

Stark County Governmental Law Seminar

Surface Water Drainage Laws Workshop

February 25, 2006

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The following sections present a brief outline of the various laws and regulations related to surface waters and the drainage thereof in the State of Ohio.

- I. Wetlands** – Defined as those land surface areas that are inundated or saturated by surface or ground water at a frequency and duration that are sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. There are three categories of wetlands:

Category 1 - Low quality, support minimal wildlife habitat and, minimal hydrological and recreational functions.

Category 2 – Moderate quality, support moderate wildlife habitat, or hydrological or recreational functions.

Category 3 – High quality, support superior habitat, or hydrological or recreational functions.

In addition to the three categories, wetlands are further divided into federally jurisdictional wetlands or isolated wetlands. Jurisdictional wetlands are those that have a watercourse running through them. Isolated wetlands are not fed or drained by a watercourse and thus are termed isolated. The United States Corps of Engineers handles permits related to jurisdictional wetlands and the Ohio EPA handles permits related to isolated wetlands. The determination of whether a wetland is jurisdictional or isolated is made by the Corps of Engineers.

If there is any question whether a wetlands exist or not in the planning process for a land development project, a Wetlands Delineation Study should be prepared by qualified consultant and reviewed by the Corps of Engineers. A wetland may or may not be disturbed or eliminated depending on the category of wetland and the proposed use of the land. Eliminating or disturbing a wetland is a process called mitigation where the wetland removed or disturbed is replaced by another wetland at another location.

A. Legislative Authority

1. Federal - In 1972, Congress adopted amendments to the Federal Water Pollution Control Act, which is commonly called Section 404 authority (33 U.S.C. 1344) to the program. The Federal Water Pollution Control Act was further amended in 1977 and given the common name of "Clean Water Act", and was again amended in 1987 to modify criminal and civil penalty provisions and to add an administrative penalty provision.
2. State – Ohio Revised Code Section 6111 and Ohio Administrative Code Section 3745.

- II. Navigable Waters** – Defined as those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce, and includes tributaries. A determination of navigability, once made, applies laterally over the entire surface of the water body, and is not extinguished by later actions or events, which impede or destroy navigable capacity.

If a proposed land development will involve the dredging, filling, relocation or other modification to an existing stream, always contact the United States Corps of Engineers for a determination on what, if any, permits will be required.

A. Legislative Authority

1. Federal - In 1899, Congress adopted the Rivers And Harbors Act with Section 10 regulating structures, or work in, over or under navigable waters of the United States. Additional regulations added when Congress adopted the Federal Water Pollution Control Act, in particular Section 404.

III. National Pollutant Discharge Elimination System

In 1972 the United States Congress passed significant amendments to the Federal Water Pollution Control Act, which required that the discharge of any pollutant to navigable waters of the United States from a point source is unlawful except through a National Pollutant Discharge Elimination System (NPDES) permit. Next Congress passed the Clean Water Quality Act of 1987, which added additional requirements as well as naming the Environmental Protection Agency (EPA) was named as the agency responsible for carrying out the requirements of the Clean Water Act.

In November of 1990, the requirements developed by the EPA for Phase I of the NPDES permit was approved and signed into law by the Federal Government. Phase I named three types of activities to be regulated through NPDES permits to help reduce pollutant sources:

- Industrial facilities that fall into one of ten categories. Industrial facilities that fall into one of ten categories established by the EPA are required obtain permit coverage under a general permit or an individual permit, depending upon the facilities SIC code and the industrial activity occurring at the facility.
- Construction activities that disturb five or more acres of land (Phase II reduces this threshold to one or more acres). Developers of such construction sites are required to obtain a general or an individual permit as well as develop and implement an approved site-specific erosion and sediment control plan.
- Municipal separate storm sewer systems (MS4s) serving populations of 100,000 or more based on 1990 census data. Each subject local government is required to develop and implement a Storm Water Management Program that includes public education, illicit discharge detection and elimination, storm sewer system and land use mapping, and analytical monitoring.

In December of 1999, the requirements developed by the EPA for Phase II of the NPDES permit was approved and signed into law by the Federal Government. These requirements build upon the existing Phase I requirements and required smaller communities known as small municipal separate storm sewer systems (MS4s) to be permitted. Smaller communities are defined as having a total population of more than 50,000, but less than 100,000 and a density of 1,000 persons per square mile based upon 2000 census data. The Phase II rules also allowed the EPA to establish a MS4 if the community has a population of at least 10,000 and it determines that wet-weather flow discharges could cause an adverse impact on the quality of receiving waters. The Phase II rules also allowed the EPA to establish a MS4 if the community has a population of at least 1000 and it determines that the discharge of storm water from that community is contributing substantially to pollutant loading of a physically interconnected and regulated MS4. The Phase II rules also lowered the threshold for construction activities that disturb earthen areas from 5 acres to 1 acre.

In Stark County, the Ohio EPA has designated Stark County as well as the Cities of Alliance, Canal Fulton, Canton, Louisville, Massillon, and North Canton; the Villages of East Canton, Hartville, and Navarre; and Canton, Jackson, Lake, Lawrence, Nimishillen, Perry, Plain and Tuscarawas Townships as small municipal MS4s.

Designated small MS4s were required to apply for a NPDES permit by March of 2003 by either submitting an individual permit or receive coverage under a general permit by filing a Notice Of Intent (NOI). All MS4s in Stark County elected to receive coverage under the Ohio EPA's NPDES General Permit No. OHQ000001 because of this process being less time consuming and costly than developing and obtaining approval for an individual permit as well as helping to ensure consistency of permit conditions for a MS4 that operates several, different facilities.

A MS4 individual permit application or notice of intent for coverage under a general permit must include descriptions of the Best Management Practices (BMPs) as well as their respective measurable goals that will be used to meet the following six minimum measures.

Public Education and Outreach. This measure must include a program designed to educate the public about the impacts of storm water discharges on receiving waters and what individuals can do to prevent storm water pollution.

Public Participation and Involvement. This measure must include a procedure for giving the public an opportunity to actually participate in both the development and implementation of a storm water program.

Elicit Discharge Detection and Elimination. Regulated municipalities must develop a plan with mechanisms designed to locate and eliminate discharges into storm sewers from sources other than storm water. This plan must include a complete map of all outfalls and identification of locations and sources of any water entering a system.

Construction Site Runoff Control. Regulated municipalities must have a regulatory mechanism in place for erosion and sediment control as well as BMPs for preventing or reducing other pollutants associated with construction activity. It is important to note that this measure does not relieve the requirements of a construction site operator to obtain an independent NPDES permit for sites larger than 1 acre. The permitting authority, however, can specifically reference qualifying local programs in the NPDES general permit requirements so the construction operator doesn't need to follow two different sets of requirements.

Post Construction Runoff Controls. Regulated municipalities must have a program requiring new and redevelopment projects to implement controls on sites, which will reduce pollutant loads in storm water runoff.

Pollution Prevention and Good Housekeeping. Regulated municipalities must have an operation and maintenance program to prevent or reduce pollutant runoff from municipal operations.

IV. Flood Plains – Defined as those land surface areas that are adjacent to rivers and streams, and which are subject to recurring inundation of storm water.

A. Legislative Authority

1. State – Local governments given authority to adopt regulations pertaining to flood plains by Ohio Revised Code Sections 307.37 and 307.85.
2. Stark County Flood Damage Regulations adopted March 31, 1987 by the Board of County Commissioners. These regulations pertain to the unincorporated areas of the Stark County and are administered by the Stark County Building Department. Local governments are required to adopt approved regulations in order to participate in the National Flood Insurance Program.

The limits of flood plains are shown on maps included in various Flood Hazard Analysis Reports prepared in the past by the Army Corps of Engineers and the U.S. Department of Agriculture, and on the Federal Emergency Management Agency (FEMA) maps. Where the FEMA maps show more extensive flood hazards, these take precedence over the other maps. Updated FEMA maps are currently being prepared for Stark County and should soon be available to the public.

In the Stark County, a flood plain permit is required for any construction or other development activity including but not limited to filling, grading or alteration of any watercourse wholly or partially within an identified flood hazard area.

V. Dams and Levees - A dam is defined as a barrier checking or preventing the flow of water resulting in the creation of a body of water where none existed previously. A levee is defined as a barrier for preventing flooding such as a continuous dike, wall or other type of structure.

Construction of a dam or levee requires a permit to be issued from the Ohio Department of Natural Resources unless they are exempt from the permit requirements of the law, which are listed in Section 1521.06 of the Ohio Revised Code and include:

- barriers less than ten feet in height and have a storage capacity of not more than fifty acre-feet at the elevation of the top of the dam.
- barriers, regardless of height, which have or will have a storage capacity of not more than fifteen acre-feet at the elevation of the top of the dam.
- barriers, regardless of storage capacity, which are or will be six or less feet in height.

To receive a copy of "Ohio Laws and Administrative Rules for Issuing Construction Permits" contact the Division of Water at the following address:

The Ohio Department of Natural Resources
Division of Water
2045 Morse Rd., Bldg. B

Additional permits may be required from the Army Corps of Engineers, Ohio EPA and the Stark County Building Department depending on the particular project.

A. Classification of Dams and Levees

The classification of levees is outlined in the Ohio Administrative Code Section 1501:21-13-09. The classification system has four classes - I, II, III and IV based on the potential for damage should the structure fail. The Chief of the Division of Water determines the class of a proposed dam or levee during the preliminary design review or of an existing dam or levee during a periodic review or inspection. Proper classification of dams and levees is necessary to determine the design criteria needed to provide appropriate safety factors against failure. The following is a brief list of some criteria used in determining the classification of a proposed or existing levee:

- Class I - loss of human life, serious hazard to health, structural damage to high value property (i.e., homes, industries, major public utilities)
- Class II - floodwater damage to homes, businesses, industrial structures with no loss of human life, damage to state and interstate highways, railroads
- Class III - damage to low value non-residential structures and local roads
- Class IV - losses restricted mainly to the dam or levee, owner's property and rural lands

VI. Land Development

Drainage law prescribes the rights of a landowner to repel and/or expel surface water at the boundaries of his land. How surface waters are repelled by a downgrade or downstream landowner affects the upgrade or upstream property owner(s). How surface waters are expelled by an upgrade or upstream landowner affects the downgrade or downstream landowner(s). Three basic rules, fundamental to most state laws, regarding surface drainage are as follows:

Common Enemy Rule – Regards surface waters as an enemy common to all landowners. This rule states that the landowner is allowed to take whatever measures necessary to repel or expel surface water effectively regardless of the resulting damage to his neighbor's lands.

Civil Law Rule – Under this rule, each piece of land has an easement for the natural drainage to flow across, and the downgrade or downstream landowner(s) must take the natural flows from the upgrade or upstream landowner. A landowner may not obstruct, divert or collect the natural flow of surface water such that it flows from his land in unusual quantities to the detriment of the downgrade or downstream landowner(s). The downgrade or downstream landowner(s) has no obligation to accept surface water flow that has been increased unnaturally by the upgrade or upstream property owner. The key word of this rule is "natural" and is subject to interpretation. A strict interpretation can severely limit what a landowner can do on his land.

Reasonable Use Rule – The Common Enemy Rule and the Civil Use Rule constitute the two extremes of thought for surface water drainage law. Many courts have recognized this and consequently have modified these principles to include a reasonable use rule. Under the reasonable use rule, surface waters may be obstructed and diverted if done without malice or negligence and the obstruction or diversion is incidental to ordinary use, improvement or protection of the land. In effecting a reasonable use of land for a legitimate purpose a landowner, acting in good faith, may drain his land of surface waters and cast them as a burden upon the land of another, although such drainage carries with it some waters which otherwise would never have gone that way but would have remained on the land until they were absorbed by the soil or evaporated in the air, if a) there is reasonable necessity for such drainage; b) reasonable care is taken to avoid unnecessary injury to the land receiving the burden; c) if the utility or benefit accruing to the land drained reasonably outweighs the gravity of the harm resulting to the land owner receiving the burden; and d) if where practicable it is accomplished by reasonably improving and aiding the normal and natural system of drainage according to its reasonable carrying capacity.

All three drainage rules are in many instances still somewhat subjective and open to interpretation, which is why many cases have to be resolved in a court of law. For further information see the attached “Ohio’s Drainage Laws – An Overview” in Appendix A.

The legal principals that govern the right to use the water flowing in a watercourse on one’s land are different than those laws that govern the liability of repelling or expelling water from the land or even the liability for changing a watercourse through improvement or obstructions. The extent to which a landowner is entitled to use the water falls either under the riparian doctrine or the appropriation doctrine. Since use of water is different than drainage, discussion of these doctrines is not covered in this outline.

A. Legislative Authority for the unincorporated areas of Stark County

1. Stark County Subdivision Regulations adopted by the Stark County Regional Planning Commissions and the Board of County Commissioners.
2. Stark County Erosion/Sediment Control Regulations adopted by the Board of County Commissioners.
3. NPDES Permit is required when the project will involve the disturbance of more than 1-acre of earthen area. This permit can be obtained through the Ohio EPA and is required in accordance with the federal Clean Water Quality Act.
4. Depending on the nature of the project, other regulations and permits may be required as covered in previous sections.

The Subdivision Regulations pertain to storm water conveyance systems and runoff control. The Erosion and Sediment Control Regulations and NPDES Permit deals with requirements related to water quality standards.

- #### B. The rules for development of land in the unincorporated areas of Stark County follow most closely the principals of the Reasonable Use Rule. A landowner is allowed to develop his land, but it must be done in a reasonable way that doesn’t cause undue damage to a downgrade or

downstream landowner(s). In some cases, it can still be controversial what the term reasonable means and how it should be applied. In order to eliminate as much confusion as possible, the County recently adopted a revised Section 620 of the Subdivision Regulations that provide a defined engineering standard or set of requirements related to surface drainage from developed land. Some of the main features of the revised regulations are as follows:

1. Storm Water Collection and Conveyance Systems - For storm sewers, open water carriers, culverts and pavement drainage, the revised regulations refer to the Ohio Department of Transportation's (ODOT) Location And Design Manual Volume Two and ODOT's Construction and Material Specifications as the standard. For bridges, the proposed regulations refer to ODOT's Bridge Design Manual and ODOT's Construction and Material Specifications as the standard.
2. Storm Water Runoff Control requirements are deal with the rate of flows from a developed site such that the following criteria are met:
 - i. The peak flow of storm water from the developed site at an appropriately selected point of analysis on the earth's surface shall not exceed the peak flow of storm water from the pre-developed site at the same point of analysis for the same year frequency storm. This requirement applies for all storms with a frequency of 100 years and less.

See Appendix B for a Storm Water Management Hydrograph Comparison.

- ii. The peak flow of storm water from the site during construction at an appropriately selected point of analysis on the earth's surface shall not exceed the peak flow of storm water from the pre-developed site at the same point of analysis for the same year frequency storm. This requirement applies for all storms with a frequency of 10 years and less. When determining the area of land disturbed during construction, an allowance shall be included for lots that are also under construction at the same time the streets are being constructed.
 - iii. The flow of storm water from the developed site shall be drained to an adequate outlet. This outlet must be approved by the Subdivision Engineer and will consist of a ditch, stream, river, storm sewer, pond or lake having sufficient capacity to accommodate flow from the developed site.
 - iv. The flow of storm water from the developed site must not cause flooding to the proposed buildings within the development or to existing downstream homes, buildings, places of business or other structures.
 - v. Surface water draining from an existing watershed area cannot be diverted, channeled, piped or otherwise rerouted into another watershed area unless approved by the Stark County Subdivision Engineer.

See Appendix C for rainfall data for Stark County. Also, see Appendix D for a brief narrative concerning storm water runoff control structures.

3. The Stark County Erosion/Sediment Control Regulations – These regulations were adopted in accordance with and pursuant to Section 307.79 of the Ohio Revised Code and apply to all soil-disturbing activities on land within the unincorporated areas of Stark County used or proposed to be developed for non-farm commercial, industrial, residential or other non-farm purposes except for the following land uses:

- i. Activities related to producing agricultural crops.
- ii. Surface mining operations regulated under Sections 1513.01 and 1514.01 of the Ohio Revised Code.
- iii. Normal landscape maintenance activities and gardening/horticulture.
- iv. Activities disturbing less than 1-acre of earthen are.

These regulations were adopted by the Board of Stark County Commissioners and administered by the Stark County Soil & Water Conservation District.

These regulations, while not the same, have similar requirements as the National Pollutant Discharge Elimination System (NPDES) construction site permit requirements issued by the Ohio EPA and which was covered in Section III of this outline.

4. Drainage Easements

- i. Storm sewers and open channels that include drainage from public roadways must be dedicated within a public drainage easement. An example of the current wording used on Final Plats for new allotments is as follows:

“Know all men by these presents, John H. Doe, the owner of the land shown on this plat, herewithin acknowledge the making and signing of this instrument to be his free act and deed, and does hereby dedicate the streets, sanitary sewer easements and public drainage easements as shown hereon, to public use forever.”

This wording allows the government to maintain the improvements within the public drainage easements, but does not make it required of the government.

- ii. Storm water runoff control structures that include drainage from public roadways must be dedicated within a public storm water runoff control drainage easement. See Appendix E for an example wording that Stark County is currently requiring on final plats for new allotments.

VII. Other Drainage Related Topics

A. Public Roadway Drainage

1. Chapter 731 of the Ohio Revised Codes gives incorporated municipalities the authority to adopt ordinances. An ordinance a city may adopt is to allow them to remove drainage obstructions occurring on private property, which is diverting or backing up surface water upon a public street under their jurisdiction. This authority applies only to private property within the corporation limits.

2. Section 5589.06 of the Ohio Revised Code gives an Ohio Township the authority to remove a drainage obstruction on property outside the public right-of-way if such an obstruction is diverting or backing up surface water upon a public highway. The Township first must give written notice to the person, company or corporation who has caused the obstruction and allow them at least 5-days after receiving the notice to remove the obstruction. This section of the law further allows the Township to collect the expense for removal of the obstruction from the person, company or corporation by civil action by the Board of Township Trustees.

See Appendix F for a copy of the wording given in Section 5589.06 of the Ohio Revised Code.

3. Section 6151.14 of the Ohio Revised Code gives an Ohio County Board of Commissioners the authority to remove a drainage obstruction on property outside the public right-of-way if such an obstruction endangers a county or township road. The County first must give written notice to the person, or agent thereof, who has caused the obstruction and allow them at least 30-days after receiving the notice to remove the obstruction. This section of the law further allows the County to collect the expense for removal of the obstruction plus a penalty by placing an additional tax against the person who caused the obstruction.

See Appendix F for a copy of the wording given in Section 6151.14 of the Ohio Revised Code.

4. There are no doubt other state and federal laws related to the authority of the State of Ohio as well as the federal government to remove a drainage obstruction on property outside the public right-of-way if such an obstruction endangers a state or federal highway, however time constraints did not allow a search to be performed for the other such laws that may be in affect.

- B. County Ditches – The term county ditch simply means a watercourse that has been constructed under the authority of the Board of County Commissioners. In Stark County, most if not all of the 165± county ditches were originally constructed for agricultural purposes many years ago and came about through a petitioning procedure. A question that was raised by several people in the past few years is who is responsible for the maintenance of the various county ditches that have been constructed to date in Stark County. Deborah Dawson with the County Prosecutor's office issued the opinion that the County Commissioners are not responsible for maintaining any of the county ditches created before 1957.

See Appendix G for copies of the correspondence that has recently taken place on the question of who is responsible for the maintenance of a county ditch.

C. Available Procedures For Landowners In Correcting Drainage Problems

1. Landowners can work together in solving a common drainage problem and share the costs for the improvements amongst themselves while adhering to any of the applicable laws listed previously.
2. Group Agreement Project – In accordance with Section 6131.63 of the Ohio Revised Code, property owners can establish a public watercourse through a general agreement among the effected owners. The benefiting property owners agree a plan for the improvement and pay all associated costs. The construction of the project must meet the standards adopted by the

Board of County Commissioners. After the project has been completed and all costs paid, the property owners can then provide to the County Commissioners, a set of improvement plans signed by a licensed Professional Engineer with a listing of the individual assessments. The Commissioners can then pass a resolution approving the project, file the plans and assessments, and place the improvement under permanent maintenance as provided in Section 6137 of the Ohio Revised Code.

3. **Conservancy District** – Conservancy districts are political subdivisions of the state formed at the initiative of the local landowners or political subdivisions in order to solve local water management problems, usually flood control. Chapter 6101 of the Ohio Revised Code gives the requirements for the formation of a district as well as how the district's work plan is to be carried out. Many of Ohio's conservancy districts were formed to serve as a sponsor for federal flood control projects. Other authorized purposes now include conserving and developing water supply, improving drainage, collecting and disposing of waste, providing for irrigation and arresting erosion on the Lake Erie shoreline. Each conservancy district is under the direct jurisdiction of a conservancy court. Each county within the district's territory appoints one common pleas judge to the court. The conservancy court appoints the district's board of directors and board of appraisers and approves its plans. In order to carry out a court approved work plan, the conservancy district will have the affected area appraised for benefits received as a result of the improvement, and then levy special assessments and issue bonds. Projects that tend to work well with this method are large-scale improvements utilizing federal and/or state matching funds.

An example of a conservancy district that includes parts of Stark County is the Muskingum Soil and Water Conservation District.

4. **Petition Procedure** – As allowed by Chapter 6131 of the Ohio Revised Code, a petition may be filed with the Board of County Commissioners for drainage improvements. The petitioners must provide a bond and list of the benefiting landowners. Upon receipt of the petition and bond, the Commissioners will schedule a public hearing. If the project is approved at this hearing, the County Engineer is then charged with the preparation of improvement plans along with establishing an estimated assessment for each benefiting landowner. The Commissioners then hold a second and final hearing to determine if the project should proceed. If the project is approved, the improvement shall be constructed followed with permanent maintenance provided in accordance with Section 6137 of the Ohio Revised Code.

See Appendix H for a brochure explaining the petitioning process in detail.

5. **Stormwater District** – In accordance with Chapter 6117 of the Ohio Revised Code, the Board of County Commissioners have the authority to establish a stormwater district with no petition or bond required. Should the Commissioners decide to create such a district, the boundaries of the affected areas must be established which also determines who the benefiting landowners are. The Commissioners then charge the County Sanitary Engineer or the County Engineer with the preparation of improvement plans along with estimated individual assessments for each benefiting landowner. After the landowners have been notified of their proposed assessment, a final hearing is held by the Commissioners to determine if the project is to be constructed.

6. In accordance with Chapter 1515 of the Ohio Revised Code, a landowner may file a petition with the local Soil & Water Conservation District's (SWCD) Board of Supervisors. The Board has the option to accept or reject the petition. If accepted, the SWCD personnel perform the plan preparation along with estimated individual assessments for each benefiting landowner. The SWCD Supervisors then notify the affected landowners of the proposed improvement and hold a public hearing. If the project is approved by the SWCD Supervisors, they then certify the project to the Board of County Commissioners. If the County Commissioners approve the project, it is then constructed with permanent maintenance provided in accordance with Section 6137 of the Ohio Revised Code.
7. The County Commissioner's currently have a program in which a citizen submits a complaint form for a drainage related problem to the Commissioner's office. A complaint form may be obtained by calling the drainage complaint hotline at 330-451-7589. The complaint is then investigated by the Commissioner's engineer, who grades or gives the complaint a rating based upon criteria that has been established for this program. All of the complaints received are then compiled, input received from the various affected Townships and the Commissioners decide which of the problems will receive funding and corrective actions are taken. Funding for this program comes from the general fund and not from the landowner(s) submitting the complaint.

APPENDIX A

OHIO'S DRAINAGE LAWS

— AN OVERVIEW —



*...how water rights problems related to drainage
are addressed in Ohio*

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OHIO'S DRAINAGE LAWS — AN OVERVIEW

Agricultural producers and landowners in humid areas like Ohio are concerned with the need to dispose of excess water. For agricultural producers, excess water can mean delayed planting, spring flooding and replanting, delayed cultivations, soil compaction and delayed harvesting. About 57 percent of Ohio's cropland acres are naturally poorly drained. According to the 1987 National Resources Inventory (USDA-SCS, 1989), Ohio has about 12.5 million acres of cropland. Approximately 50 percent of these acres have received drainage improvement, but another 3.5 million acres need improved drainage. In contrast, nearly all urban areas require stormwater management. For the private landowner in rural and urban areas, excess water can mean damage to the landscape, mudslides, basement and property flooding, and, in some cases, extensive damage to or loss of the dwelling.

Competition for various uses of Ohio's water resources has grown in recent years, as was seen during the 1988 drought. However, 1990 was the wettest year in 108 years of records, with more than 51 inches of precipitation. Therefore, after a series of "dry" years, the wet springs of 1989 and 1990 have again drawn much attention to the need for Ohio landowners to better understand their rights to dispose of or drain excess water. The disposal of excess water continues to be very important from an economic standpoint. Public awareness of the importance of excess water disposal and the environmental consequences is rapidly increasing. Water rights laws as they relate to the disposal of excess water in the rural and urban areas of Ohio are very complex. The existing laws have been under development for a long period of time and will continue to be reviewed and updated.

This publication presents a brief overview of the rights of Ohio landowners to dispose of excess water and the legal mechanisms by which to do so. Some interesting Ohio decisions and opinions written since the mid-1950s are included. Major references are Callahan (1979), Nolte (1985a), the Ohio Revised Code (ORC), and Wright et al. (1985). This publication is intended to provide the reader with insight into how water rights problems related to drainage are addressed in Ohio. It is not intended to provide strict legal interpretation. Note: Legal citations are italicized and footnoted in the text. Footnotes are presented on page 14.

RIGHTS TO DISPOSE OF EXCESS WATER

There are various methods that can be employed to solve drainage problems. In some cases, the extent of the improvement may only involve an individual landowner and one parcel of land. In others, improvements may involve several landowners and even communities, and land areas in the thousands of acres. Each situation is a separate case and should be judged on its own merit.

... 1990 was the wettest year in 108 years of records, with more than 51 inches of precipitation.

When correcting an existing drainage problem involves more than one landowner, the owners may mutually agree to cooperate to provide the necessary drainage improvements.

MECHANISMS FOR DRAINAGE IMPROVEMENT

When correcting an existing drainage problem involves more than one landowner, the owners may mutually agree to cooperate to provide the necessary drainage improvements. The Ohio County Ditch Law provides for the mutual agreement procedure, which is used frequently in Ohio. The mutual agreement procedure provides for: plans to be filed with the county clerk, along with information on the proposed costs; review by the county engineer; and placement of the improvement in a permanent maintenance program conducted by the county government. This procedure is one of the simplest mechanisms by which to make a drainage improvement involving one or more landowners.

There are other legal provisions for carrying out drainage improvements when more than one landowner is involved. These include:

1) The Ohio County Ditch Law, commonly referred to as the Ohio Drainage Laws, presently consists of Chapters 6131, 6133, 6135, and 6137 of the ORC. There have been extensive amendments to the County Ditch Law (first enacted around 1850) passed in 1957 and 1981. Chapter 6131 addresses "County Ditches," 6133 addresses "Joint County Ditches," 6135 addresses "Interstate County Ditches," and 6137 addresses "Ditch Maintenance Fund." Chapter 6131 is probably most relevant to private landowners in Ohio. Drainage improvement procedures based on these chapters are outlined by Nolte (1985b).

2) The Ohio Conservancy District Law (Chapter 6101 of the ORC), originally designed to address flood control, was broadened to authorize drainage improvements. The original Conservancy District law was enacted in 1914. These provisions have been used independently and in conjunction with the Watershed Protection and Flood Prevention Act, Public Law 83-566, as described in OCES (1970). Public Law 83-566, commonly called PL-566, only provides planning and financial assistance.

3) Conservation Improvement Projects Through Soil and Water Conservation Districts (Chapter 1515 of the ORC) is the authority for the Soil and Water Conservation Districts to construct improvement projects, and specifically addresses the disposal of water. This mechanism has been available since 1969. These provisions, as outlined by Nolte and Derickson (1980), are sometimes referred to as Senate Bill 160 projects.

Some of the mechanisms mentioned above have been revised frequently and additional changes are continually being recommended. The last revision of the Ohio County Ditch Law was through House Bill 282, July 5, 1983.

THE BASIC DOCTRINES FOR DECISIONS

Three separate rules of law have been developed and applied by Ohio courts over the years to determine the legal rights and responsibilities of landowners to dispose of excess water (Callahan, 1979; Wright et al., 1985). These are the common enemy doctrine, the civil law doctrine and the doctrine of reasonable use. The discussion on the common enemy and civil law doctrines that follows is intended to provide the reader a historical perspective on past court decisions that led to the present application of the reasonable use doctrine.

The common enemy doctrine, which generally has been applied to urban areas, gives an individual landowner the unqualified right to dispose of water. The underlying theory is that these waters are the common enemy of man to be fought off by each property owner as he/she sees fit. If one follows this theory, water could be disposed of without regard to the consequences to adjoining landowners.

The civil law doctrine, which in the past generally applied to rural areas, requires the lower landowner to accept the natural water flow, but prohibits the upper landowner from changing the natural drainage, thereby increasing the burden on the lower landowner. The underlying principle is that lower lands are servient to upper lands with respect to receiving the natural flow of diffused surface water.

Ohio common law defines surface water as water diffused over the ground and derived from falling rain and melting snow; the water retains its status as surface water until it reaches a well-defined channel in which it merges with other waters. At this point, surface waters become part of the running waters of a stream and cease to be surface waters (*Crawford v. Rambo*¹). The term diffused surface water, simply stated, is water spread over the ground surface; it is not concentrated in a well-defined channel.

Although Ohio courts had adopted the civil law doctrine for application to drainage of surface waters of rural lands, they held that it did not apply to urban areas. Since the Franklin County Court of Appeals decided the case of *Lunsford v. Stewart*² in 1953, many courts have applied the reasonable use doctrine to reach decisions related to surface water drainage in urban areas. *Lunsford v. Stewart* involved an urban landowner who filled and built structures on his city lot that diverted the natural flow of water from the adjoining lot. The judgment in *Lunsford v. Stewart* was based in part on the reasonable use doctrine. Earlier Ohio courts generally applied the common enemy doctrine for "city" drainage, but this rule had not been applied in all cases.

Three separate rules of law have been developed and applied by Ohio courts over the years to determine the legal rights and responsibilities of landowners to dispose of excess water.

*"A landowner is not unqualifiedly privileged to deal
with surface water as he/she sees fit"*

As Ohio has undergone the strains of urban and rural development, the courts have adopted many modifications and exceptions to the civil law and common enemy doctrines. In addressing the problems of applying these two doctrines, the court's reasonable use doctrine has evolved to provide flexibility and practicality to application of Ohio's drainage laws. The reasonable use doctrine essentially provides that an acceleration or an obstruction of surface water flow should be examined to determine whether or not the change is "reasonable" in the particular case. In 1980, the Ohio Supreme Court applied the reasonable use doctrine in the case of *McGlashan v. Spade Rockledge Corp.*³ The high court defined the rights of landowners as follows: "A landowner is not unqualifiedly privileged to deal with surface water as he/she sees fit, nor is he/she absolutely prohibited from interfering with the natural flow of surface waters to the detriment of others. A possessor of land is legally privileged to make a reasonable use of his/her land even though the flow of water is altered, thereby causing harm to others." (*McGlashan v. Spade Rockledge Corp.* will be discussed further in a later section.) The reasonable use doctrine has been applied to a number of cases in Ohio since 1953. For more reading on the progression of Ohio courts toward application of the reasonable use rule, the reader is referred to interpretative summaries provided in the *University of Cincinnati Law Review* (1980) and *Capital University Law Review* (1980).

PROVISIONS, DECISIONS AND OPINIONS OF INTEREST

The Ohio General Assembly has provided a mechanism for groups of landowners to equitably share the costs of change when a procedure to improve drainage is followed, as set forth in the Ohio County Ditch Law. The Ohio County Ditch Law provides that upstream landowners may be assessed to help pay the cost of channel improvement necessary to discharge the accelerated flow due to man-made causes (Section 6131.01 ORC). An assessment is possible only when a petitioned improvement is being carried out as provided by the Ohio County Ditch Law. (The Ohio County Ditch Law assessment procedure was recently tested and upheld in an Ohio district court of appeals, and the U.S. Sixth Circuit Court of Appeals in *Kunkle, et al. v. Fulton County Board of Commissioners, et al.*⁴, January 1991.) However, in most situations, a landowner must utilize the courts to collect for damages caused by either upstream or downstream drainage alterations.

Legal controversy frequently arises when damage is caused by a watercourse overflowing onto a lower landowner's property. Traditionally, Ohio courts have held that the upper landowner is not liable if the overflow is from a natural watercourse. In 1964, the Ohio Supreme Court held in *Munn v. Horvitz*⁵ that "upland owners may place flowing surface waters in a natural watercourse at such

increased rate as the upland owners desire, so long as no additional waters from outside the watershed are included in such flow, without incurring any liability from downstream owners." *Munn v. Horvitz* involved a private landowner and the construction of a municipal storm sewer in the city of Mayfield Heights. However, an appellate court ruled in 1968, in the case of *Johnston v. Miller*⁶, that an upper landowner incurs liability if he/she collects water by artificial drainage (such as tiles and pipes) and then discharges it into a watercourse in quantities that exceed, and at points that differ from, the natural drainage flow, even if his/her actions are reasonable.

The *Munn v. Horvitz*⁵ decision was modified in *Masley v. Lorain*⁷, a 1976 case involving a municipal storm sewer in the city of Lorain and four property owners. The Ohio Supreme Court held that "the construction and operation of a municipal storm sewer so as to cause material damage to a downstream landowner, as a result of flooding from rains or other causes which are reasonably foreseeable, is a direct encroachment upon that land which subjects it to a public use that excludes or restricts the landowner's dominion and control over his land, and such owner has a right to compensation for the property taken under Section 19, Article I of the Ohio Constitution." The two important phrases in the decision are "cause material damage" and "are reasonably foreseeable." In this particular case, the city of Lorain had used Martin Run Creek as part of its storm sewer system. An engineering firm had recommended to the city that stream improvement to Martin Run Creek was necessary downstream from the storm sewer outlet to carry the increased water flow. The city of Lorain did not follow the recommendation.

REASONABLE USE

In recent years, the Ohio Supreme Court appears to have adopted the reasonable-use rule as the basis for court decisions involving disposition of surface water. In the 1976 case of *Chudzinski v. Sylvania*⁸ involving accelerated runoff from a shopping center that caused downstream damages on private property, the appeals court decision provided a detailed statement of the reasonable use rule. In 1977 the village of Mayfield, in *Myotte v. Mayfield*⁹, was found liable for injury for permitting construction of an industrial complex causing flooding of a lower riparian's land by greatly increased runoff of surface water. The court found that the village knew of a flooding problem prior to permitting construction and failed to implement a solution so that increased flow from the industrial park could be accommodated. After a review of the common enemy and civil law doctrines, and information about the stream capacity, the court of appeals chose to apply the "broader, more flexible rule of reasonableness."

... the court's reasonable use doctrine has evolved to provide flexibility and practicality to application of Ohio's drainage laws.



... the *McGlashan v. Spade Rockledge Corp.* ruling has been interpreted to be very strong and diminishes the strength of the common enemy and civil law doctrines.

The court's 1980 decision in *McGlashan v. Spade Rockledge Corp.*³ appears to be dominant in support of application of the reasonable use doctrine. A developer had begun construction of condominiums in the city of Broadview Heights before completing a new drainage system to take care of the altered drainage. An August rainstorm occurred, causing excess runoff from cleared land that carried mud, rocks and other debris onto adjoining property and causing flooding of basements. The Ohio Supreme Court found the developer liable for damages. The court's declaration further stated that the Court adopts a reasonable use rule to be used in resolving surface water controversies as follows: "A possessor of land is not unqualifiedly privileged to deal with surface water as he pleases, nor is he absolutely prohibited from interfering with the natural flow of surface waters to the detriment of others. Each possessor is legally privileged to make a reasonable use of his land, even though the flow of surface waters is altered thereby and causes some harm to others. He incurs liability only when his harmful interference with the flow of surface water is unreasonable. In determining the reasonableness of an interference, the trier of fact is to be guided by the rules stated in 4 Restatement on Torts 2d 108-142, Sections 822-831." The court cited *Lunsford v. Stewart*², *Munn v. Horvitz*⁵, *Chudzinski v. Sylvania*⁸, and *Myotte v. Mayfield*⁹ in making its decision.

Four cases, *Lunsford v. Stewart*², *Masley v. Lorain*⁷, *Myotte v. Mayfield*⁹, and *McGlashan v. Spade Rockledge Corp.*³ are important cases that set certain precedents. In particular, the *McGlashan v. Spade Rockledge Corp.* ruling has been interpreted to be very strong and diminishes the strength of the common enemy and civil law doctrines. Three of the cases mentioned above were recently cited in a court of appeals ruling that upheld a lower court decision in the case of *Huggins Farms, Inc. v. Bucyrus Plaza Ltd., et al.*¹⁰ in May of 1989. This unreported Crawford County case involved the interference with surface water drainage that resulted in the regular flooding of 20 acres of land. The court ruled that the interference was unreasonable.

In 1981, the Court of Appeals of Cuyahoga County applied the reasonable use rule in *Accurate Die Casting Co. v. Cleveland*¹¹. In this case, a municipality imposed its storm sewer system on a natural watercourse, subsequently causing flood damage to a commercial business. This case is noteworthy, not only because of the application of reasonable use, but the decision that the defense of sovereign immunity does not preclude liability for damages caused by a municipality's negligent design of its storm sewer system. This ruling was appealed to the Ohio Supreme Court, which would not hear the appeal, thereby supporting the appeals court decision.

URBAN SEDIMENT AND STORMWATER MANAGEMENT

Various organizations have developed stormwater runoff control criteria. In 1977, the Mid-Ohio Regional Planning Commission recommended that the peak rate of runoff from an area after development shall not exceed the peak rate of runoff from the same area before development for all storms up to a 100-year frequency, 24-hour storm (Mid-Ohio Regional Planning Commission, 1977). The 100-year, 24-hour storm is a 4.6-inch to 5.7-inch rainfall in Ohio. Wayne County adopted similar criteria for storms from a 2-year to 100-year frequency (McCullough, 1979).

The Ohio Department of Natural Resources, Division of Soil and Water Conservation, adopted Rule 1501:15-1-06 of the ORC to recommend control of accelerated erosion in urban areas effective November 1, 1979 (House Bill 513). Since then, many local governments (county, township and/or municipal) have adopted programs to address urban stormwater and sediment problems. Township activities are permissible as long as the township rules do not conflict with county or state statutes as stated in Ohio Attorney General's Opinion Number 85-053, September 17, 1985 (USDA-SCS, 1987). Delaware County adopted urban sediment pollution and water runoff control regulations (March, 1981) requiring the person developing a site to petition the county for permanent maintenance of structures and other facilities when two or more property owners benefit. Similar approaches have been initiated in other areas in Ohio. As of February 1986, 24 counties, 63 municipalities and 6 townships in Ohio had adopted local standards for urban sediment and stormwater management (USDA-SCS, 1987). This USDA publication contains a list of these counties, municipalities and townships.

There are other provisions of the Ohio Revised Code that address drainage problems. Section 3767.13 of the ORC, in the Nuisances Law, prohibits any person from unlawfully diverting a watercourse from its natural course or state in a way that injures or prejudices others. The penalty for violation of Section 3767.13 is a third-degree misdemeanor. A common pleas court can enjoin such a diversion as a nuisance upon the bringing of legal action by the Attorney General, the county prosecuting attorney, or a citizen of the county (Ohio Legislative Service Commission, 1977; USDA-SCS, 1987).

STORMWATER MANAGEMENT UTILITIES

The Ohio Revised Code provides for the establishment of stormwater management utilities, which are usually funded through a tax levy that is approved through referendum. Under Section 727.012 of the ORC, a municipality

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can initiate action that allows for an assessment based on a percentage of tax value, an assessment in proportion to the benefits to the property, or an assessment based on the front footage of the property (Nolte, 1983).

In June of 1985, Cincinnati adopted a stormwater management code that authorized collection of storm drainage service charges on developed land to finance a storm water management system (Nolte, 1985a). The idea of stormwater utilities started in the western U.S., and the Cincinnati district is the first established east of the Mississippi (Johnson, 1990). In addition to Cincinnati, stormwater utilities have been established in Forest Park (1988), Montpelier (1986), Union (1987), Upper Arlington (1990), Wooster (1985) and Zanesville (1987). The cities of Canal Winchester, Columbus, Delaware, Mayfield, Newark and Toledo are presently investigating the implementation of stormwater utilities (Johnson, 1990).

MAINTENANCE AND/OR RECONSTRUCTION

Very few of the cases mentioned above dealt with agricultural drainage systems within farm fields. Concerns often arise when subsurface drains that were constructed by mutual agreement need maintenance or reconstruction. The following describes a case where an existing subsurface drainage system needed repair.

A landowner wanted to replace a 5-inch tile that drained a portion of his/her property with a 6-inch tile to meet current drainage criteria. The 5-inch line crossed a downstream owner's land a distance of 250 feet to an open ditch. No written easement had been secured and recorded for the original 5-inch tile. The original tile had been in place for more than 50 years, but no agreement could be reached by the two landowners to allow its replacement with a 6-inch tile. The issue was taken to the township trustees as provided in Section 6139.06 of the ORC. The trustees approved the change and awarded \$150 in damages to the lower owner. (Section 6139.06 was re-appealed effective April 9, 1981.) In 1977, a court of appeals heard the case as *Wilkins v. Sitterley*¹² and found no proof that the subsurface drain was conducive to public welfare, and the showing of such proof is required by the statute. The court held that the prescriptive easement right created by the existence of the 5-inch tile at its present location for a period of 50 years gave the upper owner the right to repair and maintain the 5-inch tile in its present size and location subject to damages to the lower owner, but it could not be enlarged. A prescriptive easement is simply the right to use another's property that is not inconsistent with the owner's right and that is acquired by a use that is open, notorious, adverse and continuous for the statutory period (Black, 1979). According to Ohio case law, the minimum period required to acquire a prescriptive easement is 21 years.

WETLANDS

In recent years, major national and local attention has focused on conservation of wetlands. There are many complex issues to address related to drainage improvements and the protection of unique ecosystems. Numerous state and federal agencies are involved in some aspect of wetland protection. These agencies include, but are not limited to: the USDA Soil Conservation Service (SCS) and Agricultural Stabilization Conservation Service, the U.S. Army Corp of Engineers, the U.S. Environmental Protection Agency, the U.S. Fish and Wildlife Service, the Ohio Environmental Protection Agency, and various divisions in the Ohio Department of Natural Resources. It is beyond the scope of this publication to address fully the complex issues associated with drainage improvements and the conservation of existing wetlands in Ohio. However, if there are questions in this area, the reader is advised to contact the agencies listed above. A good place to start is with the county Extension office or the local USDA-SCS District Conservationist.

ALTERNATIVES

In almost all the cases and procedures mentioned in this publication, the landowner must initiate the action to resolve the drainage dispute or make the drainage improvement. This publication has mentioned at least seven basic alternatives an individual landowner might consider to resolve a drainage problem. These are summarized below, but not necessarily in order of importance or choice.

- The landowner may work voluntarily with other landowners involved in the same drainage problem, and try to work out an agreement to pay the necessary costs and construct the improvements.
- The voluntary group may construct the needed improvement, and then apply to the Board of County Commissioners to place the improvement in a maintenance program under the provisions of the Ohio County Ditch Laws (ORC Section 6131.63). Under this alternative, the improvement ideally would be maintained perpetually from funds collected through assessments.
- The landowner may apply for assistance through the conservation works of improvement procedure of the Soil and Water Conservation District, and pay assessments for improvement construction and maintenance (Senate Bill 160 projects).
- The landowner may petition for the improvement under the Ohio County Ditch Laws (ORC Chapter 6131). If the petition is approved, the landowner should expect to pay assessments for his/her portion of the construction costs for the improvement, as well as assessments for perpetual maintenance.
- A drainage improvement district may be funded through a tax levy approved through a referendum.
- The landowner may consult a qualified attorney to present a case for getting the drainage problem resolved in a court of law. Most often the landowner is trying to collect damages resulting from the neglect of others to properly address a drainage problem.

... each case is judged on its own merit ... each case may have specifics that are unique.

- Landowners may choose to do nothing and accept the consequences, such as continued flooding, flood damage, etc., and possible future litigation by a third party. Many landowners do select this alternative.

SUMMARY

This publication has presented a brief overview of Ohio's drainage laws. The examples and cases discussed herein are not inclusive of all such cases or examples relating to the problems associated with the drainage of excess water. The reader should understand that each case is judged on its own merit, and that each case may have specifics that are unique.

Water rights laws addressing disposal of excess water in Ohio are complex. This publication is intended to help the reader better understand how water rights problems related to drainage are addressed in Ohio. Its intent is not to provide strict legal interpretation. Because of the complex nature of the water rights laws in Ohio as they pertain to disposal of excess water, the help of a qualified attorney may be necessary for one to fully understand how these laws may apply to individual situations.

WHERE TO GET MORE INFORMATION

In each county, there are numerous sources of information on water rights related to drainage. These include: the Ohio Cooperative Extension Service, the Soil and Water Conservation District, the local library, the county engineer's office, the county prosecuting attorney's office, and offices of private attorneys. However, the actual availability of any information may vary greatly from county to county, and office to office. The following is a guide to locating some of the information referenced in this publication.

- All publications published by the Ohio Cooperative Extension Service, and currently in print, are available through the county Extension office.
- The report by Callahan (1979) provides a more complete treatment of Ohio water rights up until about 1978, and the bulletin by Wright et al. (1985) serves as a reference to a number of water rights cases. Both of these publications are out of print, but are on file at: ODNR, Division of Soil and Water Conservation or Division of Water, Fountain Square, Columbus, OH 43224; Department of Agricultural Engineering, The Ohio State University; and possibly at some university and public libraries.
- Copies of the chapters and sections of the Ohio Revised Code cited in this publication may be obtained at most university libraries, public libraries, county law libraries and possibly at some county prosecuting attorneys' and county engineers' offices. The Ohio Revised Code is published and updated frequently.

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FOOTNOTES

- ¹ *Crawford v. Rambo*, 44 Ohio St. 279 (1886).
- ² *Lunsford v. Stewart*, 95 Ohio App. 383 (1953).
- ³ *McGlashan v. Spade Rockledge Corp.*, 62 Ohio St. 2d 55 (1980).
- ⁴ *Kienke, et al. v. Fulton County Board of Commissioners, et al.*, Case No. 90-3261, U.S. Sixth Circuit Court of Appeals. Decision filed January 8, 1991.
- ⁵ *Munn v. Horvitz*, 175 Ohio St. 521, 196 N.E. 2d 764 (1964).
- ⁶ *Johnston v. Miller*, 15 Ohio App. 2d 233 (1968).
- ⁷ *Masley v. Lorain*, 48 Ohio St. 2d 334 (1976).
- ⁸ *Chudzinski v. Sylvania*, 53 Ohio App. 2d 151 (1976).
- ⁹ *Myotte v. Mayfield*, 54 Ohio App. 2d 97 (1977).
- ¹⁰ *Huggins Farms, Inc. v. Bucyrus Plaza Ltd., et al.*, Case No. 3-86-4, Third District Court of Appeals. Decision filed in Crawford County, Ohio, May 9, 1989.
- ¹¹ *Accurate Die Casting Co. v. Cleveland*, 2 Ohio App. 3d 386 (1981).
- ¹² *Wilkins v. Sitterley*, Fifth District Court of Appeals. Decision filed in Fairfield County, Ohio, March 28, 1977.

- Copies of individual court decisions can be obtained at some university and public libraries, and at most law libraries. However, for most recent local decisions, the reader may need to consult the county prosecuting attorney's office, the office of the clerk of county courts or the office of the clerk of the particular district or state court of interest. The length of time for the written description of a local ruling to get into publication, and then into the library system, can be several years. Some local decisions are filed only in the clerk of courts office where the case was heard. If a local case goes unreported, it is usually regarded by legal professional publishers as having, or setting, little or no precedence. Most cases go unreported. Although these cases have less importance on a statewide basis, they may have great importance in the local court where the decision was made.

- The Ohio Legislative Service Commission (Columbus, OH) can furnish copies of legislation under consideration by the Ohio House and Senate. Each year, the House and Senate consider various articles of legislation related to drainage and stormwater management. The Legislative Service Commission also maintains a library of documents published by the commission.

- The USDA-SCS (1987) stormwater management manual is available in local SWCD offices.

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APPENDIX B

EXAMPLE

Determine the change in the volume of storm water runoff from 100 acres of land after it is developed for a 25 year frequency storm with a 24 hour duration. Assume the undeveloped land is currently a forest covered area with slopes averaging 5 percent. Also assume that the land will be developed as a new allotment with single-family homes of moderate density. Use 4.33 inches of rainfall in a 24 hour period to be a 25 year frequency storm.

$$\text{Pre-developed Volume of Runoff } Q = C \times I \times A$$

$$= 0.20 \times 0.36 \frac{\text{Feet}}{\text{Day}} \times 4,356,000 \text{ Sq. Ft.}$$

$$= 313,632 \text{ Cubic Feet} = 2,345,967 \text{ Gallons}$$

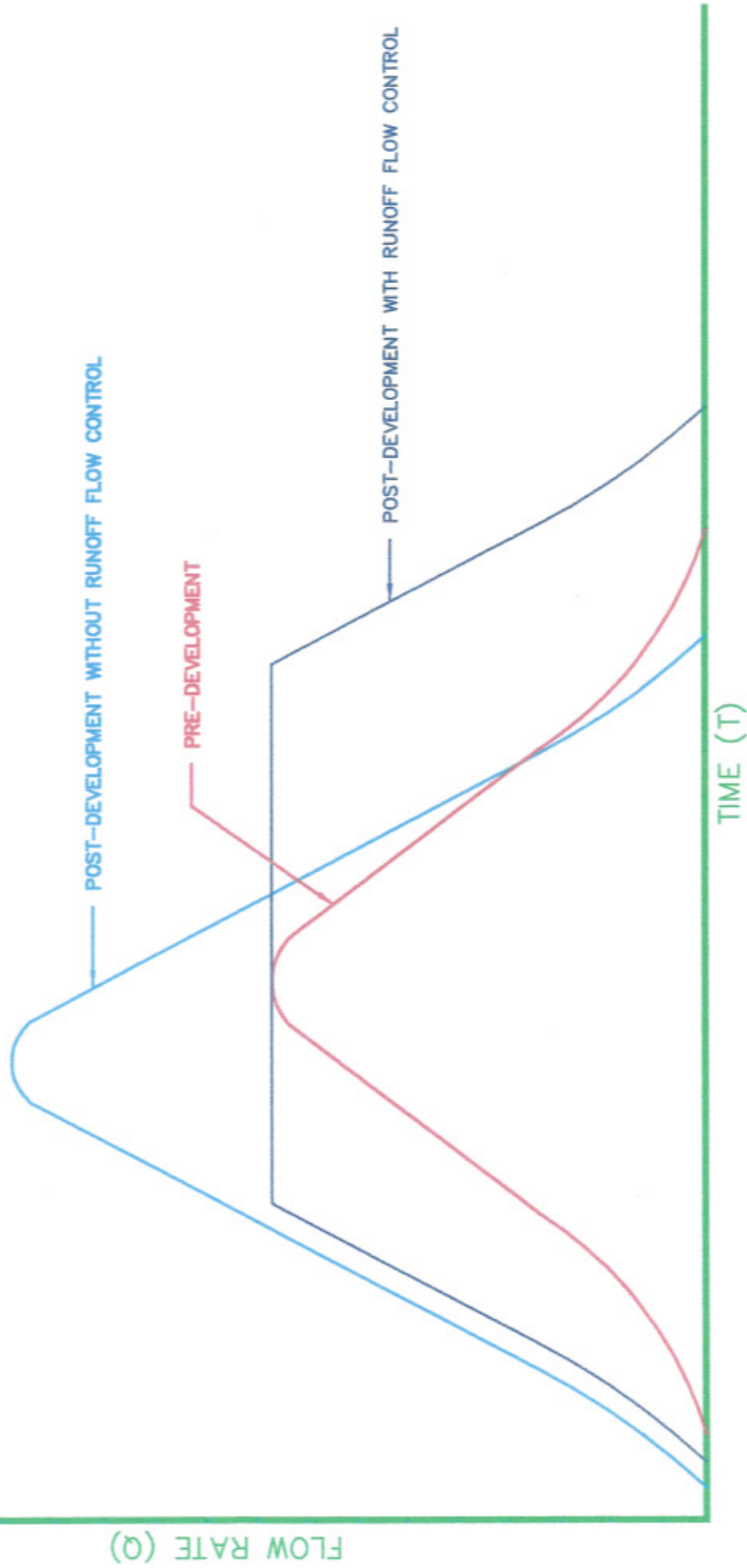
$$\text{Post-developed Volume of Runoff } Q = C \times I \times A$$

$$= 0.50 \times 0.36 \frac{\text{Feet}}{\text{Day}} \times 4,356,000 \text{ Sq. Ft.}$$

$$= 784,080 \text{ Cubic Feet} = 5,864,918 \text{ Gallons}$$

$$\text{Change In Volume of Runoff} = 470,448 \text{ Cubic Feet} = 3,518,951 \text{ Gallons}$$

(Conservative Estimate)



STORM WATER MANAGMENT HYDROGRAPH COMPARISON

APPENDIX C

**RAINFALL FREQUENCY DATA
STARK COUNTY, OHIO**

Storm Frequency Years	5 Min.	10 Min.	15 Min.	30 Min.	60 Min.	120 Min.	3 Hours	6 Hours	12 Hours	24 Hours	48 Hours	4 Days	7 Days	10 Days	20 Days
2	0.39	0.60	0.73	0.98	1.21	1.38	1.47	1.75	2.08	2.43	2.80	3.19	3.81	4.38	6.10
5	0.47	0.73	0.89	1.22	1.53	1.78	1.89	2.24	2.62	3.04	3.46	3.89	4.61	5.25	7.20
10	0.53	0.81	1.00	1.39	1.77	2.11	2.23	2.65	3.09	3.55	4.02	4.48	5.28	5.95	8.04
25	0.61	0.93	1.15	1.62	2.10	2.59	2.75	3.27	3.80	4.33	4.85	5.32	6.23	6.93	9.18
50	0.67	1.01	1.25	1.79	2.36	3.00	3.18	3.79	4.42	5.00	5.56	6.02	7.01	7.71	10.06
100	0.73	1.09	1.36	1.96	2.62	3.43	3.66	4.38	5.11	5.74	6.33	6.77	7.83	8.53	10.93
200	0.79	1.17	1.46	2.13	2.89	3.92	4.19	5.03	5.88	6.56	7.18	7.57	8.71	9.37	11.79
500	0.87	1.27	1.59	2.35	3.26	4.61	4.96	6.00	7.04	7.78	8.42	8.75	9.95	10.53	12.92
1000	0.93	1.35	1.68	2.52	3.54	5.21	5.62	6.84	8.05	8.83	9.47	9.73	10.96	11.45	13.77

NOTES:

- Rainfall data given in table are in inches.
- Information above taken from NOAA Atlas 14, Volume 2, Version 2 issued by the National Weather Service For Stark County Location N40.785 W81.416.
- Actual measured rainfall amounts for various locations in Stark County is available from the National Oceanic And Atmospheric Administration's internet web site:
<http://www.afws.net/states/oh.oh.htm>

APPENDIX D

STORM WATER RUNOFF CONTROL STRUCTURES

Storm water runoff control structures have become the central focus of most storm water management plans for the development of land related to residential, commercial and industrial use. The primary task of storm water runoff control structures is to store water from a developed site temporarily during a storm and then release it at a rate equal to or less than that existing prior to the site being developed. A control structure can be a detention basin, retention basin, underground storage pipes or a tank, roof of a building, parking lot pavement areas or any combination of these. Another form of a control structure is an infiltration basin, which is different from the other types of structures because storm water is not released downstream, but instead is released or allowed to infiltrate into the ground. Because of this, infiltration basins typically require a much greater area and the site's existing soils should have a high permeability rate.

Detention and retention basins are by far the most common type of control structure in use and are usually the most economical type of structure to install if there is enough available land. When space on a site is not available or is limited, other types of control structures can be utilized such as installing large diameter pipes or tanks underground or by using parking lot or building roof areas to temporarily store storm water. These other types of control structures are also less desirable because they do not possess the pollution trapping ability of a detention or retention basin.

Detention and retention basins are designed as open cuts in the ground or can be created by earthen mounds built around their perimeter. A detention basin is dry during periods of no rain and fills with water for a short period of time during a storm. A retention basin always has a certain level of water in it and serves as a pond or lake also. Retention basins require more area than detention basins, but are often utilized for aesthetic reasons. A well-designed detention basin can usually be maintained by only periodic mowing and blends with a site's overall landscaping plan without being a noticeable feature. Basins can be designed to control runoff from a single site or from an entire region of a municipality or urbanized area. In the latter case, the basin is called a regional basin.

There are many mathematical methods that can be used for the design of runoff control structures with a few being the Modified Rational Method, Unit Hydrograph Method, Critical Storm Method, and various methods issued by the United States Soil Conservation Service. There are also numerous computer software programs available that can help make the task of designing runoff control structures much easier and less time consuming for the engineer. For those interested, the book "Introduction To Hydraulics And Hydrology" by John E. Gibbons provides more detailed information on how runoff control structures are designed.

APPENDIX E



DESIGNATES THE PUBLIC STORM WATER RUNOFF CONTROL AND WATER QUALITY DETENTION BASIN EASEMENT AREA

BY MEANS OF THIS PLAT, THE FAIRBANKS BUILDING COMPANY GRANTS AND ASSIGNS TO THE HUNTERS CHASE HOMEOWNERS ASSOCIATION THE FOLLOWING RIGHTS, RESPONSIBILITIES AND RESTRICTIONS:

- MAINTENANCE AND REPAIRS OF THE BASIN SHALL BE DONE IN ACCORDANCE WITH THE APPROVED STORM WATER QUALITY MAINTENANCE PLAN ON FILE WITH THE STARK COUNTY SOIL & WATER CONSERVATION DISTRICT. IN ADDITION THE OPERATION, CAPACITY AND GEOMETRY OF THE BASIN SHALL BE MAINTAINED IN ACCORDANCE WITH THE APPROVED CONSTRUCTION PLANS ON FILE WITH THE STARK COUNTY SUBDIVISION ENGINEER.
- ALL STORM SEWER PIPE INLETS AND OUTLETS TO AND FROM THE DETENTION BASIN SHALL BE KEPT FREE OF DEBRIS/BLOCKAGE AS NECESSARY TO FUNCTION PROPERLY.
- ALL COSTS ASSOCIATED WITH SAID MAINTENANCE AND REPAIR SHALL BE BORNE BY THE HUNTERS CHASE HOMEOWNERS ASSOCIATION.
- NO SWING SETS OR OTHER PLAY/WORK EQUIPMENT, MULCHED LANDSCAPE BEDS OR STRUCTURES OF ANY KIND ARE PERMITTED WITHIN THE DEFINED LIMITS OF THE EASEMENT AREA.

NOTE:

THE PUBLIC STORM WATER RUNOFF CONTROL AND WATER QUALITY DETENTION BASIN MUST BE INCLUDED IN THE FINAL PLAT'S NOTARIZED CERTIFICATION BY THE OWNER(S) OF THE SUBDIVISION DEDICATING IT TO PUBLIC USE.

APPENDIX F

§ 5589.06. Obstructing ditch, drain, or watercourse; duty of superintendent.

No person shall wrongfully obstruct any ditch, drain, or watercourse along, upon or across a public highway, or divert any water from adjacent lands to or upon a public highway. Whenever the township highway superintendent learns of any obstruction of any ditch, drain, or watercourse along, upon, or across a public highway, or diversion of any water from adjacent lands to or upon a public highway, he shall notify the board of township trustees, which shall cause written notice thereof to be personally served upon the person, firm, or corporation, or upon any agent in charge of the property of the person, firm, or corporation causing such obstruction or diversion. Notice may be served by a constable of the proper township or any person authorized and deputed therefor by the board of township trustees, and shall describe and locate said obstruction or diversion and direct its immediate removal. If the person, company, or corporation does not within five days from the receipt of written notice proceed to remove such obstruction and complete the removal within a reasonable time, the township highway superintendent, upon the order of the board of township trustees, shall remove the obstruction. The expense incurred shall be paid in the first instance out of any money levied, collected, and available for highway purposes and shall then be collected from the person, company, or corporation by civil action by the board of township trustees, and paid into the highway fund of the township.

HISTORY: GC § 13421-7; 106 v 574 (659), § 284; Bureau of Code Revision. Eff 10-1-53.

§ 6151.14. Board of county commissioners may remove drift; expenses.

The board of county commissioners may remove from a river, watercourse, or creek, within the county, drift, timber, piling, or other obstruction placed or negligently allowed to remain therein by a person that obstructs to any extent the free flow of the water or endangers a county or township road, after giving thirty days' notice to the person, or an agent thereof, to remove the obstruction within that time.

The expenses of the removal shall be paid out of the county general fund, and the amount so paid together with fifty per cent penalty shall be placed upon the tax duplicate by the county auditor against the person to be collected as other taxes.

The board of county commissioners may remove from a river, watercourse, or creek, within the county, drift, timber, piling, or other obstruction deposited by nature at a single location that obstructs to any extent the free flow of the water or endangers a county or township road. The expenses of the removal may be paid from county funds.

HISTORY: RS § 4562; 71 v 36; 98 v 23; GC § 6729, 6730; Bureau of Code Revision, RC § 6153.03, 10-1-53; RC § 6151.14, 138 v H 268. Eff 4-9-81.

APPENDIX G



JOHN D. FERRERO

STARK COUNTY PROSECUTING ATTORNEY

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Linda K. Desiato
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Amy M. Schuster

OFFICE MANAGER:

Patty J. Knepper

June 12, 2003

Christopher D. Barnes, P.E., Hydraulics Engineer
Stark County Regional Planning Commission
201 Third Street, N.E., Suite 201
Canton, Ohio 44702-1211

**Re: Maintaining County Ditches
Our File No. M126.00051**

Dear Mr. Barnes:

I reviewed the ODNr publication you enclosed with your opinion request, received on June 2, 2003, as well as R.C. §6137.02. The question you ask, "Must the county maintain county ditches constructed prior to 1957?" is the same question put to the Attorney General of Ohio in 1958. R.C. §6137.02 was enacted in 1957, by passage of House Bill 220. It required a board of county commissioners to establish and maintain a fund "for the repair, upkeep, a permanent maintenance of each improvement constructed" under R.C. §6131. That language has been interpreted to mean the establishment of the fund and the maintenance of the improvement [county ditches are such an improvement - see R.C. §6131.01(C)(1)] are mandatory.

The prior analogous section that was repealed with the passage of House Bill 220 was R.C. §6137.01, and reads:

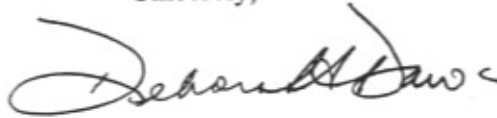
"The board of county commissioners of each county is hereby authorized to establish a maintain a fund within each county for the repair, upkeep and permanent maintenance of county...ditches..."

As the Attorney General opined, the distinction in the language is apparent: the pre-1957 statute gave the county commissioners the discretion to maintain county ditches, but did not require them to do so.

Therefore, I concur with the opinion in 1958 OAC 2511 that the county commissioners are not required to maintain county ditches in existence (i.e. constructed) prior to 1957.

I anticipate this will enable you to answer the developer's engineer regarding the Yoder Ditch project, as well as any questions pertaining to other county ditches. If you have need of further information, please contact the office.

Sincerely,

A handwritten signature in black ink, appearing to read "Deborah A. Dawson", with a stylized flourish at the end.

Deborah A. Dawson
Senior Assistant, Civil Division

DAD:slf



Stark County Regional Planning Commission Stark County Area Transportation Study

201 3rd Street NE, Suite 201, Canton, Ohio 44702-1211

Phone: 330-451-7389

FAX: 330-451-7990

Web site: www.rpc.co.stark.oh.us

May 30, 2003

Mr. David Bridenstine - Assistant County Prosecutor
Stark County Office Building
110 Central Plaza South, Suite 510
Canton, OH 44702

Subject: Application of ORC 6137

Dear Mr. Bridenstine:

After speaking with representatives from other counties and reading the attached ODNR publication, the question has been raised regarding whether or not the County has responsibility to maintain county ditches constructed prior to 1957, and if the County still has authority over county ditches constructed prior to 1957. I believe the chapter in the Revised Code pertaining to this issue is 6137, particularly in sections 01 and 02 and the corresponding case notes and OAG.

Specifically, a site development has been proposed where county ditch #18 (Yoder Ditch) runs through the property. Yoder Ditch was constructed by the County in 1938 and reconstructed by the County in 1946. Since I have received inconsistent answers to the above question, I am unsure if I can make certain requests to the developer's engineer regarding Yoder Ditch. I would appreciate your advice on how to appropriately apply ORC 6137 in this matter. Thank you in advance.

In Appreciation,

Christopher D. Barnes, P.E.
Hydraulics Engineer

Cc: Joseph Underwood - Subdivision Engineer
File

Attachments



OHIO

STREAM MANAGEMENT GUIDE

"Who Owns Ohio's Streams?"

Guide No. 02

Over the years, Ohio citizens have frequently contacted the Department of Natural Resources seeking assistance in the resolution of problems they have encountered related to water resources. Many of the questions posed have concerned the authorities and duties of government, as well as the rights and responsibilities of individuals, with regard to surface water. This fact sheet poses some of the more frequently-asked questions, and provides the responses which have been passed along. It is intended to assist the lay person in understanding the basic legal concepts involved with some of Ohio's more common water rights issues. A more comprehensive analysis can be obtained through review of the references cited, which is strongly recommended. For those persons involved in water rights conflicts, this fact sheet is intended as a prelude to consultation with an attorney, not as a substitute for it.

Who owns Ohio's streams? Ohio's Constitution does not address this question, nor has there been a statute enacted in Ohio to address it. So the answer must be derived from the common law.

What is "the common law"? The common law, in this context, is the system of law initially developed in England by the higher courts and stated in the written opinions of these courts based on general customs or on reason and fixed principles of justice.^{1,2} English common law had been adopted in the American colonies prior to the Revolutionary War, and those parts of it that were consistent with the Constitution of the United States were retained. Since then, opinions of federal and state courts in this country have modified, refined, and added to the common law of the United States and the State of Ohio.

What if the federal or state government passes a law that contradicts the common law? This type of law, called a statute, overrides the common law. Common law is used by the courts to interpret statutes and to determine the outcome of cases in which statutes are not controlling.

Are there situations not addressed by the common law? Yes, but because the common law is founded on the "laws of nature and the dictates of reason", even in the absence of a precedent it is adapt-

able to new situations and circumstances.^{1,2} A precedent is a past decision of a higher court (an appeals court or supreme court) which serves as an example for other courts to follow in similar cases. In situations where there is no clear precedent to follow, it is difficult to predict how the common law may be adapted or modified. Even in situations where there is a clear precedent, it still may be modified or reversed by a new court decision and a new precedent established. Significant changes to the common law, which normally are the result of Ohio or U.S. Supreme Court decisions, occur due to changing circumstances, an expanding knowledge base, and changing attitudes in society and in the courts.

So what does the common law say about who owns Ohio's streams? There are two components to a stream, the water flowing in it and the land beneath the water. The nature of flowing water makes it impossible for a landowner to exercise the kind of control over it that is essential for it to be considered private property. Despite a landowner's efforts to retain it, the water will inevitably seep into the ground or evaporate into the air or flow downhill onto the next property. Water is a "public good" and not ownable as private property. Landowners do have rights to make use of the water flowing through their property including the right to withdraw it and otherwise control it to the extent that nature permits, so long as the rights of others are not infringed upon.³ Such rights are known as "riparian rights", meaning they are derived through the ownership of streamside property.

As to who owns the land beneath a stream, under Ohio common law the owner of the land beside the stream also owns the land beneath it. If the land on each side is owned by two different owners, then each owns to the center of the stream unless otherwise specified by the landowners' deeds. On navigable streams there is a public right of navigation, spelled out originally in the Northwest Ordinance, which states that navigable waters shall be common highways, forever free to the people of the United States. On such streams, boaters have the right to navigate on the stream, regardless of who owns the land beside it. Because of this, some have claimed that the owners of land beside a navigable stream do not own the land beneath it. But Ohio courts have

long held that the owners of the land on the banks of a navigable stream are also owners of the beds to the middle of the stream, as in the common law.⁴ One exception is the submerged land beneath the Ohio portion of Lake Erie, which is owned and held in trust for the public by the State of Ohio.

Does a landowner who owns the land on both sides of a stream (and, therefore, beneath the stream as well) have the right to construct a dam across it? There are no constitutional provisions and, in most instances, no statutes that address this type of action. Under the common law, dam construction is allowed so long as it doesn't infringe on the rights of others. If a dam is constructed so that the water retained behind it backs up onto an upstream landowner's property and causes harm, the dam owner may be held liable in court for an unreasonable interference with the flow of surface water.⁵ If the dam curtails the flow of water downstream and prevents reasonable uses by downstream property owners, the dam owner may also be held liable in court. If the dam collapses during a normal flood and causes harm to downstream landowners, the dam owner may likewise be held liable.⁶ On navigable streams, the construction of a dam may interfere with the public's right to navigate the stream. This could result in a court decision disallowing a dam because it is an impediment to the public's right of navigation.⁷

There are also both state and federal statutes which are, in some instances, relevant to construction of a dam. Depending on the size of the dam and the amount of water it would retain, it may fall under the jurisdiction of Ohio's dam safety statute which requires a construction permit from the Ohio Department of Natural Resources, Division of Water.⁸ The purpose of the dam safety program is to require that dams are designed and constructed according to appropriate specifications to assure their structural integrity and the public safety. On a few large rivers in Ohio, construction of dams and other impediments to navigation is regulated by the U.S. Army Corps of Engineers. Impediments to navigation on these streams are generally not permitted.⁹ Construction of a dam may also constitute placement of fill into waters of the United States, which may require a federal permit, also from the U.S. Army Corps of Engineers.¹⁰ The federal and state statutes which are relevant to dam construction are outlined in Guide 06 *Permit Checklist for Stream Modification Projects*.

Whether or not a stream is navigable seems to affect landowner rights in Ohio. What is a navigable stream and how can I find out if a particular stream is navigable? Under Ohio common law, navigability cannot be determined by a precise formula which fits every stream under all circumstances and at all times. This means that the courts must decide the navigability of streams one at a time,

on a case-by-case basis. Factors provided as guidelines for the courts include the stream's capacity for boating in its natural condition, its capacity for boating after the making of reasonable improvements and its accessibility to public destinations.¹¹ A natural temporary obstruction to navigation, such as a logjam or sandbar, does not destroy the otherwise navigable nature of a stream.

Traditionally, a test of navigability has been whether a stream is used or could be used as a highway for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. Recently, the definition of navigability has been broadened to include a stream's capacity for recreational navigation as well. The modern view is that navigation for pleasure and recreation is as important in the eyes of the law as navigation for commercial purposes.¹² At any rate, under Ohio common law it is not possible to know with certainty whether or not a specific stream is subject to the public's right of navigation until a court has made such a determination.

Navigability is also defined in different ways by several federal and state statutes based upon the regulatory jurisdictions of the U.S. Army Corps of Engineers and the U.S. Environmental Protection Agency. These definitions are relevant only within the context of the statutes in which they appear. More information about these statutes and their applicability can be found in Guide 06 *Permit Checklist for Stream Modification Projects*. Fact sheets explaining Section 404 permits and Section 401 water quality certifications are available from the Ohio Environmental Protection Agency by calling (614) 644-2001.¹³

Do landowners along a stream have the right to improve drainage on their land and route the drainage outlets into the stream? **Again,** there are no constitutional provisions or statutes which address this concern. Under the common law in Ohio, landowners have the right to make a reasonable use of their land, even though altering the flow of surface water may cause harm to others. Landowners incur liability only when their harmful interference with the flow of surface water is unreasonable.¹⁴

But if the outlet is a "natural watercourse," aren't property owners allowed to discharge drainage water into it even if it does cause damage downstream? Yes, but only if their actions are reasonable. Historically, the courts in Ohio maintained that upstream landowners could place surface water above and beyond the natural flow into natural watercourses without being liable to downstream owners.¹⁵ However, more recent court decisions have applied a "reasonable use" rule instead. Under this rule, landowners are neither permitted to dispose of surface water any way they wish nor are they prohibited from interfering with the natural flow of

surface water to the detriment of others. Landowners are liable for damages caused by their interference with the natural flow of surface water only when their actions are "unreasonable".¹⁴

Who determines when the harmful interference with the flow of surface water is unreasonable? The reasonability of an alteration of the flow of surface water is decided by the courts on a case-by-case basis. A landowner along a stream who believes he or she has been harmed by another streamside landowner's actions must seek relief through court action. The court determines whether or not the harm is significant and material, whether it is unreasonable, and what the appropriate remedy should be. If the court determines that the harm is significant and material and that it is unreasonable, it may require that the action causing the harm be discontinued by granting an injunction against it. The court may also allow the action causing the harm to continue, but specify that compensation for damages be paid.

If a drainage improvement diverts water into a stream from land that does not naturally drain into that stream, isn't that illegal? Not necessarily. Historically, when the courts in Ohio allowed upstream landowners to place surface water above and beyond the natural flow into natural watercourses without being liable to downstream owners, one of the conditions was that none of the additional water could come from outside the watershed.¹⁵ However, since the courts have been applying the reasonable use rule, the prohibition on diversion may no longer apply.¹⁶ Under the reasonable use rule, such a diversion may be allowed unless a court determines that it constitutes a harmful interference with the flow of surface water that is unreasonable.

It is important to note that a state statute overrides the common law for diversions of water out of either the Lake Erie or Ohio River Basins in quantities greater than 100,000 gallons per day. A permit from the Ohio Department of Natural Resources is required for such diversions.¹⁷ And under federal statute, diversions out of the Lake Erie Basin, regardless of quantity, must have the approval of all the Great Lakes States' Governors.¹⁸

Who is responsible for clearing natural obstructions, such as logjams and sandbars, from streams to keep them free flowing? It is not clear than anyone has such a responsibility. Governmental entities at the municipal, county, state, and federal levels have the statutory **authority** to undertake stream clearing and drainage improvement projects, but no governmental entity at any level has been assigned by statute the **responsibility** for such activities. The common law also does not specify that property owners must keep the streams flowing through their property clear of natural obstructions.

Natural obstructions in a stream on one property may cause harm to upstream property owners by reducing the stream's capacity for conveying runoff, resulting in flooding or reducing the effectiveness of artificial drainage systems. If these problems were caused by a landowner's actions, such as the construction of a dam across the stream, this harm would be actionable in court. It is unclear whether or not a landowner's inaction in failing to remove natural obstructions from the stream is similarly actionable.

On watercourses where drainage improvements have been made under authority of County Ditch¹⁹ statutes, there are requirements for maintenance that may include removal of logjams, sandbars, and other natural obstructions. A county ditch project doesn't change a streamside landowner's basic rights to the use of the watercourse and, in fact, improves its capacity for carrying away excess water. The county (or a joint county board for multi-county drainage projects) retains a maintenance easement along the stream, and is required by the statute to maintain the original drainage project.²⁰ Landowners pay an annual maintenance assessment for these services. There are similar maintenance provisions on streams where water management improvement projects have been undertaken by one of Ohio's Conservancy Districts.²¹

Municipal governments also have the authority to undertake stream clearing and drainage improvement projects, and some cities and villages have enacted ordinances requiring that streams be maintained in their free-flowing states within the municipal boundaries.

The statutory authorities available for removing obstructions are discussed in Guide 04, *A Catalog of Contacts for Stream Topics*. The Ohio Department of Natural Resources recommends that, before an obstruction removal project is begun, consultation be made with the applicable local, state, and federal agencies listed in Guide 06, *Permit Checklist for Stream Modification Projects*. The extent of permit requirements will depend on the location and design of the particular project.

REFERENCES:

- 1 H.C. Black, 1968, Black's Law Dictionary, Definitions of Terms and Phrases of American and English Jurisprudence, Ancient and Modern, Revised Fourth Edition, edited by the publisher's editorial staff, West Publishing Company, St. Paul, Minnesota.
- 2 P.B. Gove, editor in chief, 1966, Webster's Third New International Dictionary of the English Language Unabridged, G.&C. Merriam Company, Springfield, Massachusetts.
- 3 3 Kent Comm. 439 (3d, 1836); VI-Amer. L. of Prop. § 28.55 (1954); Cooper v. Williams, (1831), 4 Ohio St.

see ref. 20

- 253, 287; Salem Iron Co. v. Hyland, (1906), 74 Ohio St. 160, 165. An excellent discussion on this topic and on water rights generally can be found in: Callahan, C.C. & J.R. Hanson, 1979, Principles of Water Rights Law in Ohio, 2nd edition, Ohio Department of Natural Resources, Division of Water, Columbus, Ohio. Additional information specific to water withdrawal rights can be found in: Hanson, J.R., A.F. Woldorf, & L.P. Black, 1991, Water Rights—An Overview of Ohio Water Withdrawal Law, 2nd edition, Ohio Department of Natural Resources, Division of Water, Columbus, Ohio.
- 4 Gavit v. Chambers, (1828), 3 Ohio St. 496.
 - 5 Fox v. Fostoria, (1897), 14 OCC 471, rev. on other grounds, 60 Ohio St. 340; Neff v. Sullivan, 9 OD Repr. 765.
 - 6 East Liverpool City Ice Company v. Mattem, (1920), 101 Ohio St. 62.
 - 7 State ex rel. Brown v. Newport Concrete Company, (1975), 44 Ohio App. 2d 121.
 - 8 Ohio Revised Code, § 1521.06.
 - 9 Federal River and Harbor Act of 1899, Section 10.
 - 10 Federal Water Pollution Control Act Amendments of 1972, Section 404.
 - 11 Coleman v. Schaeffer, (1955), 163 Ohio St. 202.
 - 12 Mentor Harbor Yachting Club v. Mentor Lagoons, (1959), 170 Ohio St. 193.
 - 13 Section 404 Permits and Section 401 Water Quality Certifications, Ohio Environmental Protection Agency fact sheets.
 - 14 McGlashan v. Spade Rockledge Corp., (1980), 62 Ohio St. 2d 55. See also: Myotte v. Mayfield, (1977), 54 Ohio App. 2d 97; Chudzinski v. Sylvania, (1976), 53 Ohio App. 2d 151; Masley v. Lorain, (1976), 48 Ohio St. 2d 334. An excellent discussion on this and related topics can be found in: Brown, L.C. and J.L. Stearns, Ohio's Drainage Laws—An Overview, Bulletin 822, OSU Extension, Columbus, Ohio.
 - 15 Munn v. Horvitz, (1964), 175 Ohio St. 521.
 - 16 Joseph v. Wyss, (1991), 72 Ohio App. 3d 199.
 - 17 Ohio Revised Code, §1501.32.
 - 18 Federal Water Resources Development Act of 1986, Section 1109.
 - 19 Ohio Revised Code, Chapters 6131, 6133, 6135, and 6137.
 - 20 The maintenance requirement applies only to county ditch projects done after 1957.
 - 21 Ohio Revised Code, Chapter 6101.

This Guide is one of a series of Ohio Stream Management Guides covering a variety of watershed and stream management issues and methods of addressing stream related problems. All Guides, including an **Index of Titles**, are available from the Ohio Department of Natural Resources. To obtain copies contact the ODNR Public Information Center at:

1952 Belcher Drive Building, C-1
Columbus, Ohio 43224-1386
614/265-6791

The guides are also available on-line as web pages and PDF files so you may print high quality originals at your location. You will find the guides on-line at: <http://www.dnr.state.oh.us/odnr/water/pubs/onlinpubs.html>.

For more information call the ODNR, Division of Water at 614/265-6739. Each Guide is designed to be easily and clearly reproduced and can be bound in a notebook. **Single copies are available free of charge. When distributing guides at meetings or in mailings, please use the printed editions or the PDF file as a master for reproducing the number of copies you need.**

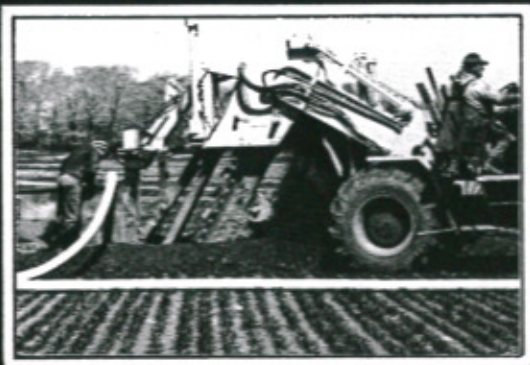
Prepared by the Ohio Department of Natural Resources, Leonard P. Black, Division of Water, principal author. Input from staff of several ODNR divisions and other local, state and federal agencies is used in the development of the Ohio Stream Management Guides. Funding for the production of the Ohio Stream Management Guides is provided in part through a federal grant under section 319 of the Clean Water Act. This Ohio Stream Management Guide is not intended to function as advice on legal issues. Please contact an attorney if legal advice is required.

Guides are available on-line at:
<http://www.dnr.state.oh.us/odnr/water/pubs/onlinpubs.html>



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APPENDIX H



THE OHIO DRAINAGE LAWS PETITION PROCEDURE



Printed courtesy of:
COUNTY ENGINEERS
ASSOCIATION OF OHIO
40 South Third Street
Columbus, Ohio 43215

THE OHIO DRAINAGE LAWS PETITION PROCEDURE

By Byron H. Nolte
Extension Agricultural Engineer

Ohio drainage laws are very broad in scope and apply to a wide variety of improvements. They are administered by the boards of county commissioners and their purpose is to provide for the better utilization of Ohio's soil and water resources.

WORK THAT MAY BE DONE

The improvements possible under the drainage laws include:

- The location, construction, reconstruction, reconditioning, widening, deepening, straightening, alternating, boxing, tilting, filling, walling, arching, or any change in the course, location or terminus of any ditch, drain, watercourse or floodway.
- The deepening, widening, straightening, or any change in the course, location, or terminus of a river, creek, or run.
- A levee, or any wall, embankment, jetty, dike, dam, sluice, revetment, reservoir, holding basin, control gate, breakwater, or other structure for the protection of lands from any stream, lake, or pond, or for the protection of any outlet, or for the storage or control of water.
- The removal of obstructions such as silt bars, log jams, debris, and drift from any ditch, drain, watercourse, floodway, river, creek, or run.
- The vacating of a ditch or drain.

Improvements may be planned, financed, and constructed using the petition procedure or the mutual agreement procedure. In either case permanent maintenance is provided.

The area affected by an improvement may include all or a part of one or more counties.

SINGLE COUNTY PETITION PROCEDURES

Summary of steps necessary to make improvements:



1.

A petition is filed by an owner or a public body.



2.

The proposed improvement is viewed by the board of county commissioners, the county engineer, and other interested people.



3.

The first hearing is held and the county engineer files his preliminary reports, including a statement of his opinion as to whether benefits from the project are likely to exceed the estimated cost.



4.

The county engineer makes surveys, plans, and specifications for the improvements; prepares a schedule of assessments of benefits and damages; and files this information with the clerk of the board of county commissioners.



5.

The final hearing is held. Any exceptions to the engineer's schedules of benefits and damages must be filed on or before the date of the final hearing. The board hears evidence, amends, corrects, and approves assessments, and orders the engineer to let the contracts for construction.



6.

The engineer receives bids at the time fixed, if no appeal has been taken to the court of common pleas.



7.

Upon completion of the contracts, the assessments are adjusted pro rata from the estimated to the final cost. This assessment, plus the maintenance for one year based upon estimated cost, is levied upon each parcel of land as stated in the schedules.



8.

The improvement is maintained by the county with funds obtained by an annual assessment upon the benefited owners.

Who May Petition

Any benefiting owner(s) may file a petition with the board of county commissioners to begin the legal steps necessary to finance, construct, and maintain an improvement.

"Owner" means any owner of any right, title, estate, or interest in or to any real property. "Owner" also includes any public corporation and the director of any department, office, or institution of the state affected by an improvement, not owning any right, title, estate, or interest in or to any real property.

Filing the Petition

Petitions are filed with the clerk of the board of county commissioners. The petition must state that the construction of the improvement is necessary and will be conducive to the public welfare. It also must state the nature and location of the work petitioned for. It must contain a list of the names and addresses, where known, of all the owners of the land which the petitioner or county engineer claims will be benefited or damaged by the construction of the proposed improvement. The petition must be signed by one or more owners as petitioners.

A 500-dollar bond must be filed with the petition plus two dollars for each parcel of land in excess of 200 listed in the petition as be-

ing benefited. The bond is released 21 days after the first hearing or at the termination of any appeal; however, if the petition is dismissed the bond is used to pay the cost of notices and any other incidental expenses and it may be used to pay the cost of the preliminary engineering report.

The petition may be amended upon written application of any benefiting owner filed with the clerk of the board of county commissioners, provided the board approves the application.

The View

The date, hour, and place where the view will start must be set by the board of county commissioners. The date shall be 25 to 90 days after the date on which the petition was filed.

A notice giving the date, hour, place of view and content of the petition must be sent by certified mail with return receipt requested, or by first class mail in a five-day return envelope, to the owners named in the petition and of legal record on the date the petition was filed.

The view gives the board of county commissioners and the county engineer an opportunity to gather field information about the proposed improvement. Also, any owner may present proof of how he will be affected by the proposed improvement.

The First Hearing

The date and hour of the first hearing will be given on the notice announcing the view. It must be from 10 to 90 days after the date set for the view.

At the first hearing the county engineer must file a preliminary report including his estimate of cost, comments on feasibility of the project, and a statement of his opinion as to whether benefits from the project are likely to exceed the estimated cost.

The board of county commissioners shall hear any evidence offered by any owner for or against the granting of the proposed improvement, or for or against any proposed changes in the improvement.

No change shall be made in the nature of the work proposed after the first hearing is completed, except upon application of an interested owner affected by the proposed improvement, and upon notice given to all owners affected by such change.

If the board of county commissioners finds:

- That an improvement is necessary:
 - (a) for disposal or removal of surplus water,
 - (b) for controlled drainage of any land,
 - (c) for irrigation,
 - (d) for storage of water to regulate stream flow,
 - (e) for prevention of overflow of any land in the county, or
 - (f) for water conservation,
- That the construction of the improvement will be conducive to the public welfare, and
- That the cost of the proposed improvement will be less than the benefits conferred by its construction, it will grant the petition.

When deciding whether to grant the petition, consideration shall be given to the protection of environmentally significant areas.

If the petition is not granted, it will be dismissed. Any owner who is affected by the dismissal may appeal to the court of common pleas of the county in which said petition was filed. If no appeal is filed within 21 days, the petitioner must pay all the costs incurred in such proceedings, and the bond will be released.

Plans and Benefits

The county engineer is responsible for making surveys, developing plans and estimating the cost of construction. Bridges and culverts are evaluated. The cost of construction includes the actual cost of construction, the cost of rights-of-way, the cost of engineering, and the cost of notices, publication, and other incidental expenses.

Plans are reviewed by the director of the Ohio Department of Natural Resources, the Ohio Department of Transportation (where a state highway is affected), and the board of directors of any conservancy district within which any part of the lands or streams affected by the proposed improvement may lie.

The plans shall provide for spreading and leveling of spoil banks and shall provide for erosion and sediment control through the establishment of a sod or seeded strip not less than four or more than 15 feet wide. The strip shall be provided on both sides of the ditch, except where suitable vegetative cover exists. The strip or other erosion and sediment control measures shall be considered a part of the permanent improvement. Owners shall be compensated for sod or seeded strips wider than four feet by their removal from the taxable valuation of the property of which they are a part.

The county engineer shall estimate the benefits accruing to public corporations, any department, office, or institution of the state of Ohio and to private owners.

In determining the estimated drainage assessments for a parcel, the county engineer shall give primary consideration to the potential increase in productivity that the parcel may experience as a result of the improvement and shall also give consideration to the quantity of drainage contributed, the relative location of the property to the project, the portion of the project through which the drainage from the parcel flows, the value of the project to the watershed, and benefits as defined below.

"Benefit" or "benefits" means advantages to land and owners, to public corporations as entities, and to the state of Ohio, resulting from drainage, conservation, control and management of water and environmental, wildlife, and recreational improvements. Factors relevant to whether such advantages result include:

- The watershed or entire land area drained or affected by the improvement.
- The total volume of water draining into or through the improvement, and the amount of water contributed by each land owner.
- The use to be made of the improvement by any owner, public corporation, or the state of Ohio.

Also, benefits include any or all of the following factors:

- Elimination or reduction of damage from flood.
- Removal of water conditions that jeopardize public health, safety, or welfare.
- Increased value of land resulting from the improvement.
- Use of water for irrigation, storage, regulation of stream flow, soil conservation, water supply, or any other purpose incidental thereto.
- Providing an outlet for the accelerated runoff from artificial drainage whenever the stream, watercourse, channel, or ditch under improvement is called upon to discharge functions for which it was not designed by nature; it being the legislative intent that uplands which have been removed from their natural state by deforestation, cultivation, artificial drain-

age, urban development, or other man-made causes will be considered as benefited by an improvement required to dispose of the accelerated flow of water from said uplands.

The county engineer must estimate the value of land or other property necessary to be taken and the damages to be sustained by any owner as a result of the construction of the proposed improvement and subsequent maintenance of such improvement. The total of these damages and valuations is included as part of the total cost of constructing the improvement.

As an alternative to the schedule of assessments, the board of county commissioners may pass a resolution to levy a tax on all the property listed and assessed for taxation in the county. The resolution must be certified to the board of elections 60 days before the election upon which it will be voted. The levy may be for a period up to 5 years except when it is for payment of debt charges the levy shall be for the life of the indebtedness.

At least 60 days prior to passage of the resolution to levy a tax for construction and maintenance of a drainage improvement, the board of county commissioners shall file with the county auditor and county board of elections an accurate map showing the locations and types of any proposed improvements, the areas to be benefited and the existing system of drainage improvements that is to be maintained. The resolution may designate all or part of the county as a drainage improvement district and the proceeds of the levy shall only be used within the district. The drainage improvement district designation shall be based on the location of the system of improvements and the areas to be benefited by that system.

The Final Hearing

Upon the filing by the county engineer of his reports and schedules, the board of county commissioners must fix a date from 25 to 90 days thereafter for the final hearing. The clerk of the county commissioners must give notice of the hearing by certified mail, or by first class mail in a five-day return envelope, to all owners whose names appear in the engineer's schedule of assessments and damages.

The notice must include the date of the final hearing on the report of the engineer, the assessment or the estimated damages, if any, and compensation for any land or other property necessary to be taken. It also includes notification that all claims for compensations or damages must be filed with the clerk of the board of county commissioners before the date fixed for the final hearing.

At the final hearing the board of county commissioners will hear all evidence offered and consider all schedules and reports filed by the county engineer. It will reaffirm its former order granting the petition or it shall set aside the former order and dismiss the petition.

If the petition is dismissed at the final hearing, all the costs in said proceedings, including the cost made by the engineer in making his surveys, reports, and schedules, may be distributed to the benefiting owners or they may be paid from county funds. The petitioner, or any owner in favor of the improvement, may appeal within 21 days to the court of common pleas from such order of dismissal.

If the petition is not dismissed, the board of county commissioners will hear any evidence offered for or against the assessment proposed to be levied against any owner, or any land, as shown by the schedule of assessments filed by the county engineer and will hear any competent evidence on the question of benefits. The board, from the evidence offered and from an actual view of the premises, will amend and correct the assessments, and the assessment so amended or corrected will be approved by the board.

The board of county commissioners must determine when the assessments are to be paid and whether bonds are to be issued. Also, they will order the county engineer to let the contracts.

Assessments

Assessments are levied on each parcel of land benefited, to pay the cost of construction and maintenance of improvements. These assessments are paid in semi-annual installments as taxes are paid. When the county general funds are used to pay for the improvement the assessment shall not exceed ten semi-annual installments.

If bonds or notes are issued, the installments will include interest added at the rate of interest the bonds or notes bear. The bond repayment period may not exceed 16 semi-annual installments.

Any owner may pay the estimated assessment on his land in cash within 30 days after the final hearing without paying any interest. Notice of intent to pay in cash must be given within 21 days after the final hearing.

If the estimated cost of the improvement does not exceed 500 dollars, not more than two semi-annual installments, as taxes are paid, will be given to owners of lands benefited to pay the assessments that are made for such improvements. If the estimated cost of the improvement exceeds 500 dollars, the board may determine the number of installments in which the assessments are to be paid, not to exceed 10 semi-annual installments.

If an assessment is 25 dollars or less, or whenever the unpaid balance of any such assessment is 25 dollars or less, the same will be paid in full, and not in installments, at the time the first or next installment would otherwise be due.

Upon completion of the works of improvement, the assessments are reduced pro rata by the difference between the estimated cost and the final cost. The assessment will include the cost of location, engineering, compensation, damages, contingency, and the assessment for maintenance for one year. The minimum construction assessment is 10 dollars and the minimum maintenance assessment is two dollars.

The original schedule of benefit assessments upon owners for the construction of any improvement must be maintained by the county auditor as the permanent base for maintenance assessments.

In lieu of the permanent base, the county commissioners may by resolution levy assessments apportioned according to tax value of benefited property. Prior to adopting the resolution, the county commissioners shall give at least 10 days notice in a newspaper of general circulation of the time and place where the resolution will be considered. The commissioners shall hear all persons concerning the proposed levy, make any necessary adjustments and may then pass a resolution levying an assessment on benefited property. Any owner so assessed may appeal to the court of common pleas the question of whether any such assessment is levied according to benefits. Any increase or reduction of the assessments levied in this manner shall be made at the regular six-year reappraisal of all property in the county.

The legislative authority of a political subdivision may choose to pay the assessment of all parcels within the subdivision.

Maintenance assessments will be made as needed by the board of county commissioners upon substantial completion of an improvement and on or before the first day of July, in each year thereafter. Assessments will be placed on the next succeeding tax duplicate, to be collected and paid as other special assessments are collected and paid.

Such maintenance assessment are to represent a percentage of estimated benefits as estimated by the engineer and found adequate by the board or joint board; except that in any year when a maintenance fund has an unencumbered balance equal to 20 per cent of the construction costs, the annual maintenance assessment is to be omitted.

After six such annual maintenance fund assessments have been made upon the owners benefiting from an improvement, the board

of county commissioners must review the permanent base for maintenance fund assessments and may increase or decrease the respective benefit apportionments in accordance with changes in benefits that have occurred during the intervening six years. When changes are made, the owners will be notified, and a hearing will be held.

At the end of six years from the date of the first review of the permanent base of maintenance assessments, and at six-year intervals thereafter, the board of county commissioners will again review such permanent base.

Owners along a drainage improvement may form any advisory committee for the purpose of notifying the county engineer of needed repair and maintenance work. Any recommendations shall be submitted to the engineer by May 1 of the year work is needed. The engineer shall consider the committee's recommendations.

Appeals

Any owner opposed to the granting of the petition, or any owner opposed to further proceedings in the improvement, or any owner who claims that the assessment levied against him is excessive, or is not in proportion to benefits, may take an appeal to the court of common pleas. The minimum appeal bond is 500 plus two dollars for each parcel over 200.

If an appeal has been taken to the court of common pleas, no further steps will be taken until the final judgement, order, or decree upon any appeal is rendered by the court of common pleas.

If the judgement, order, or decree is in favor of the granting of the improvement, the board will proceed with said improvement proceedings in compliance with such final judgement, order, or decree, from the point at which they were terminated by such appeal, or from the point at which the court orders the board to proceed.

Construction

If no appeal has been taken to the court of common pleas, the engineer must proceed to receive the bids, determine the successful bidder and enter into contract for the construction of the improvement.

If appeals have been taken to the court of common pleas, they must be settled before construction can begin.

Upon acceptance of the contract work, the engineer shall file with the county recorder a property plat showing the general location of the improvement and a statement describing the width of the permanent easement for maintenance.

Maintenance

The board of county commissioners must establish and maintain a fund for the repair, upkeep, and permanent maintenance of each improvement constructed under the provisions of the drainage laws.

Whenever the board from its own observation or the recommendation of the county engineer, or on the written complaint of any of the owners of lands subject to said maintenance assessment, has reason to believe such improvement is in need of repair or maintenance, it will, as a board or by the county engineer, make an inspection of the condition, and if it finds such need to exist, it will make an estimate of the cost of the necessary work and material required for the purpose.



A completed drainage ditch.

The board will determine the most economic and expeditious method of maintenance and repair, and cause the work to be done.

The county engineer has general charge and supervision of the repair and maintenance. He must make an inspection of the drainage improvements, and on or before the first day of June, in each year, must report to the board of county commissioners the condition of said drainage improvements and his estimate of the probable amount of funds required to repair and maintain them.

Persons who perform maintenance may go upon land abutting or adjoining drainage improvements as necessary. In the case of open ditches the area used must be not more than 25 feet from the top of the bank, except in an emergency up to 75 feet may be used. For closed ditches (tile or pipe), not more than 80 feet centered on the ditch may be used.

When the performance of maintenance requires the damage of existing crops beyond the permanently established sod or seeded strip, the owner of the crops shall be granted damages equal to market value, to be paid from the permanent maintenance fund established for the improvement.

Any owner may make application for reduction in his maintenance assessment due to work he proposes on any portion of a public ditch, watercourse, or other improvement. Such application must be filed with the county engineer on or before the first day of May, in any year and must state the nature of the work to be done. The county engineer must recommend the per cent reduction of maintenance assessment to be granted, if any. The board must either confirm or reject the allowances recommended by the county engineer.

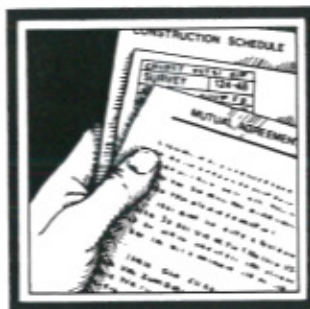
The board of county commissioners may grant to any owner a reduction of not more than 50 per cent of his annual maintenance assessment if such owner has filed with the county engineer a certificate of the board of supervisors of the soil and water conservation district of the county in which the land is located, certifying that he is following practices in the cultivation or management of agricultural land that will reduce the runoff of surface water and the

erosion of sediment and silt into drainage channels. Such certificate will remain in effect until cancelled by the board of county commissioners. The county engineer will have the right to inspect the premises of any owner claiming assessment reduction due to soil and water conservation and to ask the soil and water conservation district for review of any certificate on file.

If the cleaning out or repair of an improvement is made necessary in whole or in part by the negligent acts or omissions of any owner, the board of county commissioners, after a hearing in accordance with provisions of the law, may add to the maintenance assessment of such negligent owner an additional repair assessment in an amount sufficient to rectify the damage.

MUTUAL AGREEMENT PROCEDURE

The mutual agreement procedure applies when one or more owners desire to join in the construction of an improvement and are willing to pay the cost of construction. There are several steps necessary to make an improvement.



prove them or require amendments prior to approval.

1.

The owner(s) involved submit to the clerk of the board of county commissioners the mutual agreement, plans approved by a registered professional engineer and schedules of construction for the improvement. These are reviewed by the county engineer. He may approve them or require amendments prior to approval.



2.

The county engineer makes benefit assessment schedules for maintenance purposes. These assessments may include the cost of preparing the schedules.



3.

The board of county commissioners holds a hearing on the maintenance assessment schedules. They hear evidence and may amend and correct and shall approve the schedules.



4.

The owners contract for the construction and pay the cost as provided in their mutual agreement. This cost includes the estimated cost of maintenance for one year.



5.

The construction is inspected and certified to be in accordance with the plans. This must be done in a manner acceptable to the county engineer.



6.

The improvements are maintained by the board of county commissioners with funds obtained by an annual assessment upon the benefited owners.

MULTI-COUNTY PROCEDURE

The primary difference between making improvements in one and in two or more counties is in the group that conducts the proceedings. The procedure for the owner is essentially the same.

The petition for an improvement that is proposed to be located in, or benefits or damages land in, two or more counties may be filed with the clerk of the board of county commissioners of the county with the majority of the proposed improvements.

The proceedings are conducted by a joint board of county commissioners consisting of the members of the boards of the several counties. One member of the joint board is elected president. The clerk of the board of county commissioners where the petition is filed acts as clerk of the joint board.

A majority of the joint board constitutes a quorum. All decisions of the joint board require a vote of a majority of the county commissioners on the joint board.

The director of the Ohio Department of Natural Resources is an ex-officio member of the joint board. He may attend in person or through a designated representative. He may vote only in the case of a tie.

The clerk of the board of county commissioners with whom the petition is filed, calls a meeting of the joint board within 30 days after the petition is filed. The meeting is held in the county in which the petition is filed.

The joint board designates the engineer of the county with the majority of the improvement to do the field work necessary to plan the improvement. The engineer of each county interested must assist in making the reports and schedules, and must sign and approve them.

All applications, remonstrances, claims for compensation or damage, reports, schedules, certificates, statements, contracts, bonds, and other papers must be filed with the clerk with whom the petition is filed.

INTERSTATE PROCEDURES

Improvements may involve land in an adjoining states. The board of county commissioners in Ohio may cooperate with the proper authorities in the adjoining state to carry out interstate improvements.

OUTSIDE ASSISTANCE

Federal and state laws provide for financial assistance on certain types of improvements. These require approval prior to construction. Application for assistance must be made well in advance in order to coordinate local action with the federal program.

Improvements may be planned and constructed in cooperation with federal and state agencies. If the regulations or procedures of the cooperating agency are in conflict with the Ohio drainage laws, the board of county commissioners may adopt the agency regulations or procedures and proceed with the improvement.

The board of county commissioners, with the advice of the county engineer, may enter into agreements with local soil and water conservation districts for the purpose of planning, constructing, or maintaining drainage improvements.

NOTE

This bulletin outlines the main provisions of the Ohio drainage laws. It is not a complete legal guide. In specific cases direct reference should be made to the Ohio Revised Code Chapters 6131, 6133, 6135, and 6137. In many instances the help of a qualified attorney will be necessary.

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