

OPINION NO. 94-001

Syllabus:

1. Moneys in the waterways safety fund established under R.C. 1547.75 may be expended only for the purposes set forth in R.C. 1547.55, R.C. 1547.67, R.C. 1547.68, R.C. 1547.71, and R.C. 1547.72 to benefit all users of Ohio waterways.
2. Moneys in the waterways safety fund established under R.C. 1547.75 may be expended for dredging that is undertaken for the purposes set forth in R.C. 1547.71 or R.C. 1547.72.
3. Moneys in the waterways safety fund established under R.C. 1547.75 may be expended for activities that benefit private homeowners only if those activities advance the purposes set forth in R.C. 1547.55, R.C. 1547.67, R.C. 1547.68, R.C. 1547.71, and R.C. 1547.72 to benefit all users of Ohio waterways.
4. Moneys in the waterways safety fund established under R.C. 1547.75 may be expended for such activities as enhancing fish habitats, painting, providing trash cans and picnic areas, mowing grass, removing snow and ice, and building park areas with sediment only if a reasonable basis exists for concluding that those activities are necessary or reasonably incidental to the advancement of the purposes set forth in R.C. 1547.55, R.C. 1547.67, R.C. 1547.68, R.C. 1547.71, and R.C. 1547.72.

To: David D. Sturtz, Inspector General, Columbus, Ohio
By: Lee Fisher, Attorney General, February 18, 1994

You have requested an opinion regarding the purposes for which moneys in the waterways safety fund may be expended. The waterways safety fund has been created in the state treasury by R.C. 1547.75, and is administered by the Division of Watercraft within the Department of Natural Resources (DNR). Your request presents the following questions concerning the use of moneys in that fund:

1. Is the Waterways Safety Fund a dedicated fund which is to be used solely for the benefit of Ohio's recreational boaters?
2. [Do] the Department of Natural Resources and its Director have the authority to use monies from the Waterways Safety Fund for Dredging?
3. [Do] the Department of Natural Resources and its Director have the authority to use monies appropriated from the Waterways Safety Fund for the specific use of dredging streams flowing through and from a private home owner's property into a state maintained lake or stream? In particular, can dredging be used to benefit the private home owner and confer a tangible improvement which is realized solely by that home owner and not the citizens of Ohio?
4. [Do] the Department of Natural Resources and its Director have the authority to use monies appropriated for dredging for uses other than dredging Ohio's lakes and streams? In particular, can the Department use such appropriated monies to enhance fish habitats, build park areas with sediment, build or acquire picnic

tables and use dredge personnel for snow removal, mowing grass, painting and building refuse cans?

Waterways Safety Fund Expenditures

Created pursuant to R.C. 1547.75, the waterways safety fund comprises various watercraft licensing and registration fees that the Chief of the Division of Watercraft collects under R.C. Chapter 1547 (watercraft and waterways). See R.C. 1547.55. This fund also comprises fines, forfeitures, and penalties arising from particular categories of prosecutions, convictions, confiscations, and other actions commenced by DNR law enforcement officers or state watercraft officers. See R.C. 1547.79.

The purposes for which moneys in the watercraft safety fund may be expended are set forth in R.C. 1547.55, R.C. 1547.67, R.C. 1547.68, R.C. 1547.71, and R.C. 1547.72. R.C. 1547.55 authorizes the use of moneys in that fund to pay all expenses for salaries, operation, and administration of the Division of Watercraft; for publishing statutes and rules concerning watercraft, for publications that are solely for the purpose of providing education in watercraft safety, sanitation, or operation, and for other educational devices for that purpose; and to make payments to the Division of Parks and Recreation, the Division of Wildlife, conservancy districts, and political subdivisions of the state as provided in R.C. 1547.56.¹ R.C. 1547.55 also provides that "[n]o moneys paid into the [waterways safety] fund shall be used or paid out for any purposes other than those for which the fund is appropriated."

R.C. 1547.67 authorizes the Division of Watercraft, with the approval of the Director of Natural Resources, to expend such funds as are appropriated by the General Assembly for the purpose of assisting political subdivisions, conservancy districts, and state departments to establish or maintain and operate a marine patrol for the purpose of enforcing R.C. Chapter 1547 and administrative rules promulgated under that chapter. R.C. 1547.67 further provides that such moneys from the waterways safety fund "as determined to be necessary by the division of watercraft not to exceed ten per cent of all moneys accruing to the fund" may be expended for the foregoing purpose. Moneys that are thus allocated under R.C. 1547.67 may be used "for the purchase, maintenance, and operation of vessels and marine equipment, educational materials, and personnel salaries, necessary for enforcement of [R.C. Chapter 1547] and rules adopted under it, and to provide for the public safety." *Id.* R.C. 1547.68 authorizes similar appropriations by the General Assembly for expenditure by the Division of Watercraft, with the approval of the Director of Natural Resources, to assist political subdivisions, conservancy districts, state departments, or nonprofit organizations in establishing or participating in boating safety education programs. Moneys in the waterways safety fund "determined to be necessary by the division but not to exceed ten per cent of all moneys accruing to the fund" may also be expended for that purpose. *Id.* Moneys that are thus allocated under R.C. 1547.68 may be used "for personnel salaries and training, materials, supplies, equipment, and related expenses needed to conduct boating education programs."

R.C. 1547.71 addresses the responsibility of the Division of Watercraft to act as the state's refuge and small boat harbor agency for purposes of federal law. In that regard, R.C. 1547.71 provides that the Division of Watercraft "shall participate and co-operate with the

¹ R.C. 1547.56 provides for refunds of watercraft registration fees by the Chief of the Division of Watercraft to the Division of Parks and Recreation, the Division of Wildlife, conservancy districts, and other political subdivisions of the state.

[army] corps of engineers in acquiring, constructing, and maintaining refuge and light draft vessel harbor projects, channels, and facilities for vessels in the navigable waters lying within the boundaries of the state." Pursuant to R.C. 1547.75, moneys in the waterways safety fund may be expended by the Division of Watercraft in carrying out those activities.

R.C. 1547.72 addresses the authority of the Division of Watercraft to undertake certain activities that pertain to watercraft harboring, mooring, docking, launching, and storing, and that foster watercraft safety. R.C. 1547.72 reads as follows:

The division of watercraft, whenever it considers it in the best interests of the state, and as an aid to lake commerce and navigation, or recreation, may construct, maintain, repair, and operate refuge harbors and other projects for the harboring, mooring, docking, launching, and storing of light draft vessels, and marine recreational facilities. Subject to section 1547.77 of the Revised Code, those harbors, projects, and facilities may be constructed on waters in this state. If a refuge harbor lies between the shore line and a harbor line established by the United States government so as to interfere with the wharfing out by a littoral owner to navigable waters, the littoral owner shall consent thereto in writing before the location and construction thereof.

The division may lease any space in those refuge harbors or other projects for the harboring, mooring, docking, launching, and storing of light draft vessels. The rental therefor shall be determined by the division.

The division, with the approval of the director of natural resources, may expend for the acquisition of any rights in land, or for the construction, maintenance, repair, and operation of refuge harbors and other projects for the harboring, mooring, docking, launching, and storing of light draft vessels, and marine recreational facilities on waters in this state, for planning, studies, surveys, and engineering therefor, or for the improvement of harbors, channels, and waterways to foster vessel safety, such funds as are appropriated by the general assembly for those purposes, and in addition, moneys accruing to the waterways safety fund established in section 1547.75 of the Revised Code.

Beneficiaries of Waterways Safety Fund Expenditures

In your first question you have asked whether the waterways safety fund is a dedicated fund that is to be used solely for the benefit of Ohio's recreational boaters. R.C. 1547.75 provides that the waterways safety fund is for the purposes set forth in R.C. 1547.55, R.C. 1547.67, R.C. 1547.68, R.C. 1547.71, and R.C. 1547.72. Those five statutes are explicit in their enumeration of the purposes for which moneys in the waterways safety fund may be used. Although the General Assembly may intend Ohio's recreational watercraft users to be the primary beneficiaries of expenditures from the waterways safety fund, *see, e.g.*, R.C. 1547.01(B)(9),² no language appears in any of those statutes directing the use of that fund "solely for the benefit of Ohio's recreational boaters." Rather, those statutory provisions are

² R.C. 1547.01(B)(9) provides that "[w]aters in this state," as used in R.C. Chapter 1547, means "all streams, rivers, lakes, ponds, marshes, watercourses, waterways, and all other bodies of water, natural or man-made, which are situated wholly or partially within this state or within its jurisdiction, and are used for recreational boating." (Emphasis added.) "Navigable waters," as used in R.C. Chapter 1547, means "waters which come under the jurisdiction of the department of the army of the United States and any waterways within or adjacent to this state, except inland lakes having neither a navigable inlet or outlet." R.C. 1547.01(B)(10).

broader in scope, and authorize expenditures from the waterways safety fund for purposes that relate generally to the improvement or maintenance of Ohio's waterways, and the promotion of watercraft safety. The statutes do not condition or otherwise qualify those purposes with respect to particular categories of waterway users. R.C. 1547.72 does, in fact, authorize the expenditure of moneys in the waterways safety fund for various watercraft harboring, mooring, docking, launching, and storing activities "as an aid to lake commerce and navigation, or recreation." (Emphasis added.) As a practical matter, therefore, the statutory purposes for which moneys in the waterways safety fund are expended may, in fact, benefit all users of Ohio's waterways, regardless of the type of marine or navigational activities in which those users are engaged.

Dredging Public Waterways

In your second question you have asked whether the Department of Natural Resources and its Director have the authority to use moneys in the waterways safety fund for dredging. Dredging is not specifically listed in R.C. 1547.55, R.C. 1547.67, R.C. 1547.68, R.C. 1547.71, or R.C. 1547.72 as an activity that may be undertaken with moneys in the waterways safety fund. It is, however, apparent that circumstances may be presented in which moneys in that fund may be used in support of dredging activities. In that regard, the Director of Natural Resources and the Chief of the Division of Watercraft may, in the reasonable exercise of their discretion, determine that dredging advances one or more of the purposes enumerated in R.C. 1547.71 or R.C. 1547.72. R.C. 1547.71 provides that the Division of Watercraft shall participate and co-operate with the Army Corp of Engineers in "acquiring, constructing, and maintaining refuge and light draft vessel harbor projects, channels, and facilities for vessels in the navigable waters lying within the boundaries of the state," and for such purposes may expend moneys in the waterways safety fund, R.C. 1547.75. R.C. 1547.72 also provides that the Division of Watercraft, whenever it considers it in the best interests of the state, and as an aid to lake commerce and navigation, or recreation, may "construct, maintain, repair, and operate refuge harbors and other projects for the harboring, mooring, docking, launching, and storing of light draft vessels, and marine recreational facilities." The Division of Watercraft may also undertake the "improvement of harbors, channels, and waterways to foster vessel safety." *Id.* In support of those activities, the Division of Watercraft, with the approval of the Director of Natural Resources, may expend moneys in the waterways safety fund.

The dictionary states that "dredge," when used as a transitive verb, means "to enlarge or clean out (a river channel, harbor, etc.) with a dredge." *Webster's New World Dictionary* 426 (2d college ed. 1978). As a noun, a "dredge" is "an apparatus for scooping or sucking up mud, sand, rocks, etc., as in deepening or clearing channels, harbors, etc." *Id.* Dredging, therefore, is an activity that may be undertaken in furtherance of the purposes thus listed in R.C. 1547.71 or R.C. 1547.72. For example, under R.C. 1547.71 dredging might be used in refuge harbor and channel maintenance to remove sediment accretions, thus ensuring adequate water depth for vessels that use those harbors and channels, or to retrieve submerged objects that might interfere with safe navigation. Dredging might be used to advance similar purposes under R.C. 1547.72, thus serving "as an aid to lake commerce and navigation, or recreation," or "for the improvement of harbors, channels, and waterways to foster vessel safety." Consequently, when the Division of Watercraft undertakes dredging for those purposes, moneys in the waterways safety fund may be expended for that dredging.

Dredging Streams Located Upon Private Property

In your third question you have asked whether the Department of Natural Resources and its Director have the authority to use moneys in the waterways safety fund to dredge streams flowing through and from a private homeowner's property into a state-maintained lake or stream,

when the tangible improvement to the streams resulting from that dredging benefits only the private homeowner, and not the citizens of Ohio. As explained previously, moneys in the waterways safety fund may be expended for the several purposes set forth in R.C. 1547.55, R.C. 1547.67, R.C. 1547.68, R.C. 1547.71, and R.C. 1547.72. Those purposes are meant to promote watercraft safety and waterways improvement and maintenance that provide benefits generally available to all users of Ohio's waterways, which is in keeping with the general principle that any expenditure of public moneys must serve a public purpose. *See generally State ex rel. Dickman v. Defenbacher*, 164 Ohio St. 142, 128 N.E.2d 59 (1955); *State ex rel. Bruestle v. Rich*, 159 Ohio St. 13, 110 N.E.2d 778 (1953).

You have asked about dredging streams located on a private homeowner's property in a situation in which such dredging is posited as benefiting the private homeowner exclusively. If, in fact, the dredging were to benefit only the private homeowner, then it would not come within the statutory purposes and would not be a proper use of moneys in the waterways safety fund. If, however, the dredging serves the purposes established by statute, then it is not rendered impermissible by the fact that it may also benefit a private homeowner. *See, e.g., State ex rel. McClure v. Hagerman*, 155 Ohio St. 320, 324, 98 N.E.2d 835, 837 (1951) (private interests of individuals may be advanced "incidentally" by an expenditure of public funds provided the primary object of that expenditure is to serve a public purpose). The fact that dredging occurs in streams flowing through private property is not determinative of the question whether it serves any of the proper purposes authorized by statute. For example, water flow from a private homeowner's streams may have a material bearing upon the depth or flow of water in a lake or stream maintained by the state, which may affect the safe and effective operation of watercraft that travel upon those bodies of water. Similarly, dredging a private homeowner's streams may serve to remove natural debris or other impediments that would otherwise enter the state-maintained lake or stream and constitute obstacles to safe navigation upon those bodies of water. If, in particular circumstances, the Director of Natural Resources and the Chief of the Division of Watercraft reasonably determine that dredging a private homeowner's streams advances the purposes enumerated in R.C. 1547.71 or R.C. 1547.72, then such dredging is an activity for which moneys in the waterways safety fund may be properly expended. *Cf., e.g.,* 1980 Op. Att'y Gen. No. 80-093 (the Division of Watercraft, with the approval of the Director of Natural Resources, may expend funds pursuant to R.C. 1547.72 to remove a privately-owned dam that obstructs a navigable watercourse). In contrast, if the dredging confers a tangible improvement only for the private homeowner, rather than for the general public, then it is not a permissible use of moneys in the waterways safety fund.

Waterways Safety Fund Expenditures: Other Activities

Finally, in your fourth question you have inquired about the authority of DNR and its Director to use moneys that have been appropriated for dredging³ for activities other than dredging Ohio's lakes and streams. Specifically, you ask whether such moneys may be used to

³ In Am. Sub. H.B. 152, 120th Gen. A. (1993) (eff., in part, July 1, 1993) (section 70, uncodified), the General Assembly has appropriated to the waterways safety fund group, for the use of the Department of Natural Resources (DNR), total amounts of \$14,175,932 for fiscal year 1994 and \$14,485,140 for fiscal year 1995. Those amounts have been divided and allocated among ten separate appropriation items. Appropriation item 725-414 has been designated "waterways improvement." To this item the General Assembly has allocated \$2,392,041 for fiscal year 1994 and \$2,652,809 for fiscal year 1995. A member of your staff has indicated that your question concerns moneys in that appropriation item. No appropriation item has been expressly designated for "dredging."

enhance fish habitats, build park areas with sediment, build or acquire picnic tables, and use dredge personnel for snow removal, mowing grass, painting, and building refuse cans. You also state in your letter that those moneys have been used for wildlife preserves, to purchase parkland and a golf course, to improve channels for private landowners, to meet city codes, and to improve scenic value.

An initial review of this list of activities would tend to suggest that they are not expenditures for waterways improvements, since none of these activities is expressly listed in the statutes prescribing purposes for which moneys in the waterways safety fund may be expended. As in the case of your second and third questions, however, whether moneys in the waterways safety fund may be spent on the foregoing activities may depend upon the more general purposes that those activities can be shown to serve. If the Director of Natural Resources and the Chief of the Division of Watercraft, in the reasonable exercise of their discretion, are able to determine that these activities actually advance one or more of the purposes set forth in R.C. 1547.55, R.C. 1547.67, R.C. 1547.68, R.C. 1547.71, or R.C. 1547.72, then waterways safety fund moneys may be expended for those activities. Your fourth question thus turns entirely on whether it can be shown that such activities would directly advance or would be reasonably incidental to those particular statutory purposes.

Such determinations are largely factual in nature, and ordinarily can be made only on a case-by-case basis, taking into account the particular circumstances of each activity. Thus, while the enhancement of fish habitats is not designated as a statutory purpose for expenditures from the waterways safety fund, activity that is authorized under the appropriate statutes and that results in enhanced fish habitats is clearly permitted. Similarly, the authority to construct, maintain, repair, and operate projects for the harboring, mooring, docking, launching, and storing of light draft vessels, and marine recreational activities, would seem to carry with it the authority to paint portions of such projects that are in need of maintenance; to cut weeds, mow grass, and remove snow or ice to keep the projects usable; and to provide trash cans, picnic tables, and other incidental benefits for the convenience of persons using the projects. The use of dredge sediment in park construction or development might also be a reasonable use of those moneys, particularly if no other means of disposing of that sediment is either preferable or readily available. Whether the statutory purposes governing the waterways safety fund can be extended to authorize expenditures for wildlife preserves or the purchase of a golf course or parkland may present a more difficult determination. In each case, the test is whether a particular expenditure is necessary or incidental to the advancement of one of the statutory purposes. Unless a reasonable basis exists for concluding that each such activity advances one or more of the purposes enumerated in the several statutes discussed above, moneys in the waterways safety fund may not be expended upon those activities.

Conclusion

It is, therefore, my opinion, and you are advised that:

1. Moneys in the waterways safety fund established under R.C. 1547.75 may be expended only for the purposes set forth in R.C. 1547.55, R.C. 1547.67, R.C. 1547.68, R.C. 1547.71, and R.C. 1547.72 to benefit all users of Ohio waterways.
2. Moneys in the waterways safety fund established under R.C. 1547.75 may be expended for dredging that is undertaken for the purposes set forth in R.C. 1547.71 or R.C. 1547.72.
3. Moneys in the waterways safety fund established under R.C. 1547.75 may be expended for activities that benefit private homeowners only if those

activities advance the purposes set forth in R.C. 1547.55, R.C. 1547.67, R.C. 1547.68, R.C. 1547.71, and R.C. 1547.72 to benefit all users of Ohio waterways.

4. Moneys in the waterways safety fund established under R.C. 1547.75 may be expended for such activities as enhancing fish habitats, painting, providing trash cans and picnic areas, mowing grass, removing snow and ice, and building park areas with sediment only if a reasonable basis exists for concluding that those activities are necessary or reasonably incidental to the advancement of the purposes set forth in R.C. 1547.55, R.C. 1547.67, R.C. 1547.68, R.C. 1547.71, and R.C. 1547.72.