OPINION NO. 71-009

Syllabus:

1. After the license of a stripmined lands operator is terminated and his bond released Section 1513.07, Revised Code, imposes no further obligation on the State of Ohio with respect to the private land.

2. Section 1513.16, Revised Code, does not authorize the State of Ohio to enter on private properties after stripmined land is reclaimed and the operator's bond released for the purpose of abating sources of pollution that are affecting adjacent or downstream properties and interests.

3. State monies can be used to furnish the local share in a state-sponsored federal demonstration project, and may consequently be used in abating pollution on private lands with the concurrence of the property owner pursuant to such project.

4. A local watershed sanitary district or local political subdivision cannot accept responsibility for administering a state-federal pollution abatement project within its district.

5. If a local political subdivision or state agency carries out corrective measures on a stripmined area on private land which does not abate the pollution nor solve the problem, they cannot be held liable by downstream interests.

To: Fred E. Morr, Director, Department of Natural Resources, Columbus, Ohio

By: Paul W. Brown, Attorney General, January 7, 1971

I have before me your letter which states:

> "Recent inquiry into residual stripmine problems, including acid mine drainage, have brought forth several unanswered legal questions on which we are requesting your opinion.
>
> "(1) Stripmine licenses issued under Section 1513.07 are in effect for one year from the date of issuance with the operator having two years in which to complete required reclamation work. Upon satisfactory completion during this period or within any extensions granted, the operator's bond is released and his license

obligation terminated. Does the State of Ohio have any further obligation or responsibility on these private lands after the operator is released and his bond returned?

"(2) Does the State of Ohio have authority to enter on private properties after stripmined land is reclaimed in accordance with Section 1513.16, the reclaimation approved and the operator's bond released, for the purpose of correcting or abating sources of pollution that are affecting adjacent or downstream properties and interests?

"(3) Can State monies be expended on private stripmined lands to abate pollution problems in order to furnish the local share in a state sponsored federal demonstration project?

"(4) Can a local Watershed Sanitary District in Ohio accept responsibility for administering a state-federal pollution abatement project within its district. This question applies equally well to local political subdivisions that might be capable carrying out such a project and should be included in your answer.

"(5) If any local political subdivision or state agency carries out corrective measures on a stripmined area on private land which does not abate the pollution nor solve the problem, can the administering agency be held liable by downstream interests."

In response to your first question, concerning the state's obligation or responsibility on these private lands after the operator is released and his bond returned, Chapter 1513 of the Revised Code, which deals with the reclamation of stripmined lands, imposes no further obligation or responsibility on the state after the operator is released.

The state's general concern with pollution control arises under Section 3701.21, Revised Code, which provides in part that the Department of Health:

"* * * may adopt and enforce such special or general regulations relative to the control of the discharge of sewage and industrial wastes into the various streams, lakes, and other bodies of water and for preventing the undue pollution thereof as are necessary for the protection of the public health and welfare."

(Emphasis added)

In addition Section 6111.02, Revised Code, provides for a Water Pollution Control Board in the Department of Health, and Section 6111.03, Revised Code, empowers the board to issue orders for the abatement of the discharge of industrial wastes. However, the above cited sections contain no requirement that the state act in every case of pollution. Rather the language implies that state action is discretionary. Thus, in response to your first question, the State of Ohio

has no further obligation on the private lands after the operator has been released and his bond returned.

Your second question concerns the authority of the state to enter on private property for the purpose of correcting or abating the sources of pollution. While the Water Pollution Control Board is empowered by Section 6111.03, supra, to issue orders for the abatement of the pollution, and by Section 6111.05, Revised Code, to enter on private land to inspect and investigate the conditions relating to the pollution, there is no provision authorizing the state to enter on the private property to make the corrections. In effect, Chapter 6111, Revised Code, establishes the courses of action to be taken in dealing with the pollution in question. To allow the state to enter onto the private property to make the corrections would be inconsistent with the provisions. Therefore, the state may not enter upon the private properties for the purpose of correcting or abating the sources of pollution.

Your third question reads, "May state money be expended on private stripmined lands to abate pollution problems in order to furnish the local share in a state-sponsored federal demonstration project?"

The local share, in such a state-sponsored federal demonstration project, is the money provided by the state in cooperation with the federal government for work on the specific project. However, if it appears that the project is a peculiarly local responsibility, and not a state responsibility, the state is then prohibited from assuming the local debt under Section 5, Article VIII, Ohio Constitution, which reads:

> "The state shall never assume the debts of any county, city, town, or township, or any corporation whatever, unless such debts shall have been created to repel invasion, suppress insurrection, or defend the state in war."

The federal demonstration project mentioned in your request will deal with the prevention of acid mine drainage into the adjacent reservoir, streams and lakes in the area. Such reservoir, streams, and lakes fall within "waters of the state", as referred in Section 6111.01 (H), Revised Code. Under Section 6111.03, supra, the Water Pollution Control Board shall have the following powers:

> "* * * * * * * * *
>
> "(b) to develop programs for the prevention, control, and abatement of new or existing pollution of the waters of the state.
>
> "(c) to administer grants from the federal government and from other sources, public or private, for carrying out any of its functions.
>
> "* * * * * * * * *"

The appropriation of the needed state monies for regional water development in general, and in this instance, demonstration projects in particular, is provided by Amended House Bill

No. 828, 108th General Assembly, line item 725-239, which authorizes the Department of Natural Resources to spend $10,200,000.00 for regional water development in cooperation with local entities and federal agencies for reservoirs, stream monitors, demonstration projects, subsurface exploration and other water development.

It is my conclusion that with the necessary money provided by Amended House Bill No. 828, and under the authority of the Water Pollution Control Board's power to develop programs for the prevention, control and abatement of new or existing pollution of the waters of the state, state money can be used to furnish the local share in a state-sponsored federal demonstration project, and may consequently be used in abating pollution on private lands with the concurrence of the property owner pursuant to such project.

In answering your fourth question, on whether a local watershed sanitary district or local political subdivision in Ohio may accept responsibility for administering a state-federal pollution abatement project within its district, Section 6105.02, Revised Code, is relevant. This section provides that the board of directors of a watershed district, for the purpose of assisting to obtain the orderly development and the most beneficial use of the water resources within the territorial boundaries of the district, may:

"* * * * * * * * *

"(F) Assist governmental agencies and private interests in the planning and development of water resources within the district.

"* * * * * * * * *

"(H) Make contracts with any person or agency for the purpose of carrying out section 6105.01 to 6105.21, inclusive, of the Revised Code.

"* * * * * * * * *"

Under this section a local watershed sanitary district or political subdivision may assist in the administration of state-federal pollution abatement projects within their districts, but the responsibility for administering these projects is not vested in them but the Water Pollution Control Board. Section 6111.03, Revised Code, states that the Water Pollution Control Board shall have power:

"* * * * * * * * *

"(C) To administer grants from the federal government and from other sources, public or private, for carrying out any of its functions * * *.

"* * * * * * * * *"

Subsection (A) of Section 6111.03, supra, grants to the board the function:

"(A) To develop programs for the preven-

tion, control, and abatement of new or existing pollution of the waters of the state, * * *."

Therefore, it seems that a local watershed sanitary district may assist in, but not accept responsibility for, administering a state-federal pollution abatement project within its district. The Water Pollution Control Board's authority, under Section 6111.03, supra, to administer the project would also preclude local political subdivisions from the role of administrator.

Your fifth question asks "if any local political subdivision or state agency carries out corrective measures on a stripmined area on private land which does not abate the pollution nor solve the problem, can the administering agency be held liable by downstream interests?" There is no statutory or case authority directly on point which would answer this question.

However, it is well settled that a riparian owner is entitled to receive the water of streams free from pollution. Columbus & H Cool & I Co. v. Tucker, 48 Ohio St. 41, 26 N.E. 630 (1891). To be actionable, however, pollution must be of such a nature as to interfere with the riperian landowner's proper use of the stream. Mansfield v. Hand, 19 O.C.C. 488, 10 O.C.D. 567 (1900). Therefore if the pollution of the water is to such an extent as to cause substantial damage, liability exists and an action will lie against those who have caused or contributed to the pollution for the recovery of such substantial damages as the lower proprietor may sustain.

However, in regard to the state agency, Article I, Section 16 of the Ohio Constitution, provides:

> "* * * Suits may be brought against the state, in such courts and in such manner as may be provided by law."

This provision has been uniformly interpreted as not being self-executing, State, ex rel., Williams v. Glander, 148 Ohio St. 188, 74 N.E. 2d 82, cert. denied, 332 U.S. 817 (1947); and therefore, unless the legislature makes some further provision by law, there is no remedy against the state. Wolf v. Ohio State University Hospital, 17 Ohio St. 49, 162 N.E. 2d 475 (1959). Ohio has adopted the traditional common law rule that the state cannot be sued without its consent and this consent must be given by the legislature. Palmer v. State, 18 Ohio Op. (NS) 609, 26 Ohio Dec. 563 (1916), aff'd 96 Ohio St. 513, 118 N.E. 102 (1917).

It is a rule of construction in Ohio and elsewhere that statutes in derogation of common law are to be strictly construed. Ray v. Trenton Twp., 49 Ohio App. 172, 190 N.E. 707 (1934). Since a statute giving consent to sue the state is in derogation of the common law doctrine of sovereign immunity, the Ohio courts have refused to find consent in the absence of clear and express language to that effect in the code. There is no provision under Chapter 6111, supra, or any other relevant chapter of the code here in point, which gives consent for the state to be sued. Therefore, if any state agency carries

out corrective measures on private lands to abate pollution, the administering agency cannot be sued by downstream interests.

However, because Ohio is immune from suits, does not mean it is immune from doing wrong. As to most matters, the State of Ohio has chosen not to have its liability determined in a court of law. Instead the General Assembly has established the Sundry Claims Board. The Board has three main functions: (1) to receive and investigate claims; (2) to hear and decide claims; (3) to make recommendations to the General Assembly. The Board has limited its jurisdiction to those cases in which no other form of remedy has been established by statute. Therefore through the Sundry Claims Board the injured downstream riparian owners may seek redress for their grievance.

Concerning the liability of a local political subdivision, it is a well established rule that municipal corporations and other political subdivisions of the state are immune from liability for tortious acts done in the performance of governmental functions. Tinsley v. Cincinnati & County Commrs., (CP) 4 Ohio Op. 2d 454, 146 N.E. 2d 336 (1951), aff'd by Ct. of Appeals MCO Nov. 13, 1957. The theory is that a local political subdivision has a dual function, one exercised as a mere agent of the state in the process of government, the other private in its nature in that it is exercised for the particular benefit of the corporation and its inhabitants as distinguished from those things in which the whole state has an interest. In acting in its governmental capacity, the municipality or other political subdivision is not liable in tort for either a nonfeasance or a misfeasance, because in so acting, it is but the agent of the state and is so far a part of the state that it partakes of the sovereignty of the state in respect to immunity from suit. (See 120 A.L.R. 1376.)

The abatement of pollution in the waters of the state is certainly an activity in which the whole state has an interest, and as such, a political subdivision which is attempting to correct or abate the pollution is acting in its governmental capacity which entitles it to partake in the sovereignty of the state in respect to immunity from suit.

Therefore, it is my opinion and you are hereby advised that:

1. After the license of a stripmined lands operator is terminated and his bond released Section 1513.07, Revised Code, imposes no further obligation on the State of Ohio with respect to the private land.

2. Section 1513.16, Revised Code, does not authorize the State of Ohio to enter on private properties after stripmined land is reclaimed and the operator's bond released for the purpose of abating sources of pollution that are affecting adjacent or downstream properties and interests.

3. State monies can be used to furnish the local share in a state-sponsored federal demonstration project, and may consequently be used in abating pollution on private lands with the concurrence of the property owner pursuant to such project.

4. A local watershed sanitary district or local political subdivision cannot accept responsibility for administering a state-federal pollution abatement project within its district.

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