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1. FISH—WHEN HABITAT, FOOD SUPPLY AND OTHER ENVIRONMENTAL CONDITIONS THREATENED—INJURY OR DESTRUCTION—DELETERIOUS SUBSTANCES—WATERS OF STATE—COMMISSIONER OF CONSERVATION AND NATURAL RESOURCES—MAY BRING ACTION FOR INJUNCTION IN NAME OF STATE.
2. WHERE INJURY ALREADY EXISTENT—STATE MAY BRING ACTION FOR DAMAGES AGAINST PERSON OR PERSONS CAUSING INJURY OR DESTRUCTION.
3. DUTY OF COMMISSIONER OF CONSERVATION AND NATURAL RESOURCES, GAME PROTECTOR AND DESIGNATED EMPLOYEES TO CAUSE PROCEEDINGS TO BE INSTITUTED WHEN LAWS VIOLATED THROUGH DISCHARGE OF COAL DIRT, COAL SLACK, COAL SCREENINGS OR REFUSE FROM COAL MINES INTO STREAMS AND WATER COURSES, THE HABITAT OF FISH—SECTIONS 1441, 12646, 12647 G. C.

SYLLABUS:

1. When the habitat, food supply and other environmental conditions of fish are threatened with injury or destruction by the discharge of deleterious substances into the waters of the state, the Commissioner of Conservation and Natural Resources may bring an action in the name of the state for an injunction.

2. Where the injury or destruction of such habitat, food supply or other environmental conditions has already taken place the state can bring an action for damages against the person or persons causing such injury or destruction.

3. Under the provisions of Section 1441, General Code, it is the duty of the Commissioner of Conservation and Natural Resources, game protectors and such other employees of the Division of Conservation and Natural Resources as said Commissioner may designate, to cause proceedings to be instituted under Sections 12646 and 12647, General Code, when such latter sections are being violated by the discharging of coal dirt, coal slack, coal screenings or refuse from coal mines into streams and watercourses which are the habitat of fish.

Columbus, Ohio, December 8, 1948

Hon. H. A. Rider, Commissioner
Division of Conservation and Natural Resources
Columbus, Ohio

Dear Sir:

I have before me your communication requesting my opinion and reading as follows:

"In the investigations of stream and lake pollution by the Division of Conservation and Natural Resources many instances are found where substances of neither a poisonous nor oxygen consuming nature are being or have been discharged into a stream or lake, over the waters of which the State of Ohio has control. These substances are wastes from such processes as the washing of coal, sand and gravel which do not directly kill fish and game but which do destroy the habitat of such wild animals as require an aquatic or riparian environment thereby causing them to migrate, if possible, to a more favorable one.

"Vegetation required as food and cover is often damaged or completely destroyed; the chain of small aquatic plant and animal organism not adapted to migration but necessary as fish food is also destroyed and riffles and spawning areas necessary to the propagation of and preservation of fish fry are eliminated by the settling of the solids over the natural stream bottom.

"In some instances the damage to a naturally favorable habitat extends for distances of from one to ten or more miles from the point of discharge and requires many years for the restoration of such habitats by natural means. To restore them promptly by unnatural means is very expensive in labor, material, and re-stocking.

"We believe such migrations are responsible for injury to and destruction of adult fish and other migratory aquatic life but evidence of direct destruction or damage is often difficult to obtain. That the habitat has been destroyed, however, can be established without difficulty.

"Your opinion on the following specific questions which arise from the instances in the foregoing paragraphs is respectfully requested:

"(1) When the habitat of wild animals is threatened with injury or destruction by the discharge of substances causing the migration of said wild animals (fish and game) to another habitat in which food, cover and other environmental conditions are

favorable for living and reproduction, has the Conservation and Natural Resources Commission the authority to bring an action in the name of the State of Ohio to enjoin the threatened discharge of such a substance.

“(2) If such destruction of habitat is an accomplished fact may the State of Ohio bring an action against the person or persons causing such injury or destruction.

“(3) Has the Conservation and Natural Resources Commission, as protectors and managers of the wild animals (the ownership of and title to which is declared to be in the state), authority to cause an action to be brought in the name of the state under Sections 12646 and 12647—Nuisances, Chapter 6, Part 4th Ohio General Code, when a person or persons persist in discharging such substances into a stream or water course over which the state has control.”

Your attention is invited to my opinion No. 785, 1946 Opinions of the Attorney General, page 142. That opinion deals with the authority of the Conservation and Natural Resources Commission to bring an action to enjoin a threatened injury to or destruction of fish and also the right to sue for damages where such injury or destruction has already taken place. The syllabus of that opinion reads:

“1. The Conservation and Natural Resources Commission has the authority to bring an action in the name of the state of Ohio to enjoin a threatened injury to or destruction of wild animals, which are the property of the state of Ohio, by the introduction into a stream or lake in this state of a substance which injures or kills such wild animals.

“2. Where an injury to or destruction of wild animals, the property of the state of Ohio, is an accomplished fact, the state can bring an action for damages against the person causing such injury or destruction.

“3. In the event of the pollution of a stream or lake which injures or kills wild animals, the property of the state of Ohio and also violates the laws governing public health, the Division of Conservation and Natural Resources should cooperate with the Department of Health in correcting the violation. If, however, such cooperation is impossible, the Division of Conservation and Natural Resources is still charged with the duty of protecting and preserving the wild animals of the state, and it may proceed against the person causing such injury so long as such proceeding does not infringe on any right of the Department of Health.”

It will be noted that the foregoing opinion related to injury or destruction of fish caused by placing in the water substances which were directly poisonous or lethal to the fish. In the questions you now present, it appears that the substances being introduced into the water may not be directly poisonous to the fish, but are deleterious to the preservation and propagation of fish in that these substances do destroy food supply, habitat and the passageway of the fish to and from feeding and spawning grounds.

As pointed out in the 1946 opinion referred to above, the ownership of fish is in the state in trust for all its people, and even though the subaqueous land may be privately owned, the fish, until reduced to possession, remain the property of the people of the state. Section 1438-1, General Code, delegates authority and control, in matters pertaining to wild life, to the Commission of Conservation and Natural Resources and provides in part:

"It is the purpose of this act and the policy of the state of Ohio to provide an adequate and flexible system for the proper management of the clams or mussels, crayfish, aquatic insects, fish, frogs, turtles, birds and quadrupeds, to guarantee a future supply of such wild animals and to provide for their present use and development for public recreation and food supply.

"In conformity with Article II, Section 36 of the constitution of the state of Ohio, providing for the passage of laws for the conservation of the natural resources of the state, including streams, lakes, submerged and swamp lands, and Sections 1390, 1391 and related sections of this chapter, the conservation and natural resources commission shall have authority and control in all matters pertaining to the protection, preservation, propagation, possession and management of the wild animals defined in Section 1390 of the General Code, * * *."

The term "wild animals," as used in the above section, is defined in Section 1390, General Code, to include fish and other forms of aquatic life. Section 1438-2f, General Code, also relates to the power of the Commission to enforce the laws relative to wild life and provides, in so far as pertinent, as follows:

"* * * The commission shall enforce by proper legal action or proceeding the laws of the state and its orders for the protection, preservation, propagation and management of wild animals, sanctuaries and refuges for the propagation of such wild animals, and shall adopt and carry into effect such measures as it deems necessary in the performance of its duties."

Since, as pointed out above, the general right and ownership of fish is in the state, and since the proprietary rights of the state are as absolute and unqualified as those of an individual (see 37 O. Jur. 242), it would seem that the state does have the right to invoke the aid of the courts by way of injunction to prevent a threatened injury to or destruction of its property. It is stated in 21 O. Jur. 1115:

“An injunction will issue to prevent irreparable injury to public as well as private property.”

A question quite similar to the one you present was before the Supreme Court of Arkansas in the case of Meriwether Sand & Gravel Co. v. State, ex rel. Attorney General, et al., 181 Ark. 216, 26 S.W. (2nd) 57. The Court said, at page 61 of 26 S. W. (2nd) report:

“* * * As has been stated in 11 R. C. L. 1047, cited in brief of appellee: ‘The regulatory power of a state extends not only to the taking of its fish but also over the waters inhabited by the fish; its care of the fish would be of no avail if it had no power to protect the waters from pollution; it is immaterial whether the water is navigable or not; to the extent that streams are common passageways for fish to and from their breeding and feeding grounds they are public waters and subject to governmental regulations. Thus, for the preservation of fish the casting of sawdust or other mill refuse into streams may be forbidden. Moreover, the placing of mill refuse in a stream inhabited by fish may be considered a nuisance, and the attorney general of a state without the information of a private relator, may procure an injunction against the continuance of such a pollution of the stream. When the unrestrained right to run a saw mill on the bank of a stream conflicts with the right of the public to have fish live and increase in the water, the right of the mill proprietor must give way to the right of the public; nor can the owner of such a mill by lapse of time acquire a prescriptive right to discharge sawdust in the stream so as to preclude the State from forbidding the practice. So the operator of a coal mine may be forbidden to drain sulphur or mine water into a stream though the stream be the natural receptacle of such drainage and it is not practicable to drain the mine otherwise.’”

Also in the case of State v. Southern Coal & Transportation Co., 71 W. Va. 470, 76 S. E. 970, the following statement is found at page 971 of the Southeastern Reporter:

“* * * Fish have always been regarded by the government as very valuable for sport and food. It may be said that no government fails to make provision for their propagation and

preservation. As to its power to do so under its police power there can be no question. The Supreme Court of the United States has held thus: 'It is within the power of a state to preserve from extinction fisheries in waters within its jurisdiction, by prohibiting exhaustive methods of fishing, or the use of such destructive instruments as are likely to result in the extermination of the young as well as the mature fish.' *Lawton v. Steele*, 152 U. S. 133, 14 Sup. Ct. 499, 38 L. Ed. 385. In 71 Ohio St. 186, 73 N. E. 216, 104 Am. St. Rep. 770, 1 Ann. Cas. 948, will be found the case of *State of Ohio v. French*, which holds that the Legislature may provide for the protection of the fish, and may declare nets used contrary to law a public nuisance, and that such statute is constitutional. The case of *People v. Truckee Lumber Co.*, 116 Cal. 397, 48 Pac. 374, 39 L. R. A. 581, 58 Am. St. Rep. 183 holds that fish within the waters of a state constitute the most important part of that species of property commonly designated as 'wild game,' the general right and ownership of which is in the people of the state. The right to protect such property for the common use and benefit is one of the recognized prerogatives of the sovereign. It also holds that the right of the state to protect fish is not confined to navigable or public waters, but extends to all waters within the state, public or private, where the animals are accustomed to resort for spawning or other purposes, and of which they have freedom of passage to or from the fishing grounds of the state. The state owns the fish in its streams and has ample power to preserve and protect them from destruction under its police power, and private right and convenience must yield to it. This right of the state is abundantly sustained by the highest authority. *McCready v. Virginia*, 94 U. S. 391, 24 L. Ed. 248; 13 Am. Ency. L. 556; 19 Cyc. 987, 1006; *Geer v. Connecticut*, 161 U. S. 519, 16 Sup. Ct. 600, 40 L. Ed. 793; *Hudson County v. McCarter*, 209 U. S. 349, 28 Sup. Ct. 529, 52 L. Ed. 828, 14 Ann. Cas. 560."

See also, to the same effect, *People v. Truckee Lumber Co.*, 116 Cal. 397, 48 Pac. 374; *State v. Haskell*, 84 Vt. 429, 79 A. 852; *Commissioner v. Sisson*, 189 Mass. 247, 75 N. E. 619.

Therefore, in specific answer to your first question, it is my opinion that when the habitat, food supply and other environmental conditions are threatened with injury or destruction by the discharge of a deleterious substance into the waters of the state, an action may be brought in the name of the state for an injunction.

You also inquire whether an action for damage may be brought where such destruction or injury is an accomplished fact. While proof of damage in such a case may be difficult to ascertain, yet there is no reason why

such action can not be maintained provided you can establish the value in money of the damage to the property of the state. Here again the state, like an individual, can sue the person causing such damage for the money value of the injury to its property. In such a case it will be proper for you to certify the claim to this office where such action as may be necessary will be taken.

Your third and last question concerns the authority of the Commission to bring an action to invoke the penalties provided in Sections 12646 and 12647, General Code. Since these sections provide the penalties for various criminal violations they must be strictly construed. In other words, an act to be punishable as a crime in Ohio must be specifically embraced within the terms of the statute. With this principle in mind it is difficult to state, from the information set forth in your letter, whether the substances being cast into the water would constitute a violation of these sections. These sections provide:

Section 12646, General Code.

“Whoever erects, continues, uses or maintains a building, structure or place for the exercise of a trade, employment or business, or for the keeping or feeding of an animal which, by occasioning noxious exhalations or noisome or offensive smells, becomes injurious to the health, comfort or property of individuals or of the public, or causes or suffers offal, filth or noisome substances to be collected or remain in any place to the damage or prejudice or (of) others or of the public, or unlawfully obstructs or impedes the passage of a navigable river, harbor or collection of water, or corrupts or renders unwholesome or impure, a watercourse, stream or water, or unlawfully diverts such watercourse from its natural course or state to the injury or prejudice of others, shall be fined not more than five hundred dollars.”

Section 12647, General Code.

“Whoever intentionally throws, deposits or permits to be thrown or deposited, coal dirt, coal slack, coal screenings or coal refuse from coal mines, refuse or filth from a coal oil refinery or gas works, or whey or filthy drainage from a cheese factory, into a river, lake, pond or stream, or a place from which it may wash therein, or causes or permits petroleum, crude oil, refined oil, or a compound, mixture, residuum of oil or filth from an oil well, oil tank, oil vat or place of deposit of crude or refined oil, to run into or be poured, emptied or thrown into a river, ditch, drain or watercourse, or into a place from which it may

run or wash therein, upon conviction in the county in which such coal mine, coal oil refinery, gas works, cheese factory, oil well, oil tank, oil vat or place of deposit of crude or refined oil is situated, shall be fined not less than fifty dollars nor more than one thousand dollars.”

Your letter states that the substances being cast into the water are the wastes from the processes of washing coal, sand and gravel. In such case, it would appear that the acts complained of fall within the inhibition of each of the above sections. It will be noted that under Section 12646, General Code, the corruption of or the rendering unwholesome or impure a watercourse is prohibited under penalty of fine, and under the terms of Section 12647, General Code, the intentional deposit of coal dirt, coal slack or coal refuse is made a crime.

In Section 1441 of the General Code it is provided :

“* * * The commissioner, game protectors, and such other employees of the division as the commissioner may designate, and other officers as are given like authority, shall enforce all laws pertaining to the taking, possession, protection, preservation, management and propagation of wild animals and all commission orders then in effect. * * *”

In view of the above, and in answer to your third question, it would appear, and it is accordingly my opinion, that not only have the Conservation Commissioner and game protectors authority to cause criminal proceedings to be instituted under the above sections, but it would appear to be their mandatory duty to do so.

Respectfully,

HUGH S. JENKINS,
Attorney General.