

1523.

POLLUTION OF STREAMS IN OHIO—WHERE IT WILL AFFECT FISH LIFE—UNDER SECTION 1438-1 G. C. DIVISION OF CONSERVATION AND NATURAL RESOURCES HAS AUTHORITY TO PREVENT AND CORRECT—EXPENDITURE OF FUNDS.

SYLLABUS:

By virtue of Section 1438-1, General Code, the Division of Conservation and Natural Resources has the authority to spend its funds for the purpose of preventing and correcting the pollution of streams in Ohio where such pollution will affect the fish life in such streams.

COLUMBUS, OHIO, December 7, 1939.

HON. DON G. WATERS, *Commissioner, Division of Conservation and Natural Resources, Columbus, Ohio.*

DEAR SIR: This will acknowledge receipt of your recent communication in which you present the question as to the authority of the Division of Conservation and Natural Resources to expend conservation funds for the purpose of preventing or correcting the pollution of streams in Ohio.

Section 1438-1, General Code, provides in part, with reference to the powers of the Conservation and Natural Resources Commission:

“It shall have authority and control in all matters pertaining to the protection, preservation, propagation and management of
* * * fish * * *.”

It is well recognized that the pollution of streams in Ohio causes the destruction of thousands of fish annually. Consequently, it seems obvious that measures to prevent and correct pollution of streams would directly serve to protect and preserve the fish in the streams of Ohio.

I recognize the fact that Sections 1249, et seq., General Code, confer upon the State Board of Health broad powers with reference to the protection of streams, rivers and lakes against pollution. However, that fact alone does not preclude the Division of Conservation and Natural Resources from acting to prevent the pollution of streams. Section 1438-1, General Code, also provides:

“The conservation and natural resources commission is hereby authorized to enter into contracts and agreements with other departments and subdivisions of this state and with other states and the United States for the accomplishment of the pur-

poses for which it is created, and shall cooperate with and shall not infringe upon the rights of other state departments, political subdivisions, and other public officials and public and private agencies in the conduct of conservation plans and other matters in which the interests of the conservation and natural resources commission and such other departments and agencies overlap.”

It may be seen from an examination of the above provision that the Legislature contemplated that there might be situations in which the interests of the Division of Conservation and Natural Resources and other divisions of state government might overlap. However, the Legislature has specifically provided that the Division of Conservation and Natural Resources shall cooperate with such other division or department in matters of mutual interest. The only limitation specified in Section 1438-1, supra, is that the Division of Conservation and Natural Resources shall not infringe upon the rights of the departments in matters wherein interests overlap.

Section 1430, General Code, after setting up requirements as to fishing licenses, provides:

“All moneys derived from such licenses are hereby appropriated exclusively for the use of the conservation council for the purchase, protection, propagation, preservation, and stocking of fish, including the establishment, operation and maintenance of fish hatcheries, the leasing, purchasing or otherwise acquiring title to land for said hatcheries, constructing fish chutes and dams and other methods of fish propagation and fish culture, and for other proper conservation activities, and for use as provided in section 1438-1, 1441, 1442 and 1443 of the General Code.

Provided, however, that not more than twenty-five per centum of such moneys shall be used for the payment of administration or other overhead expenses of the council and the remaining seventy-five per centum shall be used exclusively for the purchase, protection, propagation, preservation and stocking of fish.”

In House Bill No. 674, passed by the 93rd General Assembly on June 1, 1939, entitled “An Act to make general appropriations for the biennium beginning January 1, 1939 and ending December 31, 1940”, at page 61 of such act under the heading of “Division of Conservation”, the following appears:

“There is hereby appropriated to the Division of Conservation all balances in the Uses and Purposes Fund, Lake Erie Fund, Fishing License Fund, and the fund made up from fees

derived from the sale of minnow dealers' permits, as of December 31, 1938, together with all moneys credited and to be credited to said funds during the period beginning January 1, 1939, and ending December 31, 1940. Said funds shall be available for the use of the Division of Conservation, for the purposes specified by law, and for such purposes may be used to supplement any specific appropriation made herein, or for new projects within the intent and purpose of the law, and the Controlling Board herein provided, is authorized to approve transfer to the various budget classifications under personal service, maintenance and additions and betterments to supplement the specific appropriations made by the legislature. No expenditure, except expenditures for which specific appropriations are herein made, shall be made from said funds for any one object or purpose in excess of five hundred dollars (\$500.00), without the consent and approval of the Controlling Board and the Controlling Board is hereby authorized to release from said funds, such amounts in excess of five hundred dollars (\$500.00) as may be shown to its satisfaction to be necessary or expedient."

The funds above specified were appropriated to the use of the Division of Conservation not only for the purposes specified by law, but also for new projects within the intent and purpose of the law. It seems clear that the funds above specified may be used for the prevention of pollution in streams, which purpose would obviously serve to protect and preserve the fish life in such streams.

Furthermore, on page 60 of House Bill No. 674 above referred to, there was appropriated to the Division of Conservation and Natural Resources the sum of \$50,000 in each of the years 1939 and 1940 for "stream improvement". The primary purpose for such appropriation was to furnish funds for the improvement of the habitat of fish. It may be repeated that the prevention of the pollution of streams would directly aid in accomplishing such purpose. Consequently, it appears that such "stream improvement" fund might be used for such purpose.

In arriving at the conclusions herein set forth, I am not unmindful of Opinion No. 126, rendered in 1937 by the then Attorney General wherein it was ruled as disclosed by the syllabus:

"Under the provisions of Section 1438-1, General Code, the Conservation Council has no authority, right or privilege in the prosecution of stream, river and lake pollution cases."

It will be noted that the ruling in the 1937 opinion was only concerned with the prosecution of cases. The instant question is the authority of the Division of Conservation and Natral Resources to ex-

pend funds for the purpose of preventing and correcting pollution conditions in the streams of Ohio, rather than the prosecution of cases.

In view of the above and in specific answer to your inquiry, I am of the opinion that by virtue of Section 1438-1, General Code, the Division of Conservation and Natural Resources has the authority to spend its funds for the purpose of preventing and correcting the pollution of streams in Ohio where such pollution will affect the fish life in such streams.

Respectfully,

THOMAS J. HERBERT,
Attorney General.

1524.

INCOMPATIBLE OFFICE—VILLAGE CLERK AND TRUSTEE OF FIREMEN'S RELIEF AND PENSION FUND—WHERE A MUNICIPAL CORPORATION HAS TWO FULL TIME MEMBERS OF FIRE DEPARTMENT, IT IS THEIR DUTY TO SERVE AS MEMBERS, BOARD OF TRUSTEES, FIREMEN'S RELIEF AND PENSION FUND—SECTIONS 4600, 4600-1 G. C.

SYLLABUS:

1. *A village clerk, being the auditing official of the municipality, is required to keep a check upon the expenditures of all departments, including the firemen's relief and pension fund, and his position as village clerk is, therefore, incompatible with that of a citizen member of the board of trustees of such relief and pension fund.*

2. *Where there are only two full time regular members of the fire department of a municipal corporation, under the provisions of Sections 4600 and 4600-1, General Code, as amended by the 93rd General Assembly, it is the duty of such full time regular members to serve as members of the board of trustees of the firemen's relief and pension fund.*

COLUMBUS, OHIO, December 7, 1939.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN: I have your request for my opinion in which you ask if the offices of Village Clerk and member of the Board of Trustees of the Firemen's Pension Fund are incompatible, and whether members other than full time regular members are eligible to serve as members of such Board of Trustees. The statement of facts upon which your request is based is as follows: