Legal Standards for Storm Water Drainage in Ohio

A. Reasonable Use Rule – Surface Water

The Ohio Supreme Court has adopted the "reasonable use rule" as the basis for court decisions involving disposition of surface water. The most cited case on the subject is *McGlashan v. Spade Rockledge Corp.*, 62 Ohio St. 2d 55 (1980).

"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 reason able 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."

B. Governmental immunity in storm water cases.

The Ohio Political Subdivision Tort Liability Act (the "Act") was codified as R.C. Chapter 2744 in 1985 in response to the judicial abrogation of sovereign immunity in Ohio in the early 1980s. The Act creates a three-part scheme to govern the liability of a political subdivision.

1. Immunity for governmental functions.

R.C. 2744.02(A)(1) provides that "a political subdivision is not liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision." This grant of immunity applies to all "governmental functions." The "design and construction" of a sewer system is specifically listed as a "governmental function" under R.C. 2744.01(C)(2)(1).

2. No immunity for negligent implementation of proprietary functions.

R.C. 2744.02(B)(2) creates an immunity exception under which political subdivisions are liable in damages including injury, death, or loss "caused by the negligent performance of acts by their employees with respect to proprietary functions of the political subdivisions." The definition of proprietary function includes "the maintenance, destruction, operation, and upkeep of a sewer system." R.C. 2744.01(G)(2)(d). Furthermore, the maintenance responsibility does not necessarily follow original construction or ownership of the structure. *Hedrick v. City of Columbus*, 93-LW1660 (Ohio App. 10th Dist.)

A municipality is not obliged to construct or maintain sewers, but when it does *** it becomes its duty to keep them in repair and free from conditions which will cause damage to private property; and in the performance of such duty the municipality is in the exercise of a ministerial or proprietary function and not a governmental function within the rule of municipal liability for tort. *Moore v. City of* Streetsboro, 2009-Ohio-6511 ¶73 citing *Holbrook v. Brandenburg,* 2d Dist. No. 2007 CA 106, 2009-Ohio-2320. The municipality becomes liable for damages caused by its negligence in this regard *in the same manner and to the same extent as a private person under the same circumstances." Id.* at ¶17.

3. Exceptions to liability for proprietary functions.

R.C. 2744.03(A)(3) provides a political subdivision with protection from liability if the action or failure to act by a political subdivision's employee "was within the discretion of the employee with respect to policy-making, planning, or enforcement powers" and was within the "duties and responsibilities of the office or position of the employee." To constitute a basic policy making decision, an exercise of judgment should involve the weighing of fiscal priorities, safety, and engineering considerations. *Williamson v. Pavlovich* (1989), 45 Ohio St.3d 179, 185.

R.C. 2744.03(A)(5) provides a political subdivision with protection for liability when the injury or loss resulted from the exercise of judgment or discretion in "determining whether to acquire, or how to use, equipment, supplies, materials, personnel, facilities, and other resources unless the judgment or discretion was exercised with malicious purpose, in bad faith or in a wanton or reckless manner."

C. Wetlands Preservation

1. Permit Required

Section 404 of the federal Clean Water Act requires that any person planning to discharge dredged or fill material into waters of the US must first obtain a Section 404 Permit from the US Army Corps of Engineers ("Army Corps") and a Section 401 Water Quality Certification ("WQC") from the applicable state regulatory agency (Ohio EPA in Ohio).

"Waters of the US" have been consistently interpreted by the courts to include ditches that convey surface water from a watershed into creeks, streams, rivers and lakes ***and wetlands that are hydrogeologically connected to such surface water bodies.***

When evaluating Section 404 Permit applications, the Army Corps shall first make the following determinations: i) that potential impacts to the waterway will be avoided to the maximum extent practicable; ii) the remaining unavoidable impacts must be mitigated to the extent appropriate and practicable; and iii) compensatory actions shall be taken to offset the unavoidable impacts.

2. Mitigation

In 2004, the Army Corps issued a "Mitigation Guidelines Checklist for the State of Ohio" to provide Ohio EPA with further guidance on the components of an acceptable mitigation plan to offset unavoidable impacts. Ohio EPA is required to follow the guidance in that checklist when reviewing 401 WQC applications.

The Mitigation Guidelines Checklist provides that compensatory mitigation may include the restoration, enhancement, creation and/or preservation of streams, wetlands and other aquatic resources. Compensatory mitigation should generally be "in-kind" and occur as close to the site of the adverse impact as practicable in order to minimize losses to the local aquatic ecosystem.

Out-of-kind and/or offsite compensation is appropriate only when compensation either cannot reasonably be conducted in kind and/or at the impact site, or would be more beneficial to the aquatic ecosystem. If in-kind or out-of-kind mitigation cannot be accomplished onsite or offsite, and all possibilities have been exhausted or a greater environmental benefit would be realized, the applicant may use an approved mitigation bank or participate in an approved in-lieu fee arrangement if those opportunities are available.

3. Permit decision criteria.

The Director of Ohio EPA ***shall not issue*** a Section 401 WQC unless he determines that the applicant has demonstrated that the discharge of dredged or fill material to "waters of the state" (included within the "waters of the US" definition) or the creation of any obstruction or alternation in waters of the state will: (1) not prevent or interfere with the attainment or maintenance of applicable water quality standards; and (2) not result in a violation of any other applicable sections of the Clean Water Act.

The Director ***may deny*** an application for a Section 401 WQC if he concludes that the discharge of dredged or fill material or obstructions or alterations in waters of the state will result in adverse long or short term impact on water quality.

The Director ***may impose*** such terms and conditions in a Section 401 WQC as are appropriate or necessary to ensure adequate protection of water quality, and may require the applicant to perform various environmental quality tests, either before or after the WQC is issued, to assure adequate protection of water quality.

The Director's decision to deny a Section 401 WQC application will be upheld on appeal to the Environmental Review Appeals Commission ("ERAC") if it is based on "reliable, probative and substantial evidence." *Johnson's Island Property Owners' Association vs. Schregardus*, 104 Ohio App.3d 563 (1995). As a practical matter, ERAC will generally defer to the Director's decision even if the applicant has an expert testify that the proposed activity will not cause a negative effect on water quality.

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