



# Drain Tiles in the Right-of-Way

A Strategic Risk Management Guideline for  
County Road Commissions

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Liability

Strategic Risk Management Guideline

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What Road Commissions can do to limit costs and liability exposure arising from drain tiles tied to highway right-of-ways.

Agricultural fields are commonly upgraded with tiles to help remove excess water from the soil subsurface. Often, these tiles tie into roadside ditches within the county highway right-of-way. In many cases, the roadside ditches are not capable of accommodating the increased drainage, which can spell trouble on a number of fronts for Road Commissions.

This guideline advises Road Commissions how to address the issues that may arise as a result of unapproved drain tiles emptying into roadside ditches, and how to use right-of-way permits to avoid the associated increased costs and liability exposure.

### The Problem

Ditches are designed to drain and channel water from the surface of a highway. They are not designed or intended

to drain adjacent private property. An unexpected and new source of water can cause a ditch to become inundated and overflow. If the subsurface water of a large field is suddenly routed into a roadside ditch, even an average rainfall can cause flooding. An overflowing ditch can:

- damage the surface and subsurface of the adjacent highway. In turn, a damaged highway can pose a threat to the public, and can lead to liability for the Road Commission.
- increase the Road Commission's maintenance and repair costs associated with the highway.
- flood adjacent property. Flooding of this nature might fall within an exception to governmental immunity known as the

### *The Road Commission's Permit Authority*

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*MCL 224.19b(1) states: A person, partnership, association, corporation or governmental entity shall not construct, operate, maintain or remove a facility or perform any other work within the right-of-way of a county road except sidewalk installation and repair without first obtaining a permit from the county road commission having jurisdiction over the road and from the township, city or village in which the county road is located when a permit is required by ordinance of the township, city or village, pursuant to authority conferred by article VII, section 29 of the Michigan constitution of 1963. The adjacent property owner shall not be required to obtain a permit for work incidental to the maintenance of the right-of-way lying outside of the shoulder and*

“sewage disposal system event exception.”

### **Right-of-Way Permits**

In Michigan, any work within a county highway right-of-way requires a permit from the Road Commission. The costs and liability risks associated with overflowing ditches provide good reasons to require a permit anytime a drain tile is tied into a roadside ditch. The permit process will allow the Road Commission to inspect the ditch to ensure that it has the capacity to accept the additional water without overflowing, and to require that the applicant make any necessary changes to the ditch or to the drain tile as a condition to the permit.

For example, the Road Commission may require that, before a permit is issued:

- the ditch be improved or enlarged, or
- the drain tile be redesigned so as to lessen the impact on the ditch.

These types of conditions allow Road Commissions to head off problems before they occur.

It is important to note that the purpose of such conditions is not to make things more difficult for applicants. In fact, Road

Commissions are not required to request improvements or impose any conditions. If there are no safety or liability concerns with the capacity of the ditch, even factoring in the additional drainage, then conditions are not necessary. Conditions are simply a good way to protect the highways, limit liability exposure and to promote safety.

### **Existing Drain Tiles**

Existing drain tiles that were tied to roadside ditches without a permit present a different set of challenges, but there are options for Road Commissions. Under Michigan law, Road Commissions can insist upon the removal of unauthorized encroachments into a right-of-way. Where the Road Commission seeks to remove an encroachment, it can:

- demand that the encroachment be removed within 30 days of notice.
- remove the encroachment itself, and be reimbursed, if the encroachment is not removed within the 30-day period.

An alternative is to contact, in writing, the person responsible for the encroachment, explaining that the Road Commission has the authority to demand or arrange for the

removal of the encroachment, but would consider issuing a retroactive right-of-way permit if the Road Commission’s specified concerns are addressed. In other words, the Road Commission can use the authority it has to remove encroachments as leverage to ensure that the responsible person addresses the Road Commission’s safety and liability concerns.

Of course, not every case will be easily solved with a letter. In those tougher cases, it is best to consult the Pool who can help develop a solution tailor-made to the circumstances.

