



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 that 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.