lakes Compact)

IOWA

- Registration - above 25,000 gpd
- Reporting - annually
- Permits - GW and SW above 25,000 gpd/10 year renewal
- **Priorities** (domestic, domestic part of muni. system, livestock, power, industrial, non-traditional irrigation, irrigation, recreation, out-of-state export)
- Permits protect water rights, stream flow and domestic wells with resolution process
- Fees – for application review and annual use

Minnesota

- **Registration** - more 10,000 gpd or 1,000,000 gal per year
- **Reporting** – annually by month (termination and fine)
- **Permits** – more 10,000 gpd or 1 mg/year both SW and GW
- **Priorities** – (domestic, use < 10,000 gpd, use for agr. & irr. < 10,000 gpd, power production, other non-agr. < 10,000 gpd, non-essential uses) drought restrictions and/or suspensions
- **Fees** – graduated system for application and review and annual use fees
- **Domestic well interference resolution process**

Kentucky

- **Registration** – all permits
- **Reporting** – all permittees, daily/monthly, semi-annual records
- **Permits** - SW and GW 10,000 gpd
- **Priorities** – exemptions/permits (domestic, agricultural, power/steam generation, injection for oil & gas)

Missouri

- Registration – 100,000 gpd
- Reporting – annually
- Regulation – none

Wisconsin

- Registration – 100,000 gpd
- Reporting – annually 100,000 gpd
- Regulation – GW 100,000 gpd, SW 2,000,000 gpd
- Regulation Great Lakes Basin – general 100,000 gpd (25 years), individual 1,000,000 gpd (10 years)
- Special protections – public supplies from GW withdrawals, mandatory water conservation statewide for new users & all PWS > 10,000 in population

Michigan

- Registration - 100,000 gpd capacity
- Reporting - 100,000 gpd
- Regulation - 2,000,000 gpd ave. in 30 day or 100 mg in 1 year
- Special protection – domestic well impact dispute resolution process

Indiana

- Reporting – 100,000 gpd
- Registration – 100,000 gpd
- Regulation – in restricted use areas 100,000 gpd, navigable waterway, 5 mgd from Lake Michigan surface water, 100,000 gpd from a salmonid stream, and 1 mgd from any other surface or ground water source (all 90 day ave.)
- Special protection – DNR may restrict groundwater pumping if withdrawals exceed capacity of aquifer and protection for small wells from significant groundwater withdrawals including water supply replacement

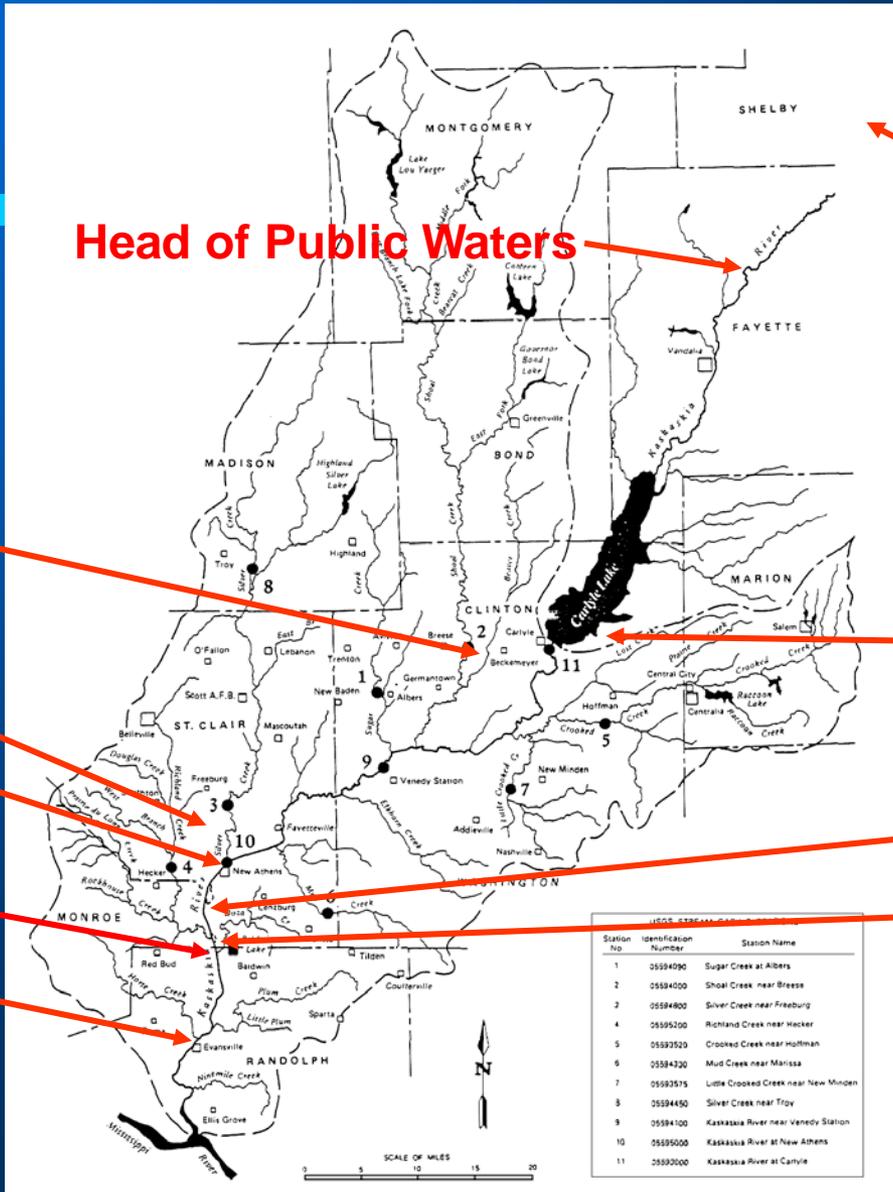
Great Lakes Compact

- Monitoring and reporting
- Water conservation
- Management of in basin water use
 - Withdrawal
 - Consumptive Use
- Prohibition on diversions
 - Straddling community/county exceptions
- Public Participation
- Into Illinois Law P.A. 095-0238 (59 pages) 45 ILCS 147
- Illinois is exempt from 20 out of 59 pages of requirements

Great Lakes Compact Council

- Formed under Compact (binding) - includes Governor's of Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Pennsylvania, Wisconsin and Congressional ratification
- Regional Agreement (good faith) - also includes Ontario and Quebec
- Each State and Province must manage and regulate new or increased withdrawals, diversions and consumptive uses > 5 mgd
- Proposals for diversions and consumptive uses must be subject to Council "approval" and Regional review after State permit approved

Kaskaskia Basin Water Allocation



Head of Public Waters

Holland Energy-8 mgd
Holland Regional-5 mgd

Gateway-4 mgd

Prairie State-13.35 mgd
Dynergy-14.35 mgd

Carlyle

SLM WC

Kaskaskia WD

Sparta

Evansville

Kaskaskia Basin

- Federal Authorities – Navigation is Supreme!!
- Federal Clean Water Act Section 404 (dredge fill in wetlands)
- Other Specific Federal Statutes
 - Flood Control Act of 1938 (Carlyle Lake)
 - Flood Control Act of 1958 (Lake Shelbyville)
 - Water Supply Act of 1958
 - Navigation Project
- Also ILCS “Kaskaskia River Watershed and Basin Act”