To: Persons Probably Interested in the Attached Chapter on Ohio Water Law.

From: Robert Vertrees

Leonard Black recently wrote the attached chapter about water law in Ohio for the 2005 edition of Water and Water Rights. Here is what he wrote me in an e-mail about it. From what he says, I believe you can work up a citation for it, should you want to refer to it in a formal manner.

Also, he sent me the attached page, which he also refers to in the following message, and is his update for the 2006 version of Water and Water Rights.

Here is Leonard's message, sent on August 22, 2006.

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Dr. Vertrees:

The publication is entitled Waters and Water Rights, Robert E. Beck, Editor-in-Chief. It is eight volumes, published by Lexis Publishing. It was originally published in 1991, but different portions are revised and reissued regularly. My contribution is contained in volume 6, which was revised and reissued in 2005. I think Lexis also puts out annual updates—I have already made a submission for 2008. I’ve attached an MS Word document containing my 2006 submission (this is subject to Professor Beck's editing, of course)—you might want to attach it to the 2005 document I gave you.

Lenn Black

<<2006 Update of Water and Water Law-Ohio.doc>>

Much of the Ohio case law relevant to water rights is rather old, and it is not always clear how it will be interpreted in the current setting. On some issues, there is very little case law to rely on. Due to these factors, it is often difficult to describe very clearly what the existing precedent actually is. For this reason, the publications used as sources herein frequently resort to qualifying their statements concerning Ohio water law, noting the many minor conditions and exceptions that may apply. For the purpose of brevity, these many minor conditions and exceptions are generally not noted herein, which improves the readability but may also give the impression that the precedents are clearer than may be justified. The reader should be aware that the descriptions of Ohio water law precedents contained herein are general in nature, and that there may be situations in which they do not apply.

I. WATER WITHDRAWAL LAW.

There are no Ohio statutes authorizing an agency of state government to regulate the withdrawal and use of water (except under certain limited circumstances), so water withdrawal rights are defined primarily by case law.

A. Reasonable Use Doctrine.

For surface water withdrawals, Ohio case law follows the reasonable use riparian doctrine, under which a landowner with a stream flowing
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through or alongside his property has the right to withdraw and use a reasonable amount of water from the stream. City of Canton v. Shock, 66 Ohio St. 19 (1902); see also Cooper v. Williams, 4 Ohio 253, 286 (1831), affirmed on rehearing, 5 Ohio 391 (1832); Buckingham v. Smith, 10 Ohio 288 (1840); McElroy v. Goble, 6 Ohio St. 187 (1856); Bisher v. Richards, 9 Ohio St. 495 (1859); Frazier v. Brown, 12 Ohio St. 294 (1861); Accurate Die Casting Co. v. Cleveland, 2 Ohio App. 3d 386, 389, 442 N.E.2d 459 (1981). This doctrine limits such withdrawal and use rights to riparian owners. City of Canton v. Shock, 66 Ohio St. 19 (1902); see also Mallory v. Dillon, 18 Ohio Law Abs. 239, 240 (1934). [See generally supra Treatise §§ 7.02, 7.03.]

The right of a riparian owner to use water from a stream that passes through his land is not proprietary, but usufructuary only. Cooper v. Williams, 4 Ohio 253, 286 (1831), affirmed on rehearing, 5 Ohio 391 (1832); Salem Iron Co. v. Hyland, 74 Ohio St. 160, 165 (1906); VI-A Amer. L. of Prop. § 28.55 (1954). The rights of a landowner with respect to the flow of water in a stream are not absolute; but rather are correlative to, and limited by, similar rights enjoyed by other owners. Riparian rights are property within the purview of the constitutional provision that prevents the taking of property for a public use without just compensation. City of Mansfield v. Balliett, 65 Ohio St. 451 (1901); State ex rel. Andersons v. Masheter, 1 Ohio St. 2d 11, 12 & 13, 203 N.E. 2d 325 (1964).

For groundwater withdrawals, Ohio case law also follows the reasonable use doctrine. In Cline v. American Aggregates Corp., 15 Ohio St. 3d 384, 474 N.E.2d 324 (1984), the Ohio Supreme Court overturned the common law theory of absolute ownership in percolating water, Frazier v. Brown, 12 Ohio St. 294 (1861), and adopted § 858 of the Restatement (Second) of Torts, stating: “A proprietor of land or his grantee who withdraws ground water from the land and uses it for a beneficial purpose is not subject to liability for interference with the use of water by another, unless: (a) the withdrawal of ground water unreasonably causes harm to a proprietor of neighboring land through lowering the water table or reducing artesian pressure, (b) the withdrawal of ground water exceeds the proprietor’s reasonable share of the annual supply or total store of ground water, or (c) the withdrawal of ground water has a direct and substantial effect upon a watercourse or lake and unreasonably causes harm to a person entitled to the use of its water.” Restatement (Second) of Torts § 858(1). [See generally supra Treatise ch. 22.]

It is not clear that there is a riparian right to groundwater. The
comment to Restatement (Second) of Torts § 858 states: “This section also recognizes that the right to withdraw ground water is a property right.” Id. cmt. (b). But in Smith v. Summit County, 131 Ohio App. 3d 35, 721 N.E.2d 482 (1998), an Ohio Appeals Court cited Logan Gas Co. v. Glasgo, 122 Ohio St. 126, 130-131, 170 N.E. 874 (1930), Huelsmann v. State, 56 Ohio App. 2d 100, 105, 381 N.E.2d 950 (1977), and the Restatement (Second) of Torts § 841 in ruling that there is no riparian right to groundwater. There are currently several cases making their way to the Ohio Supreme Court concerning this question.

1. Determination of Reasonable Use.

A 1988 statute, codified in Ohio Revised Code (ORC) § 1521.17, provides guidance to Ohio courts. ORC § 1521.17(B) states: “In accordance with section 858 of the Restatement (Second) of Torts of the American law institute, all of the following factors shall be considered, without limitation, in determining whether a particular use of water is reasonable: (1) the purpose of the use; (2) the suitability of the use to the watercourse, lake, or aquifer; (3) the economic value of the use; (4) the social value of the use; (5) the extent and amount of the harm it causes; (6) the practicality of avoiding the harm by adjusting the use or method of use of one person or the other; (7) the practicality of adjusting the quantity of water used by each person; (8) the protection of existing values of water uses, land, investments, and enterprises; (9) the justice of requiring the user causing harm to bear the loss.” These are the same factors listed in the Restatement (Second) of Torts § 850A. (Restatement (Second) of Torts § 858(2) states, “The determination of liability … is governed by the principles stated in §§ 850 to 857.”)

It should be noted that, although this provision is included in the chapter of the Ohio Revised Code that describes ODNR-Division of Water authority, it does not grant to the ODNR-Division of Water the authority to make determinations of whether or not specific water uses are reasonable. Such responsibility remains with the courts.

In addition to the factors listed in ORC § 1521.17(B), there are several general principles associated with the reasonable use doctrine as described by the Restatement (Second) of Torts: (1) no proprietor will be regarded as making an unreasonable use of the water unless his action causes harm to another; (2) no course of action arises merely from the fact that the flow of water in a stream has been perceptibly diminished; there is a cause of action only when the use of the stream by one owner exceeds that which he is privileged to make; and (3) the purpose for which the water is taken must be one that is beneficial to
the taker; no substantial quantity of water can be taken and simply wasted, to the injury of a lower riparian owner.

2. Riparian Land.

Land qualifies as riparian, regardless of its history of ownership, so long as it fronts on a stream at some point. Property that abuts a lake or pond with an outlet channel is also considered riparian land. 3 H. Tiffany, Real Prop. § 739 (3d ed. (Jones), 1939); VI-A Amer. L. of Prop. § 28.55 (1954), and owners of property fronting on a lake are entitled to use the lake water for domestic purposes in connection with this land even though their titles do not extend beyond the edge of the water. Lembeck v. Nye, 47 Ohio St. 336 (1890); Bass Lake Co. v. Hollenbeck, 11 Ohio C.C. 508, 523 (1896). Where a lake or pond is wholly on the property of a single owner, his rights are those of reasonable use only so long as such lake or pond feeds a watercourse; where a lake or pond has no apparent outlet into a watercourse, it is subject to the exclusive use of the owner of the land on which it is found. 3 H. Tiffany, supra § 739. [See also supra Treatise § 7.02(a).]

3. Riparian Owners.

The identity of the owner of riparian land has no effect on the existence or scope of riparian rights. Corporations and partnerships, as well as individual owners, have riparian rights by virtue of the ownership of a riparian tract. Warder & Barnett v. Springfield, 9 Ohio Dec. Reprint 855 (1885); 56 Am. Jur., Waters, § 283 (1947). The State and its political subdivisions have also been held to have the rights of riparian proprietors by virtue of owning riparian property. Greenville v. Demorest, 14 Ohio C.C. (n.s.) 113 (1911). A municipality is a riparian proprietor in its corporate capacity (regardless of whether or not it owns riparian property) if a stream flows through its corporate limits; riparian rights extend throughout the municipal limits but not beyond them. City of Canton v. Shock, 66 Ohio St. 19 (1902). This does not grant a municipality the right to withdraw water from a stream that does not flow through its corporate limits and transport it into the municipality for use (even though the municipality may be a riparian owner by virtue of owning riparian property), or to withdraw water from a stream running through its corporate limits and supply it to persons outside the municipality. Such activities may be legal if the overall withdrawal and use does not result in significant and material damages to another riparian proprietor.

Riparian rights do not extend to those who own land along the state-owned Ohio & Erie and Miami & Erie Canal feeder lakes, the
waters of which are under the direct jurisdiction of the ODNR. Withdrawal of these waters is allowed only by lease as authorized by ORC § 1520.03, which allows the ODNR to lease such waters “only to the extent that the water is in excess of the quantity that is required for navigation, recreation, and wildlife purposes.”


*Cooper v. Hall*, 5 Ohio 321 (1832), held that riparian rights confine the use of the water to the riparian land; however, legal uses on non-riparian land are clearly possible. The Restatement (Second) of Torts § 855 states: “if it is otherwise reasonable under the rule of § 850A because it is made for a beneficial purpose, is suitable to the water body and has social and economic value, a nonriparian use that can be accommodated with riparian uses and causes no substantial harm to them can be reasonable despite its nonriparian character.”

The Restatement (Second) of Torts § 858, which has been adopted for considering disputes among groundwater withdrawers, *Cline v. American Aggregates Corp.*, 15 Ohio St. 3d 384, 474 N.E.2d 324 (1984), does not limit the use of groundwater to riparian property. Since it is not clear that a riparian right to groundwater even exists, *Smith v. Summit County*, 131 Ohio App. 3d 35, 721 N.E.2d 482 (1998), presumably there is no limitation as to the use of groundwater on the property from which it is withdrawn.

5. Transfer of Riparian Rights.

Riparian rights, because they are property rights protected from government taking without just compensation, are indeed transferable. *City of Mansfield v. Balliett*, 65 Ohio St. 451 (1901); *Portage County Bd. of Comm’rs v. City of Akron*, 156 Ohio App. 3d 657, 808 N.E.2d 444 (2004). The transfer of riparian rights for groundwater is less certain, in that it is not clear that such rights exist. Presumably a property owner may allow for the use of groundwater withdrawn on his property to be used on another property and, so long as it does not cause significant and material damage, there would be no actionable cause for litigation. [*See generally supra Treatise § 7.04.*]

6. Preference for Domestic Use.

The primary use of a stream is for domestic purposes, and for the satisfaction of domestic needs; the right of a riparian owner to take the water from the stream is absolute. *City of Canton v. Shock*, 66 Ohio St. 19 (1902); VI-A Amer. L. of Prop. § 28.57 (1954); 3 H. Tiffany, Real Prop. § 724 (3d ed. (Jones), 1939). A riparian owner may take such
water as needed for domestic purposes, even though the result is that none is left for the commercial uses of lower owners. *City of Canton.* It is unclear whether or not the preference for domestic use extends to the withdrawals of a municipality that supplies the domestic needs of inhabitants of a city or other service area *City of Canton* seems to indicate that it does while the Restatement (Second) of Torts § 850A, seems to indicate that it does not. With the adoption of § 858 of the Restatement (Second) of Torts for considering groundwater conflicts in Ohio, domestic uses of groundwater presumably receive the same preference as domestic uses of surface water. [See generally supra Treatise § 7.02(b).]

Where the water of a stream is insufficient to supply the needs of two riparian proprietors for non-domestic purposes, each has a right to the reasonable use of the water, which is to be divided so that each will bear his fair proportion of the loss occasioned by the shortage. *City of Canton.*

7. **Inter-Basin Transfers of Water.**

In *City of Canton v. Shock*, 66 Ohio St. 19 (1902), the Ohio Supreme Court stated, "The obligation to return the water to the stream without 'any essential diminution' means that the water not consumed in the use ... must be returned to the stream, or an opportunity given for it to flow back into the stream by the ordinary channels. It cannot be lawfully diverted, or transported, so as to prevent it from flowing back into the stream." *Id.* at 33. Conceding that a diversion of stream water beyond the watershed is an unauthorized use, the question remains whether such a diversion is actionable in itself, or whether no cause of action arises in the absence of an actual injury to the party complaining. There is no direct answer in Ohio court precedent, but the unanimity of Ohio courts in holding an actual injury necessary for a cause of action in other cases involving interference with the flow of surface water suggests that the same condition would be imposed here.

ORC § 1501.32 prohibits transfers of water in excess of 100,000 gallons per day out of the Ohio portions of the Lake Erie and Ohio River Basins without a permit issued by the director of ODNR. The director may not issue such a permit if: (1) during the life of the project for which the water is to be diverted, some or all of the water to be diverted will be needed for use within the basin; (2) the proposed diversion would endanger the public health, safety, or welfare; (3) the applicant has not demonstrated that the proposed diversion is a reasonable and beneficial use and is necessary to serve the applicant's present and future needs; (4) the applicant has not demonstrated that
reasonable efforts have been made to develop and conserve water resources in the importing basin and that further development of those resources would engender overriding, adverse economic, social, or environmental impacts; (5) the proposed diversion is inconsistent with regional or state water resources plans; (6) the proposed diversion, alone or in combination with other diversions and water losses, will have a significant adverse impact on in-stream uses or on economic or ecological aspects of water levels. For proposed inter-basin transfers out of the Ohio portion of the Lake Erie Basin, the director may not issue a permit until the requirements of the federal Great Lakes diversion statute, 100 Stat. 4230, 42 U.S.C. § 1962d-20 (which prohibits the diversion of water out of the Great Lakes Basin without the approval of the governors of all the Great Lakes states), have been met. For a map showing the Lake Erie drainage in Ohio, see www.dnr.state.oh.us/water/watersheds. [See also generally supra Treatise § 9.06.]

B. Additional Statutory Law.

ORC § 1501.33, enacted in 1988, states that “no person shall ... withdraw waters of the state in an amount that would result in a new or increased consumptive use of more than an average of two million gallons per day over a 30-day period without first obtaining a permit from the director of natural resources.” Under ORC § 1501.34, the director cannot approve an application for such a permit “if he determines that any of the following criteria apply: (1) public water rights in navigable waters will be adversely affected; (2) the facility’s current consumptive use, if any, does not incorporate maximum feasible conservation practices as determined by the director, considering available technology and the nature and economics of the various alternatives; (3) the proposed plans for the withdrawal, transportation, development, and consumptive use of water resources do not incorporate maximum feasible conservation practices as determined by the director, considering available technology and the nature and economics of the various alternatives; (4) the proposed withdrawal and consumptive uses do not reasonably promote the protection of the public health, safety, and welfare; (5) the proposed withdrawal will have a significant detrimental effect on the quantity or quality of water resources and related land resources in this state; (6) the proposed withdrawal is inconsistent with regional or state water resources plans; (7) insufficient water is available for the withdrawal and other existing legal uses of water resources are not adequately protected.” No permits under this section have been issued, since no applications have been
received. It remains unclear when a permit is required (i.e., when a water withdrawal would actually result in a new or increased consumptive use more than two million gallons per day).

ORC § 1501.31(B) states that the provisions contained in ORC §§ 1501.30–1501.35, which includes the permit requirements for inter-basin transfers greater than 100,000 gallons per day out of the Ohio portion of the Lake Erie and Ohio River Basins [ORC § 1501.32] and for water withdrawals resulting new or increased consumptive uses greater than two million gallons per day [ORC §§ 1501.33–1501.34], do not affect common law riparian rights.

ORC § 1521.16, enacted in 1988, requires a person who owns a facility capable of withdrawing more than 100,000 gallons per day of surface or groundwater to register that facility with the ODNR, and report annually thereafter its monthly withdrawal quantities.

II. WATER DISPOSITION LAW.

While there are several Ohio statutes granting to various subdivisions of state government the authority to undertake drainage and flood control projects, there are no statutes that authorize any agency of state government to regulate the disposition of excess surface water (except under certain limited circumstances). So, water disposition rights are defined primarily by case law.

A. Reasonable Use Doctrine.

Historically, Ohio courts generally employed the civil law doctrine with regard to the obstruction of the natural flow of diffused surface water, wherein lower lands are held to be servient to upper lands (i.e., an upper landowner could require the lower to receive the diffused surface water that naturally drains onto the lower land). Butler v. Peck, 16 Ohio St. 334 (1865); Tootle v. Clifton, 22 Ohio St. 247 (1871); Blue v. Wentz, 54 Ohio St. 247 (1896); Vermillion v. Myers, 82 Ohio St. 414 (1910); Kasch v. City of Akron, 100 Ohio St. 229 (1919). An upper landowner could not increase the burdens on the lower lands by discharging diffused surface water in excess of the natural drainage. But the upper landowner could, without incurring liability, channel his surface water into a watercourse passing through his land, even though it increased the volume and accelerated the flow of the stream to the injury of others. Munn v. Horvitz, 175 Ohio St. 521 (1964). The upper landowner could not send to the watercourse water from an area that did not naturally drain to it. Mason v. Commissioners of Fulton County, 80 Ohio St. 151 (1909); Nagy v. City of Akron, 27 Ohio App. 250 (1927); Lucas v. Carney, 167 Ohio St. 416 (1958); Munn v. Horvitz,
175 Ohio St. 521 (1964); Johnston v. Miller, 15 Ohio App. 2d 456 (1968); Steinbeck v. Stenger, Inc., 46 Ohio App. 2d 22 (1975). [See generally supra Treatise §§ 10.03(b)(2), 59.02(b)(3).]

In a couple cases, Springfield v. Spence, 39 Ohio St. 665 (1871); Lunsford v. Stewart, 95 Ohio App. 383 (1953), Ohio courts held that the common enemy doctrine applied in urban areas, though this was apparently never a general rule of law. Evers v. Akron, Ohio C.C. (n.s.) 168 (1912); Rueckert v. Sicking, 20 Ohio App. 162 (1923); McKernann v. Grimm, 31 Ohio App. 213 (1928); City of Norwood v. Sheen, 126 Ohio St. 482 (1933); McCrory v. Knight, 62 Ohio Law Abs. 353 (1951); Lucas v. Carney, 167 Ohio St. 416 (1958). [See generally supra Treatise §§ 10.03(b)(1), 59.02(b)(2).]

From as early as 1902, Ohio courts had incorporated elements of the reasonable use doctrine in their decisions regarding riparian rights. In Canton v. Shock, 66 Ohio St. 19 (1902), the Ohio Supreme court identified as a basic principle that “the city must exercise its rights reasonably, and so as to cause as little injury to others as possible.” In Lunsford v. Stewart, 95 Ohio App. 383 (1953), which applied the common enemy doctrine, the lower owner’s freedom from liability was predicated on his making improvements in a “reasonable” manner. In Lucas v. Carney, 167 Ohio St. 416 (1958), the court held that a municipality may make “reasonable use” of a natural watercourse to drain surface water. [See generally supra Treatise §§ 10.03(b)(3), 59.02(b)(4).]

In three decisions handed down during the late 1970s involving the discharge of surface water into natural watercourses, Ohio courts explicitly applied the reasonable use doctrine. Chudzinski v. Sylvania, 53 Ohio App. 2d 151 (1976); Masley v. City of Lorain, 48 Ohio St. 2d 344 (1976), and Myotiee v. Mayfield, 54 Ohio App. 2d 97 (1977). Later, in McGlashan v. Spade Rockledge Corp., 62 Ohio St. 2d 55 (1980), which involved diffused surface water, the Ohio Supreme Court again applied the rule of reason and stated, “[I]n resolving surface water controversies, [courts of this state will apply] a reasonable-use rule [under which] ‘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.’” Id. at 60 (quoting Stanley V. Kinyon & Robert C. McClure, Interfer-
ences with Surface Waters, 24 Minn. L. Rev. 891, 904 (1940)). Further
guidance was provided as the cause was remanded for a new trial: “In
determining the reasonableness of an interference, the trier of fact is to
be guided by the rules in 4 Restatement on Torts 2d 108-142, Sections
822–831.” 62 Ohio St. 2d at 60. Based on these decisions, it seems
clear that the reasonable use doctrine is appropriate in the consideration
of disputes over the disposition of both diffused surface water and
water in watercourses.

B. Inter-Basin Transfers of Water.

In Joseph v. Wyss, 72 Ohio App. 3d 199, 594 N.E.2d 142 (1991), the
court applied the reasonable use doctrine in holding that a drainage
project resulting in an inter-basin transfer of water was legal because
the plaintiffs failed to show they had incurred significant and material
damage. The requirements contained in ORC § 1501.32, described
previously, supra § 1(A)(7), also apply to transfers of water out of the
Ohio portions of the Lake Erie and Ohio River Basins resulting from
the disposition of excess surface water.

C. Statutory Provisions for the Disposition of Surface Wa-
ter.

Ohio statutory law authorizes municipalities to drain by artificial
means any lot or land within municipal limits on which water
accumulates [ORC § 715.41], to remove obstructions from culverts,
covered drains, or watercourses and increase the capacity of culverts
and drains [ORC § 715.47], to improve waterways passing through
municipal limits [ORC § 717.01], and to enlarge, deepen, and
straighten any watercourse located in whole or in part within or lying
contiguous to the municipality [ORC § 715.15]. County commisson-
ers are authorized to undertake and maintain projects to improve
drainage and alleviate flooding [ORC chs. 6131–6137]. Conservancy
Districts also have the authority to undertake drainage and flood
control projects and to act as local sponsors for federal flood control
and drainage projects [ORC ch. 6101]. County soil and water conserv-
ation districts are authorized to implement, operate, and maintain
works of improvement for flood prevention and the conservation,
development, utilization, and disposal of water [ORC § 1515.08] and
the ODNR may cost share in such works [ORC § 1515.16]. The
unlawful obstruction or diversion of waterways from their natural
courses to the injury or prejudice of others is prohibited by ORC
§ 3767.13, which addresses nuisance law. [See generally supra Treat-
tise §§ 10.03(b)(5), 59.04.]
Federal law authorizes the U.S. Department of Agriculture’s Natural Resource Conservation Service to undertake projects for flood prevention and the conservation, development, utilization, and disposal of water [P.L. 83-566] and the U. S. Army Corps of Engineers to undertake large flood control projects specifically authorized by Congress and smaller projects under authority of § 205 of the Flood Control Act of 1948. [See generally supra Treatise ch. 60.]

III. WATER POLLUTION CONTROL LAW.

Unlike water withdrawal and water disposition law, there are numerous Ohio statutes that define the right to discharge pollution into the waters of the state. Considerable case law has accumulated to clarify the statutes and, for the sake of brevity, cases will be described herein only when they are considered basic to understanding how the relevant statutes operate.

A. Ohio Environmental Protection Agency Law.

ORC § 3745.01 provides for the creation of the Ohio Environmental Protection Agency (OEPA) and requires that agency to administer the laws pertaining to (among other things) the prevention, control, and abatement of water pollution, and to take such actions as may be necessary to comply with the requirements of federal laws and regulations pertaining to (among other things) water pollution control. Courts of common pleas are without jurisdiction to proceed in actions for declaratory or injunctive relief involving controversies under ORC ch. 3745. State ex rel. Maynard v. Whitfield, 12 Ohio St. 3d 49, 12 Ohio B. 42, 465 N.E.2d 406 (1984).

ORC § 6111.04 prohibits the discharge of sewage, industrial waste, and other waste into waters of the state and declares such actions to be public nuisances, except when they are in compliance with discharge permits issued by the OEPA. ORC § 6111.44 prohibits the installation or modification of sewerage or sewage treatment works without the approval of the OEPA. Other sections of ORC ch. 6111 prescribe the processes and procedures for the formulation, issuance, monitoring, and enforcement of such discharge permits, assuring that Ohio remains in compliance with the requirements of the Federal Water Pollution Control Act, administration of which (within Ohio) has been delegated to the OEPA. ORC § 6111.041 requires the adoption of water quality standards, ORC § 6111.042 authorizes the adoption and enforcement of rules, and ORC § 6111.12 requires the establishment of an antidegradation policy. ORC § 6111.043 requires the OEPA to regulate the injection of sewage and other wastes into wells, in order to control
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pollution and prevent contamination of underground sources of drinking water. ORC § 6111.10 prohibits the sale of household laundry detergent containing phosphorus in any form in excess of one-half percent by weight (expressed as elemental phosphorous) in the counties wholly or partly within the Ohio portion of the Lake Erie Basin. [See generally supra Treatise chs. 53, 54.]

ORC ch. 6111 does not abridge rights of action or remedies in equity or under the common law, or stop riparian owners in the exercise of their rights in equity or under the common law to suppress nuisances or abate pollution. ORC § 6111.08. [See generally supra Treatise ch. 57.] Not does it create new rights or provide original remedies to private persons. Board of Commissioners v. Mentor Lagoons, Inc., 6 Ohio Misc. 126, 35 Ohio Op. 2d 244, 216 N.E. 2d 643 (1965).

Ohio law grants the authority to apply for and obtain discharge permits and to construct, operate, and maintain sewerage and sewage treatment works to: private individuals and corporations, ORC ch. 6112; municipalities, ORC § 715.40 and § 717.01; Sanitary Districts, ORC ch. 6115; County Sewer Districts, ORC ch. 6117; and Regional Water and Sewer Districts, ORC ch. 6119.

ORC § 3734.02(C) prohibits the establishment of a new solid waste facility or the modification an existing solid waste facility without a permit from the OEPA. ORC § 3734.02(A) requires the OEPA to promulgate rules governing solid waste facilities to ensure that such facilities will be located, maintained, and operated so as not to cause or contribute to water pollution. The operator of a solid waste facility under ORC ch. 3734 is not exempt from the prohibitions against pollution of waters of the state or from the requirement to obtain a permit under ORC § 6111.04. State ex rel. Brown v. Rockside Reclamation Inc., 48 Ohio App. 2d 157, 2 Ohio Op. 3d 137, 356 N.E.2d 733 (1975).

B. Ohio Department of Agriculture Law.

ORC §§ 903.02–903.03 prohibits the operation of an existing concentrated animal feeding operation without a permit to operate as well as the construction of a new or modification of an existing concentrated animal feeding operation without a permit to install from the Ohio Department of Agriculture (ODA). ORC § 903.08 prohibits the discharge of manure or stormwater from a point source (i.e., concentrated animal feeding operation) without first obtaining a discharge permit from the ODA. Other sections in ORC ch. 903 prescribe the processes and procedures for the formulation, issuance,
monitoring, and enforcement of discharge permits by the ODA.

C. Ohio Department of Natural Resources Law.

ORC § 1509.22 prohibits the placement of brine into surface or groundwater or on land in such quantities or in such a manner as could cause: (1) water used for consumption to exceed Federal Safe Drinking Water Act standards, (2) damage to public health or safety, or (3) injury to the environment. The ODNR-Division of Mineral Resources Management is required to adopt rules and issue orders regarding the storage and disposal of brine. ORC § 1509.221 prohibits the injection of brine into underground formations without a permit from the ODNR-Division of Mineral Resources Management.

ORC § 1511.02 requires the ODNR-Division of Soil & Water Conservation to establish standards to achieve a level of management that will abate the degradation of the waters of the state by (1) animal waste and (2) soil sediment in conjunction with land grading, excavation, and other soil-disturbing practices on land being developed for non-farm purposes. These standards are to be designed to implement area-wide waste treatment management plans prepared pursuant to the Federal Water Pollution Control Act. Under ORC § 1511.021, farmers may develop and operate under a management plan approved by the ODNR-Division of Soil & Water Conservation. In private civil actions involving agricultural pollution, it is an affirmative defense if the farmer is operating under and in compliance with such an approved plan. ORC § 307.79 authorizes county commissioners to adopt rules establishing standards to abate the degradation of waters by soil sediment in conjunction with land grading, excavation, and other soil-disturbing practices on land being developed for non-farm purposes, consistent with standards developed by the ODNR pursuant to ORC § 1511.02.

ORC § 1513.07 prohibits coal surface mining without a mining and reclamation permit from the ODNR-Division of Mineral Resources Management, and § 1513.16 describes the performance standards that must be met by permit holders, including several provisions to prevent water pollution during the coal mining and reclamation process. ORC § 1513.27 grants the ODNR-Division of Mineral Resources Management the authority to undertake projects to control the adverse effects (including water pollution) caused by unreclaimed coal mine land affected by mining prior to April 10, 1972, when Ohio’s reclamation statute became effective. The ODNR-Division of Mineral Resources Management has the authority to order the operator of a coal mining operation to reimburse a property owner for the cost of replacing a
water supply that has been contaminated, diminished, or interrupted as a result of the coal mining operation where the owner has replaced the water supply on his own initiative. 1991 Op. Atty Gen. Ohio 267 (No. 91-052).

ORC § 1514.02 prohibits surface mining of minerals other than coal (including in-stream mining) without a permit from the ODNR-Division of Mineral Resources Management, and ORC § 1514.02(A)(10)(h) requires permit holders to ensure that contamination of groundwater resulting from mining is prevented and that, upon completion of reclamation, any watercourse, lake, or pond within the permit site boundaries is free of substances resulting from mining that are harmful to fish, waterfowl, or other beneficial species of aquatic life.

ORC § 1531.29 prohibits the placement or disposal of any garbage, waste, peeling of vegetables or fruits, rubbish, ashes, cans, bottles, wire, paper, cartons, boxes, part of automobiles, wagons, furniture, glass, oil, or anything else of an unsightly or unsanitary nature in any ditch, stream, river, lake, pond, or other watercourse. County sheriff’s departments and local game protectors with the ODNR-Division of Wildlife may issue citations pursuant to this statute.

D. Nuisance Law.

ORC § 3767.14 prohibits the placement or deposit of coal dirt, coal slack, coal screenings, coal refuse, whey or other filthy drainage from a cheese factory, petroleum, crude oil, refined oil, or residuum of oil from an oil well, tank, or vat into a river, ditch, drain, or watercourse, or into a place from which it may wash therein. ORC § 3767.16 prohibits the placement of dead animals into lakes, rivers, bays, creeks, ponds, or canals. ORC § 3767.18 prohibits the malicious befouling of a well, spring, brook, branch of running water, or water supply reservoir. Prosecution under these statutes follows the procedures prescribed in ORC ch. 3767 for nuisances.

E. Older Case Law.

In a number of Ohio cases, riparian owners have recovered for damage caused by reason of pollution. C. & H. C. & I. Co. v. Tucker, 48 Ohio St. 41 (1891); Mansfield v. Hunt, 19 Ohio C.C. 488 (1900); City of Mansfield v. Balliett, 65 Ohio St. 451 (1902); Tepe v. City of Norwood, 1 Ohio L.R. 9 (1903), aff’d 71 Ohio St. 519 (1904); Upson Coal & Mining Co. v. Williams, 7 Ohio C.C. (n.s.) 293 (1905); Columbus v. Rohr, 10 Ohio C.C. (n.s.) 320 (1907); Straight v. Hover, 79 Ohio St. 263 (1909); Standard Hocking Coal Co. v. Koontz, 5 Ohio
II.


It has been held that it is the right of a lower riparian owner to receive the water free from contamination by artificial means and that he may maintain an action for any substantial injury which results from such contamination, regardless of whether the upper owner conducted his operation with care, or was following the general practice, or would have been put to considerable expense to avoid the contamination. C. & H. C. & I. Co. v. Tucker, 48 Ohio St. 41 (1891); Mansfield v. Hunt, 19 Ohio C.C. 488 (1900); Straight v. Hover, 79 Ohio St. 263 (1909). If the evidence shows an injury, that the deposits were made intentionally, and that the result might reasonably have been foreseen, a cause of action is made out. C. & H. C. & I. Co. v. Tucker, 48 Ohio St. 41 (1891).

In these cases, involving serious pollution by reason of the discharge of sewage or industrial wastes into a stream, the Ohio courts have shown no tendency to inquire into the reasonableness of the defendant’s activity. However, in a court of appeals case in which the plaintiff sought to recover for damage caused by the discharge of mud, seeds, etc. into a stream, the court, in upholding a judgment for the defendant, pointed out that there was no allegation of negligence or unreasonable or improper use of the defendant’s land, and held that in the absence of such a showing there was no cause of action, notwithstanding that some incidental damage may have been suffered. Radcliff v. Indian Hill Acres, 93 Ohio App. 231 (1952). Since the pollution in the sewage and industrial waste cases appears usually to have been such as virtually to destroy a stream for purposes of beneficial use by downstream owners, it well may be that the results would have been the same had the reasonable use doctrine been applied expressly.


In Frazier v. Brown, 12 Ohio St. 294 (1861), the Ohio Supreme Court pointed out that the considerations of policy which govern the right to take water do not apply to its pollution. Although that case did
not actually involve an element of pollution, a subsequent circuit court case clearly held that the pollution of percolating water is a wrong for which an action can be maintained and that the liability does not depend on negligence. Rather it is based on the theory of absolute liability for harm caused by the escape of substances kept on land. Bassett v. Osborn, 23 Ohio C.C. (n.s.) 342 (1912). Accordingly, the court enjoined the maintenance of a cesspool that contaminated a spring on adjoining land so as to render it unfit for use. Similarly, liability has been imposed for contamination resulting from the storage of gasoline. Sinclair Refining Co. v. Keister, 64 F.2d 537 (6th Cir. 1933).

IV. OTHER WATER LAW ISSUES.

A few other issues have been arising in Ohio with increased frequency in recent years, which deserve some limited discussion.

A. Ownership of subaqueous lands.

Lake Erie and its bed within the boundaries of Ohio are owned by the State of Ohio. The General Assembly has declared: "... that the waters of Lake Erie ... together with the soil beneath and their contents, do now belong and have always, since the organization of the state of Ohio, belonged to the state as proprietor in trust for the people of the state, for the public uses to which they may be adapted, subject to the powers of the United States government, to the public rights of navigation, water commerce, and fishery, and to the property rights of littoral owners, including the right to make reasonable use of the waters in front of or flowing past their lands." ORC § 1506.10.

The beds of Ohio streams (including navigable streams) are owned not by the state, but rather by the owners of the land abutting the water. Unless otherwise provided by deed, one that owns the land up to the river owns to the middle of the river, subject to the easement for navigation. Gavit v. Chambers, 3 Ohio 496 (1828). It is a trespass to take sand or other material from the bed of a stream without permission of the owner. June v. Purcell, 36 Ohio St. 396 (1881). In the case of inland lakes, ownership of the bed is determined by the deeds affecting the area occupied by the lake. Lembeck v. Nye, 47 Ohio St. 336 (1890). This is not true of the Ohio & Erie and Miami & Erie Canal feeder lakes, in which the beds are owned by the ODNR. [See generally supra Treatise § 6.03.]

B. Right of Navigation.

Despite this private ownership of the streambeds, the public has a
right to float upon any water that is considered legally navigable. The Northwest Ordinance of 1787 declared that navigable waters leading into the Mississippi and St. Lawrence rivers would be common highways and forever free. The paramount authority over navigable water rests with Congress under the Commerce Clause of the U.S. Constitution. The federal government has and exercises jurisdiction over Lake Erie and the Ohio River for navigation purposes. Congress has acted only once to declare an Ohio watercourse navigable (in 1796), that being the Muskingum River to a point 79 miles from its confluence with the Ohio River. The courts determine the navigability of other Ohio streams on a case-by-case basis. [See generally supra Treatise ch. 31.]

Under Ohio common law, navigability cannot be determined by a precise formula which fits every stream under all circumstances and at all times. 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. Coleman v. Schaeffer, 163 Ohio St. 202 (1955). 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. Mentor Harbor Yachting Club v. Mentor Lagoons, 170 Ohio St. 193 (1959). 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.

While it appears clear that the public has a right to navigate on any stream that will reasonably allow the recreational use of a canoe and which may be reached by public access, the further range of permissible activities remains only partially defined. Entering upon the land of another without permission or privilege is made a crime by Ohio statute. ORC § 2911.21. Since the adjacent landowners own the beds of streams, this presumably makes wading a stream or even anchoring a boat without permission a trespass. A person boating on a navigable river has the right to moor in front of private land to do such things as repair his engine since this is incidental to navigation and commerce,
but the boat owner has no right to run a line to privately-owned shore except during emergencies. *Pollock v. The Cleveland Ship Building Co.*, 56 Ohio St. 655 (1897). An Ohio Attorney General's Opinion holds "that a boater confronted with a dam obstructing a navigable watercourse is privileged to enter privately-owned land to portage his boat around the dam so long as he takes the nearest practical route and ... conducts himself in a reasonable manner so as to avoid actual injury to the land upon which he travels." Opinion No. 80-093, 1980 Ohio AG LEXIS 12, at *2--*3. A person boating on a navigable stream also has the right to fish in the waters of the stream. *Winous Point Shooting Club v. Slaughterbeck*, 96 Ohio St. 139 (1917).

Lakes are less likely to be found navigable, even though they may be eminently suited for recreational boating. A privately owned lake without public access is considered to be non-navigable. In *Lembeck v. Nye*, 47 Ohio St. 336 (1890), the Ohio Supreme court stated, "A non-navigable inland lake is the subject of private ownership; and where it is so owned, neither the public, nor an owner of adjacent lands, whose title extends only to the margin thereof, have a right to boat upon, or take fish from, its waters." *Id.* at 339 (court syllabus). A later decision held that "the exclusive right to fish ... is vested in the owner of the land underlying waters which are not legally navigable, except where such waters are a portion of a body of water that is legally navigable." *Ohio Water Service Co. v. Ressler*, 173 Ohio St. 33, 39 (1962). This would seem to imply that a boater may legally access a lake for navigation and fishing if he can float into it via a navigable stream.

Navigability is also defined in different ways by several federal and state statutes, most notably to define 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.

**C. Removal of Obstructions to Streamflow.**

Federal law prohibits obstruction of navigable waters without approval of the Chief of Engineers and the Secretary of the Army, and in some cases the consent of Congress. 33 U.S.C. §§ 401 et seq. An Ohio statute also prohibits obstruction of a navigable river, harbor, or collection of water. ORC § 3767.13. Even without statute, obstruction of a navigable river may be a public nuisance. *Hickock v. Hine*, 23 Ohio St. 523 (1872). In at least one case, an obstruction to flow on a navigable stream was ordered removed. *State ex rel Brown v. Newport Concrete Co.*, 44 Ohio App. 2d 121 (1975).
There is no legal responsibility to keep non-navigable streams clear of obstructions. Governmental entities at the municipal, county, state, and federal levels have the statutory authority to undertake obstruction removal 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 (non-navigable) streams flowing through their property clear of 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 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 probably 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.

V. RESEARCH.

Helpful materials for further research into Ohio water law have been noted throughout the foregoing survey; however, see particularly the publications noted in the first paragraph of the survey.

In addition helpful information can be obtained from state agency websites. The website for the Ohio Department of Natural Resources Division of Water is: www.dnr.state.oh.us/water. The website for the Ohio Environmental Protection Agency is: www.epa.state.oh.us. The website for the Ohio Department of Agriculture is: www.ohioagriculture.gov/.

Agency regulations can be found in the Ohio Admin. Code. The Ohio Department of Natural Resources has title 1501 and the Ohio Environmental Protection Agency has title 3745.
WATER AND WATER LAW
OHIO
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WATER WITHDRAWAL LAW

Reasonable Use Doctrine. The question of whether or not there is a property right to ground water has now been answered. In McNamara v. Rittman, 107 Ohio St.3d 243, 2005-Ohio-6433, the Ohio Supreme Court held (in paragraph 22) that "The title to property includes the right to use the groundwater beneath that property. The 'reasonable use' standard set forth in Cline [Cline v. Am. Aggregates Corp. (1984), 15 Ohio St.3d384, 15 OBR 501, 474 N.E.2d 324] greatly expanded water rights protection, reflecting the importance of water rights to every piece of property. Cline recognizes the essential relationship between water and property and confirms that groundwater rights are a separate right in property."

While this decision clearly concluded that Ohio landowners have a property interest in the groundwater underlying their land, it did not mean that landowners have a proprietary interest in the water itself—what is owned is not the water but rather the right to withdraw and use the water. The Court explained (in paragraph 28) that "Separate title to the actual groundwater is not required to protect a landowner's use of that water. By way of analogy, a riparian owner does not own the water in a stream that runs along his property, but he does own the right to the reasonable use of the stream as a part of the title to his real estate." And the Court stated (in paragraph 31) that "... this court in Cline found that 'the advancement of scientific knowledge can insure the protection of a landowner's property rights in ground water to the same degree that the riparian doctrine protects the interests of landowners adjacent to a stream.' "