October 4, 1994

OPINION NO. 94-064

Frances S. Buchholzer, Director
Department of Natural Resources
Fountain Square
Columbus, Ohio 43224-1387

Dear Director Buchholzer:

You have requested an opinion regarding the procedures by which the Division of Wildlife of the Department of Natural Resources may dispose of certain property in the Division's possession. Your letter describes that property as follows:

> First, the Division is presently in possession of an assortment of drugs, drug paraphernalia, guns and deer antlers which were seized or otherwise obtained in the course of Division law enforcement activities. None of these items have been subject to forfeiture proceedings. All of the proceedings in relation to this property have been concluded. The property is maintained and identified by evidence tag numbers with no specified case number identification.
> Secondly, the Division is in possession of water samples taken by Division employees in the course of investigating various fish kill and pollution matters. Likewise, the proceedings relating to the water samples have been concluded.
> Finally, the Division is in possession of certain perishable property purchased in the course of undercover operations. These operations are presently ongoing.

With respect to the foregoing, you have asked the following questions:

1. What is the proper method by which the Division may dispose of drugs, drug paraphernalia, guns and deer antlers which have been seized in the course of Division law enforcement activities but which have not been subject to forfeiture proceedings?
2. What is the proper method by which the Division may dispose of water samples collected in pollution and fish kill investigations which have been concluded?

3. May the Division sell perishable evidence obtained in the course of undercover investigations where the investigation is ongoing once the evidence is

photographed and documented? If the answer is in the affirmative, what is the proper method of sale? Can the Division use the proceeds from the sale to fund the ongoing investigation?

Disposition of Property Seized by a Law Enforcement Agency

R.C. 2933.41 provides for the disposition of property that has been lost, abandoned, stolen, seized pursuant to a search warrant, or otherwise lawfully seized or forfeited. This section provides, in relevant part, as follows:

> (A)(1) *Any property*, other than contraband that is subject to the provisions of section 2933.43 of the Revised Code, other than property that is subject to section 3719.141 of the Revised Code, other than property that is forfeited under sections 2925.41 to 2925.45 of the Revised Code, other than a vehicle that is criminally forfeited under an order issued under section 4503.233 or 4503.234 of the Revised Code and that is to be disposed of under section 4503.234 of the Revised Code, other than property that has been lawfully seized under sections 2933.71 to 2933.75 of the Revised Code in relation to a medicaid fraud offense, and other than property that has been lawfully seized in relation to a violation of section 2923.32 of the Revised Code,[1] *that has been lost, abandoned, stolen, seized pursuant to a search warrant, or otherwise lawfully seized or forfeited, and that is in the custody of a law enforcement agency, shall be kept safely pending the time it no longer is needed as evidence, and shall be disposed of pursuant to this section.* Each law enforcement agency that has custody of any property that is subject to this section shall adopt a written internal control policy that addresses the keeping of detailed records as to the amount of property taken in by the agency, that addresses the agency's disposition of the property under this section, that provides for the keeping of detailed records of the disposition of the property, and that provides for the keeping of detailed financial records of the amount and disposition of any proceeds of a sale of the property under division (D)(8) of this section and of the general types of expenditures made out of the proceeds retained by the agency and the specific amount expended on each general type of expenditure....
> (2)(a) Every law enforcement agency that has any lost, abandoned, stolen, seized,

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[1] R.C. 2933.43 provides procedures for the seizure, forfeiture and disposition of contraband. *See* R.C. 2901.01(M) (defining "[c]ontraband" as used in the Revised Code). R.C. 3719.141 details the procedures required in the sale of controlled substances by a peace officer in the performance of official duties. R.C. 2925.41-.45 set forth forfeiture procedures for real and personal property directly connected to proceeds from felony drug abuse offenses and acts and property involved with the commission of such offenses or acts. R.C. 4503.233-.234 authorize in various situations the criminal forfeiture of a motor vehicle to the state. R.C. 2933.71-.75 require the forfeiture of any property that is obtained directly or indirectly from any medicaid fraud offense. R.C. 2923.31-.36 prescribe the procedures for forfeiture of property used in an enterprise that is part of a pattern of corrupt activity.

> or forfeited property described in division (A)(1) of this section in its custody shall comply with its written internal control policy adopted under that division relative to the property....
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> ....
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> (B) *A law enforcement agency that has property in its possession that is required to be disposed of pursuant to this section shall make a reasonable effort to locate the persons entitled to possession of the property in its custody, to notify them of when and where it may be claimed, and to return the property to them at the earliest possible time....*
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> (C) *A person loses any right he may have to the possession, or the possession and ownership, of property if any of the following applies*:
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> (1) The property was the subject, or was used in a conspiracy or attempt to commit, or in the commission, of an offense other than a traffic offense, and such person is a conspirator, accomplice, or offender with respect to the offense.
>
> (2) A court determines that the property should be forfeited because, in light of the nature of the property or the circumstances of such person, it is unlawful for the person to acquire or possess the property.
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> (D) Unclaimed or forfeited property in the custody of a law enforcement agency, other than contraband that is subject to the provisions of section 2933.43 of the Revised Code, other than property forfeited under sections 2925.41 to 2925.45 of the Revised Code, and other than property that has been lawfully seized in relation to a violation of section 2923.32 of the Revised Code, shall be disposed of on application to and order of any court of record that has territorial jurisdiction over the political subdivision in which the law enforcement agency has jurisdiction to engage in law enforcement activities.... (Emphasis and footnote added.)

Thus, an individual retains any right to possession, or possession and ownership, of property that has been lost, abandoned, stolen, seized pursuant to a search warrant, or otherwise lawfully seized or forfeited, and that is in the custody of a law enforcement agency,[2] unless the property is contraband subject to the provisions of R.C. 2933.43, or has been lawfully seized pursuant to R.C. 3719.141, or is forfeited under R.C. 2925.41-.45, R.C. 4503.233-.234, or R.C. 2933.71-.75, or has

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[2] Pursuant to R.C. 2933.26, "property [seized under a warrant] ... shall be kept by [a] judge, clerk, or magistrate [for use] as evidence," unless the court transfers such seized property to the law enforcement agency which executed the warrant. *See also* R. Crim. P. 41(D) ("[p]roperty seized under a warrant shall be kept for use as evidence by the court which issued the warrant or by the law enforcement agency which executed the warrant"). "The terms of R.C. 2933.41, thus, apply to property seized by warrant and held by a law enforcement agency at the direction of a court pursuant to R.C. 2933.26 or Ohio R. Crim. P. 41(D), but would not apply to property seized under a warrant and held by the court." 1991 Op. Att'y Gen. No. 91-021 at 2-108. Since you have indicated that the property in question is in the custody of the Division of Wildlife of the Department of Natural Resources, this opinion will not consider the disposition of property seized under a warrant by the Division and held by a judge, clerk, or magistrate.

been lawfully seized in relation to a violation of R.C. 2923.32, or the right to the possession of the property has been lost under R.C. 2933.41(C) or another provision of state or federal law. R.C. 2933.41; *accord* 1991 Op. Att'y Gen. No. 91-021 (syllabus, paragraph one). A law enforcement agency that has in its custody property that is required to be disposed of pursuant to R.C. 2933.41 must comply with its written internal control policy adopted under R.C. 2933.41(A)(1) that addresses the procedures the agency will follow in disposing of property under R.C. 2933.41. Also, a law enforcement agency must make a reasonable effort to return the property to the individual entitled to its possession at the earliest possible time. R.C. 2933.41(A)(2), (B); Op. No. 91-021 (syllabus, paragraphs two and three). If a law enforcement agency is unable to return property to its owner or if the property is forfeited, the property is disposed of on application to and order of any court of record that has territorial jurisdiction over the political subdivision in which the law enforcement agency has jurisdiction to engage in law enforcement activities. R.C. 2933.41(D).

After a court of record has determined that the unclaimed or forfeited property is no longer needed as evidence, *see* Op. No. 91-021 (syllabus, paragraph four), the law enforcement agency shall be required to dispose of the property as follows:

> (1) Drugs shall be disposed of pursuant to section 3719.11 of the Revised Code or placed in the custody of the secretary of the treasury of the United States for disposal or use for medical or scientific purposes under applicable federal law.
> (2) Firearms and dangerous ordnance suitable for police work may be given to a law enforcement agency for that purpose. Firearms suitable for sporting use, or as museum pieces or collectors' items, may be sold at public auction pursuant to division (D)(8) of this section. Other firearms and dangerous ordnance shall be destroyed by the agency or shall be sent to the bureau of criminal identification and investigation for destruction by the bureau.
> (3) Obscene material shall be destroyed.
> (4) Beer, intoxicating liquor, or alcohol seized from a person who is not the holder of a permit issued under Chapters 4301. and 4303. of the Revised Code or is an offender, and forfeited to the state under section 4301.45 or 4301.53 of the Revised Code shall be sold by the department of liquor control, if the department determines that the beer, intoxicating liquor, or alcohol is fit for sale. If any tax imposed under Title XLIII of the Revised Code has not been paid in relation to the beer, intoxicating liquor, or alcohol, the proceeds of the sale shall first be used to pay the tax. All other money collected under division (D)(4) of this section shall be paid into the state treasury. Any such beer, intoxicating liquor, or alcohol that the department determines to be unfit for sale shall be destroyed.
> (5) Money received by an inmate of a correctional institution from an unauthorized source or in an unauthorized manner shall be returned to the sender, if known, or deposited in the inmate's industrial and entertainment fund if the sender is not known.
> (6) Vehicles and vehicle parts forfeited under sections 4549.61 to 4549.63 of the Revised Code may be given to a law enforcement agency for use in the performance of its duties. Such parts may be incorporated into any other official vehicle. Parts

> that do not bear vehicle identification numbers or derivatives of them may be sold or disposed of as provided by rules of the director of public safety. Parts from which a vehicle identification number or derivative of it has been removed, defaced, covered, altered, or destroyed and that are not suitable for police work or incorporation into an official vehicle shall be destroyed and sold as junk or scrap.
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> (7)(a) Computers, computer networks, computer systems, and computer software suitable for police work may be given to a law enforcement agency for that purpose. Other computers, computer networks, computer systems, and computer software shall be disposed of pursuant to division (D)(8) of this section.
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> (b) As used in this section, "computers," "computer networks," "computer systems," and "computer software" have the same meaning as in section 2913.01 of the Revised Code.
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> (8) Other unclaimed or forfeited property, with the approval of the court, may be used by the law enforcement agency that has possession of it. If the other unclaimed or forfeited property is not used by the law enforcement agency, it may be sold, without appraisal, at a public auction to the highest bidder for cash, or, in the case of other unclaimed or forfeited moneys, disposed of in another manner that the court considers proper in the circumstances.

R.C. 2933.41(D).

R.C. 2933.41 thus controls the disposition of property, other than contraband that is subject to the provisions of R.C. 2933.43, other than property that is subject to R.C. 3719.141, other than property that is forfeited under R.C. 2925.41-.45, other than a vehicle that is criminally forfeited pursuant to R.C. 4503.233-.234, other than property that has been lawfully seized under R.C. 2933.71-.75 in relation to a medicaid fraud offense, and other than property that has been lawfully seized in relation to a violation of R.C. 2923.32, that has been lost, abandoned, stolen, seized pursuant to a search warrant, or otherwise lawfully seized or forfeited, and that is in the custody of a law enforcement agency. Accordingly, if the Division of Wildlife is a "law enforcement agency," as that phrase is used in R.C. 2933.41, the Division must comply with the provisions of R.C. 2933.41 when disposing of property in its custody.

The Division of Wildlife of the Department of Natural Resources is a Law Enforcement Agency

No provision within R.C. Title 29 (criminal law) specifically defines the term "law enforcement agency." R.C. 2901.01, however, defines "law enforcement officer," as used in the Revised Code, to include

> [a]n officer, agent, or employee of the state or any of its agencies, instrumentalities, or political subdivisions, upon whom, by statute, a duty to conserve the peace or to enforce all or certain laws is imposed and the authority to arrest violators is conferred, within the limits of such statutory duty and authority....

R.C. 2901.01(K)(2).

Because the General Assembly has defined the term "law enforcement officer" to include an officer, agent, or employee of a state agency who is statutorily required to enforce all or certain laws and conferred the authority to arrest violators, it reasonably appears that the General Assembly intended that a state agency that employs such officers, agents, or employees be classified as a law enforcement agency. *See* R.C. 1547.30(A)(2) (for purposes of R.C. 1547.301-.302 and R.C. 1547.304, "_[l]aw enforcement agency_ means any organization or unit comprised of law enforcement officers, as defined in division (K)(2) of section 2901.01 of the Revised Code"); R.C. 1547.303(A)(2) (as used in R.C. 1547.303-.304, "_[l]aw enforcement agency_ means any organization or unit comprised of law enforcement officers, as defined in division (K)(2) of section 2901.01 of the Revised Code"); *see also* 1968 Op. Att'y Gen. No. 68-037 at 2-45 ("[i]t would appear that the legislature used the term _law enforcement agency_ in a broad sense, the same that _law enforcement officer_ is used in a broad sense, and that depending upon the organization of the governmental activity the term may be interpreted to mean a department (police department), or an elected official (sheriff), or a division, (division of state highway patrol), or in cases of police constables designed as such and paid by a board of township trustees pursuant to Section 509.01, Revised Code, the board of township trustees would be the law enforcement agency by which the constable is employed"). Also, if the General Assembly had intended a narrower reading of the term "law enforcement agency," as used in R.C. 2933.41, it could have communicated that intention expressly, having done so in other instances. *See, e.g.*, R.C. 5123.61(A)(2) (as used in R.C. 5123.61, which provides for the reporting of abuse or neglect of a mentally retarded or developmentally disabled adult, "_[l]aw enforcement agency_ means the state highway patrol, the police department of a municipal corporation, or a county sheriff"). Thus, the Division is a law enforcement agency for purposes of R.C. 2933.41 if the Division employs individuals who are statutorily required to enforce all or certain laws and upon whom is conferred the authority to arrest violators.

R.C. 1531.13, as amended by Am. Sub. S.B. 182, 120th Gen. A. (1994) (eff. Oct. 20, 1994), sets forth the powers and duties of wildlife officers employed by the Division of Wildlife:

> The law enforcement officers of the division of wildlife shall be known as "wildlife officers." The chief of the division of wildlife, wildlife officers, and such other employees of the division as the chief of the division of wildlife designates, and other officers who are given like authority, shall enforce all laws pertaining to the taking, possession, protection, preservation, management, and propagation of wild animals and all division rules. They shall enforce all laws against hunting without permission of the owner or authorized agent of the land on which such hunting is done. They may arrest on view and without issuance of a warrant.

Accord R.C. 1533.67. The plain language of R.C. 1531.13 thus states that wildlife officers employed by the Division are law enforcement officers. In addition, the wildlife officers are required to enforce certain laws and are authorized to arrest violators. Accordingly, wildlife officers employed by the Division are "law enforcement officers," as defined in R.C. 2901.01(K)(2).

Because the Division employs law enforcement officers, the Division is a "law enforcement agency" for purposes of R.C. 2933.41. It follows, therefore, that the Division must comply with the provisions of R.C. 2933.41 when disposing of property in its custody.

Drugs, Drug Paraphernalia, and Guns in the Custody of the Division of Wildlife of the Department of Natural Resources are to be Disposed of Pursuant to R.C. 2933.41

Drugs, drug paraphernalia, and guns constitute property for purposes of R.C. 2933.41. *See* R.C. 2901.01(J)(1) (as used in the Revised Code, "_[p]roperty_ means any property, real or personal, tangible or intangible, and any interest or license in such property"); R.C. 1.59(E) (unless another definition is provided in a statute or a related statute, "_[p]roperty_ means real and personal property"). Thus, drugs, drug paraphernalia, and guns that have been lost, abandoned, stolen, seized pursuant to a search warrant, or otherwise lawfully seized or forfeited, and that are in the custody of the Division are to be disposed of pursuant to R.C. 2933.41, unless such property is contraband that is subject to the provisions of R.C. 2933.43, property that is subject to R.C. 3719.141, property that is forfeited under R.C. 2925.41-.45, property that has been lawfully seized under R.C. 2933.71-.75 in relation to a medicaid fraud offense, or property that has been lawfully seized in relation to a violation of R.C. 2923.32. R.C. 2933.41(A)(1).

You state that the foregoing property has not been subject to forfeiture proceedings and that all of the proceedings in relation to the property have been concluded. It is also assumed, for purposes of this opinion, that none of that property is or has been subject to the provisions of R.C. 2933.43, R.C. 2925.41-.45, R.C. 2933.71-.75, or R.C. 2923.32.[3] Moreover, you have not indicated that any of the drugs in question are controlled substances that are to be sold by a peace officer in the performance of his official duties; therefore, it is further assumed that the drugs are not subject to R.C. 3719.141, which details the procedures required in the sale of controlled substances by a peace officer in the performance of official duties. Accordingly, drugs, drug paraphernalia, and guns, which have not been disposed of pursuant to the provisions enumerated in R.C. 2933.41(A)(1) or another applicable provision of state or federal law, that have been lost, abandoned, stolen, seized pursuant to a search warrant, or otherwise lawfully seized or forfeited, and that are in the custody of the Division of Wildlife of the Department of Natural Resources are to be disposed of pursuant to R.C. 2933.41(A)(2)-(D). *See* Op. No. 91-021 at 2-108 n.2 ("[w]here a statute sets up forfeiture procedures separate from R.C. 2933.41, those procedures appear to control the methods employed").

The Division must first comply with its written internal control policy that addresses the procedures the Division will follow in effecting that disposition. The Division must also make a reasonable effort to return any such property to the individual entitled to its possession at the earliest possible time, unless that property was the subject, or was used in a conspiracy or attempt to

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[3] You have stated that the guns in question have not been subject to forfeiture proceedings. This opinion thus considers only the disposition of guns that have not been forfeited to the state pursuant to the provisions that appear in R.C. Chapter 1531.

commit, or in the commission, of an offense other than a traffic offense, or that a court determines should be forfeited because, in light of the nature of the property or the circumstances of such person, it is unlawful for the person to acquire or possess the property.[4] R.C. 2933.41(A)(2), (B), (C). If the Division is unable to return the property to its owner, the property shall be disposed of only after a court of record that has territorial jurisdiction over the political subdivision in which the Division has jurisdiction to engage in law enforcement activities has determined that the property is no longer needed as evidence. R.C. 2933.41(D); Op. No. 91-021 (syllabus, paragraph four). After a court of record has determined that the property is no longer needed as evidence, the Division is required to dispose of the property in accordance with the provisions of R.C. 2933.41(D).

With respect to the disposition of drugs, drug paraphernalia, and guns, R.C. 2933.41(D) provides as follows:

> (1) *Drugs* shall be disposed of pursuant to section 3719.11 of the Revised Code or placed in the custody of the secretary of the treasury of the United States for disposal or use for medical or scientific purposes under applicable federal law.
> (2) *Firearms* and dangerous ordnance suitable for police work may be given to a law enforcement agency for that purpose. Firearms suitable for sporting use, or as museum pieces or collectors' items, may be sold at public auction pursuant to division (D)(8) of this section. Other firearms and dangerous ordnance shall be destroyed by the agency or shall be sent to the bureau of criminal identification and investigation for destruction by the bureau.
> ....
> (8) *Other* unclaimed or forfeited *property*, with the approval of the court, may be used by the law enforcement agency that has possession of it. If the other unclaimed or forfeited property is not used by the law enforcement agency, it may be sold, without appraisal, at a public auction to the highest bidder for cash, or, in the case of other unclaimed or forfeited moneys, disposed of in another manner that the court considers proper in the circumstances. (Emphasis added.)

Thus, if a court of record determines that drugs, drug paraphernalia, and guns that have been lost, abandoned, stolen, seized pursuant to a search warrant, or otherwise lawfully seized or forfeited, and

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[4] Although R.C. 2933.41 does not expressly prohibit the return of illicit drugs and drug paraphernalia that are lost, abandoned, stolen, seized pursuant to a search warrant, or otherwise lawfully seized or forfeited, and that are in the custody of a law enforcement agency when no formal charges are brought against an individual, it is reasonable to infer from the statutory scheme concerning the disposition of property that the General Assembly did not intend for such property, which is contraband for purposes of the Revised Code, R.C. 2901.01(M), to be returned to an individual. *See* R.C. 2933.43 (setting forth procedures for the seizure, forfeiture, and disposition of contraband). *See generally* R. Crim. P. 26 ("[p]hysical property, *other than contraband*, as defined by statute, under the control of a Prosecuting Attorney for use as evidence in a hearing or trial should be returned to the owner at the earliest possible time" (emphasis added)).

that are in the custody of the Division, are no longer needed as evidence, the Division is required to dispose of these items in accordance with the provisions of R.C. 2933.41(D)(1), (2), and (8).[5]

Disposition of Deer Antlers

Your first question also asks about the disposition of deer antlers in the Division's possession. Information provided indicates that the deer antlers were unlawfully taken by individuals, and that the antlers have not been subject to the forfeiture proceedings set forth in R.C. 1531.20.[6]

As stated above, an individual retains any right to possession, or possession and ownership, of property that has been lost, abandoned, stolen, seized pursuant to a search warrant, or otherwise lawfully seized or forfeited, and that is in the custody of the Division, unless the property is contraband subject to the provisions of R.C. 2933.43, or has been lawfully seized pursuant to R.C. 3719.141, or is forfeited under R.C. 2925.41-.45, R.C. 4503.233-.234, or R.C. 2933.71-.75, or has been lawfully seized in relation to a violation of R.C. 2923.32, or the right to possession of the property has been lost under R.C. 2933.41(C) or another provision of state or federal law. R.C. 2933.41; *accord* Op. No. 91-021 (syllabus, paragraph one). Moreover, the Division must make a reasonable effort to return property to the individual entitled to its possession at the earliest possible time. R.C. 2933.41(A)(2), (B); Op. No. 91-021 (syllabus, paragraphs two and three).

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[5] R.C. 1531.06(G) authorizes the Chief of the Division of Wildlife to "sell confiscated or forfeited items." Such authority, however, must be exercised in conjunction with those statutes related to the seizure, forfeiture, and disposition of property by law enforcement agencies. *See generally Warner v. Ohio Edison Co.,* 152 Ohio St. 303, 89 N.E.2d 463 (1949) (syllabus, paragraph one) ("[s]tatutes relating to the same subject matter should be construed *in pari materia,* although they were enacted at different sessions of the General Assembly").

[6] R.C. 1531.20 provides, in part, as follows:

> Any motor vehicle, all-terrain vehicle, boat, net, seine, trap, ferret, gun, or other device used in the unlawful taking of wild animals is a public nuisance. Each wildlife officer, or other officer with like authority, shall seize and safely keep such property and the illegal results of its use, and unless otherwise ordered by the chief of the division of wildlife shall institute, within five days, proceedings in a proper court of the county for its forfeiture.
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> If the owner or person unlawfully using the property at the time of its seizure is arrested, pleads guilty, and confesses that the property at the time of its seizure was being used by him in violation of law or division rule, no proceeding of forfeiture shall be instituted, but the court in imposing sentence shall order the property so seized forfeited to the state, to be disposed of thereafter as the chief of the division of wildlife directs.

Because "[t]he ownership of and the title to all wild animals in this state, not legally confined or held by private ownership legally acquired, is in the state," R.C. 1531.02, the Division retains the right to possession and ownership of any deer antlers in its custody. *See* R.C. 1531.13 (wild animals or parts of a wild animal taken or had in possession contrary to law or division order that are seized by the wildlife officers of the Division shall escheat to the state). Deer antlers that have been lost, abandoned, stolen, seized pursuant to a search warrant, or otherwise lawfully seized or forfeited, and that are in the custody of the Division, thus do not constitute unclaimed or forfeited property that is subject to the disposal provisions of R.C. 2933.41(D). In addition, deer antlers, as a general matter, are not subject to the provisions of R.C. 2933.43, R.C. 3719.141, R.C. 2925.41-.45, R.C. 4503.233-.234, R.C. 2933.71-.75, R.C. 2923.32, or R.C. 2933.41(C). Therefore, deer antlers that have been lost, abandoned, stolen, seized pursuant to a search warrant, or otherwise lawfully seized or forfeited, and that are in the custody of the Division, are the property of the Division.

No provision within the Revised Code directs the disposal of deer antlers in the possession of the Division. As a result, the Division may determine a reasonable manner in which to dispose of these antlers. *See State ex rel. Attorney General v. Morris*, 63 Ohio St. 496, 512, 59 N.E. 226, 230 (1900) (where a statute authorizes performance of a particular act, but does not specify how the act is to be performed, the inference is that it is to be carried out in a reasonable manner); *cf.* R.C. 1531.20 (property forfeited to the Division pursuant to a court order is to be disposed of as the Chief of the Division directs).

Disposal of Water Samples

Your second question asks what is the proper method by which the Division may dispose of water samples collected in pollution and fish kill investigations which have been concluded. Information provided indicates that the water samples were taken from private and public ponds, lakes, streams, and other natural bodies of water.

As stated above, R.C. 2933.41 controls the disposition of property that has been lost, abandoned, stolen, seized pursuant to a search warrant, or otherwise lawfully seized or forfeited, and that is in the custody of a law enforcement agency. The language of the statute further indicates that the statute applies to property that is to be returned, if possible, to a person entitled to its possession. *See Village of Chagrin Falls v. Loveman*, 34 Ohio App. 3d 212, 216, 517 N.E.2d 1005, 1009 (Cuyahoga County 1986) ("[a] prerequisite to reaching R.C. 2933.41(C)(2) is a determination of whether R.C. 2933.41(C) is met; *i.e.*, whether a person may have a right to possession of the property so that he loses this right if R.C. 2933.41(C)(1) or (C)(2) applies"). Resolution of your question thus turns first on whether an individual is entitled to possession of a sample of water that has been taken from a private or public body of water.

In *Village of Chagrin Falls v. Loveman*, the court, in determining whether an individual was entitled to possession of a sum of money, defined the term "possession," as used in R.C. 2933.41(C), and stated as follows:

According to Black's Law Dictionary (5 Ed. 1979), at 1047, "possession" is defined as follows:

> "The detention and control, or the manual or ideal custody, of anything which may be the subject of property, for one's use and enjoyment, either as owner or as the proprietor of a qualified right in it, and either held personally or by another who exercises it in one's place and name. ***"

Village of Chagrin Falls v. Loveman, 34 Ohio App. 3d at 216, 517 N.E.2d at 1009. Applying this definition to the situation presented in your request, it appears that an individual is not entitled to possession of a sample of water since a person is not, by law, the owner or proprietor of a qualified right in the water that comprises the sample. In Ohio, as in most other states, "the right to use water is considered real property, but the water itself is not property of the landowner." Ohio Legislative Service Commission, *Water Rights in Ohio* 10 (1955). As stated in W. Goldfarb, *Water Law* 11 (2nd ed. 1988),

> [a] right to a particular quantity of water is private property because it is unique to the rightholder, but it is a different mode of property than that in a plot of land or an automobile. Water in a natural waterbody is so important to society that it cannot be privately owned. It is owned by each state as trustee for its citizens. In other words, water in natural waterbodies is "public property"; it belongs to all citizens of the state. A private citizen can only own the right to use such water. This is what lawyers call a "usufructuary right." It is not meaningless semantics to say that the subject of a private property right in water quantity is not the water itself but the use of the water, even though in many American states water rights can be bought and sold.

See also State ex rel. McElroy v. City of Akron, 84 Ohio Law Abs. 385, 389, 168 N.E.2d 500, 503 (C.P. Summit County 1960) ("[t]here is no ownership in the water itself"), *rev'd on other grounds*, 173 Ohio St. 189, 181 N.E.2d 26 (1962), *appeal dismissed for want of a substantial federal question*, 371 U.S. 35 (1962).

In light of the above, it appears that a person is not the owner or proprietor of a qualified right in a water sample. Thus, a person is not entitled to possession of a sample of water, and the provisions of R.C. 2933.41 do not control the disposition of water samples in the custody of the Division.

In addition, no other provision of the Revised Code or Ohio Administrative Code addresses the disposition of water samples. Because the Division is authorized to conduct pollution and fish kill investigations, *see* R.C. 1531.131; R.C. 1531.14; R.C. 1531.29; R.C. 1533.66; R.C. 1533.67, the Division may determine a reasonable manner in which to dispose of the water samples collected during the course of those investigations. *See State ex rel. Hunt v. Hildebrant*, 93 Ohio St. 1, 112 N.E. 138 (1915) (syllabus, paragraph four) ("[w]here an officer is directed by the constitution or a statute of the state to do a particular thing, in the absence of specific directions covering in detail the manner and method of doing it, the command carries with it the implied power and authority

necessary to the performance of the duty imposed"), *aff'd sub. nom. State ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916); *Jewett v. Valley Ry. Co.*, 34 Ohio St. 601, 608 (1878) ("[w]here authority is given to do a specified thing, but the precise mode of performing it is not prescribed, the presumption is that the legislature intended the party might perform it in a reasonable manner"). The precise manner or method of disposing of water samples that are no longer needed as evidence is thus a matter within the Division's discretion.[7]

Disposal of Perishable Evidence

Your final question asks whether the Division of Wildlife may sell perishable evidence purchased by the Division in the course of an undercover investigation of possible criminal activity, where the investigation is ongoing, once the evidence is photographed and documented. Your question arises because of certain language in R. Crim. P. 26, which provides as follows:

> Physical property, other than contraband, as defined by statute, under the control of a Prosecuting Attorney for use as evidence in a hearing or trial should be returned to the owner at the earliest possible time. *To facilitate the early return of such property, where appropriate, and by court order, photographs, as defined in Evid. R. 1001(2), may be taken of the property and introduced as evidence in the hearing or trial.* The admission of such photographs is subject to the relevancy requirements of Evid. R. 401, Evid. R. 402, Evid. R. 403, the authentication requirements of Evid. R. 901, and the best evidence requirements of Evid. R. 1002. (Emphasis added.)

Thus, R. Crim. P. 26 provides that property that is in the custody of a prosecuting attorney may be returned to its owner -- here, the Division of Wildlife -- if a court determines that photographs may be taken of the property and introduced as evidence in a hearing or trial. R. Crim. P. 26 does not address the disposition of property, photographs of which have been introduced as evidence in a hearing or trial, that is returned to its owner by a court. Further, no provision in the Ohio Rules of Criminal Procedure, Ohio Rules of Evidence, or the Ohio Revised Code provides for the disposition of such property after it is returned to its owner. It could be inferred, therefore, that an owner of property, photographs of which have been introduced as evidence in a hearing or trial, is not required to retain custody or ownership of that property until the conclusion of the criminal proceedings involving the property.

As a practical matter, however, an owner should retain custody or ownership of property, photographs of which have been introduced as evidence in a hearing or trial, until all of the criminal proceedings involving the property have been concluded, insofar as the court may require the owner to produce the property for use at a later time in conjunction with the criminal proceedings. Indeed, R.C. 2933.41(A) expressly provides that certain property obtained by various other means ("lost, abandoned, stolen, seized pursuant to a search warrant, or otherwise lawfully seized or forfeited")

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[7] As a general matter, it would be prudent for the Division to consult with legal counsel before disposing of water samples that are no longer needed as evidence.

"shall be kept safely pending the time it no longer is needed as evidence," and it would be sensible to do the same with property that has been purchased by the Division in the course of a criminal investigation. Accordingly, when the Division has purchased perishable property in the course of an undercover investigation for eventual use as evidence in a criminal proceeding, the Division should not sell that property prior to the conclusion of that criminal proceeding, even though a photograph of that property has been introduced into evidence.[8]

You have also asked, if the Division is authorized to sell perishable property, photographs of which have been introduced into evidence, how is the property to be sold, and may the Division use the proceeds from the sale to fund the ongoing investigation. Because the Division should refrain from selling perishable property purchased in the course of an undercover investigation that has not been concluded, it is unnecessary to address the foregoing questions.

Conclusion

Based on the foregoing discussion, it is my opinion, and you are hereby advised that:

1. The Division of Wildlife of the Department of Natural Resources is a law enforcement agency for purposes of R.C. 2933.41.

2. Drugs, drug paraphernalia, and guns, which have not been disposed of pursuant to the provisions enumerated in R.C. 2933.41(A)(1) or another applicable provision of state or federal law, that have been lost, abandoned, stolen, seized pursuant to a search warrant, or otherwise lawfully seized or forfeited, and that are in the custody of the Division of Wildlife of the Department of Natural Resources, are to be disposed of pursuant to R.C. 2933.41(A)(2)-(D).

3. Deer antlers that have been lost, abandoned, stolen, seized pursuant to a search warrant, or otherwise lawfully seized or forfeited, and that are in the custody of the Division of Wildlife of the Department of Natural Resources, are the property of the Division. The Division may determine a reasonable manner in which to dispose of the deer antlers.

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[8] In some instances, it may, as a practical matter, be necessary for the Division to dispose of perishable evidence before a criminal proceeding has been concluded. For example, the perishable evidence may be an endangered species that cannot be kept alive throughout the entire course of a criminal proceeding. Prudence may demand that the Division, upon consultation with counsel, dispose of the perishable evidence before the criminal proceeding is finally concluded. *See generally* R.C. Chapters 1531 and 1533 (the duties of the Division include the protection, preservation, propagation, and management of wild animals and sanctuaries and refuges for the propagation of such wild animals). In the case of a living animal, for example, the Division may determine that the most appropriate disposition is to return the animal to its natural habitat.

4. The precise manner or method of disposing of water samples that are no longer needed as evidence is a matter within the discretion of the Division of Wildlife of the Department of Natural Resources.

5. When the Division of Wildlife of the Department of Natural Resources has purchased perishable property in the course of an undercover investigation for eventual use as evidence in a criminal proceeding, the Division should not sell that property prior to the conclusion of that criminal proceeding, even though a photograph of that property has been introduced into evidence.

Respectfully,

LEE FISHER
Attorney General

October 4, 1994

Frances S. Buchholzer, Director
Department of Natural Resources
Fountain Square
Columbus, Ohio 43224-1387

SYLLABUS: 94-064

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