

The Existing Status of Water Management

STEPHEN SUSSNA, Ph.D., A.I.P.

*Member New York and Kentucky Bars
Trenton, N.J.*

ABSTRACT

This paper describes responsibilities which are imposed upon individuals or public bodies concerning watercourse management. The diffuseness of responsibility embodied in legislation and the case is examined. The ways in which governmental action is currently possible to undertake work or to enforce regulations concerning drainage outlets and watercourses that traverse private property is discussed.

One of the truly unfortunate characteristics of resource management—including watercourse management—is that there are few responsibilities which are imposed either upon individuals or public bodies. By contrast, however, there are possible penalties associated with undertaking reclamation or improvement of watercourses which may well inhibit taking any action.

In general terms, a *watercourse* has been defined as a stream of water which flows along a definite channel, with a bed and banks, for a sufficient time to give it substantial existence. Thus, the term does not include such drainage-ways as swales or intermittent streams.

New Jersey courts have ruled that riparian owners are entitled to the use and enjoyment of watercourses without obstruction. At the same time, such owners may not alter stream flow to the detriment of others. Thus, in some instances, an owner could be held responsible for the deliberate obstruction of a stream on his property, or for the removal of a tree falling from his property across his portion of the stream. In parallel fashion, local governmental agencies have no obligation to maintain natural streams or watercourses—except insofar as special responsibilities such as mosquito control have been created by legislation. However, once improvements to a

watercourse are undertaken which change it in any way from its natural state, liability may ensue. Specifically a governmental agency in New Jersey may be liable to a charge of active wrong doing if it undertakes an action which it knows, or should know, will increase the velocity of the flow within a watercourse so as to cause downstream damage.

Since most drainage outlets and watercourses traverse private property, some governmental action is required to undertake work or to enforce regulations. There are a number of ways in which such work or regulation can be accomplished.

The most direct method is through acquisition of easements or of fee title to lands, either with the consent of the property owners affected or by condemnation. However, for a municipality to exercise eminent domain there must be a state statute delegating authority for such action for the specific public use proposed.

Another means for undertaking functions or regulating the use of private property is by the proper use of police power. The power of eminent domain can be exercised to take private property because it will be *useful* to the public. Police power, on the other hand, is employed to regulate the use of private property because its uncontrolled use could be *harmful* to the public interest. It has been ruled by the courts that exercise of such power does not appropriate property for public use, even though it may disturb the enjoyment of individual rights, and thus does not require payment in compensation to the owners. Exercise of police power is limited by the requirement that there must be substantial relationship between a regulation and the legitimate purposes of the police power. However, in effect, all that is required is the establishment of some rational connection between the means employed and the end sought. Thus, the zoning power is a permissible means of regulating use of private property in connection with water control.

The extent of public lands and waters is a question which has created some confusion in New Jersey. The state, according to a number of court decisions, has sovereignty over all lands below the high water mark. These constitute the shores and submerged lands of navigable waters, and the arms of the sea, where the tide ebbs and flows. Such lands belong to the state rather than to the riparian owners.

The state legislature has the power to regulate, abridge, or vacate public rights in connection with these areas. The state's title to tidal and navigable waters can be alienated in the following ways:

1. Conveyance of fee or a lesser interest in tidal lands
2. Conveyance of grant in fee simple of riparian lands
3. Leasehold grant

4. Grant of license
5. Conveyance of easement

There still exists uncertainty as to the extent to which state title has been alienated, as well as to the degree to which public control has been vacated.

Federal jurisdiction over watercourses is limited to interstate waters. Passage of the *Submerged Land Act* in 1953 established state title to lands beneath the navigable waters within each state, and confirmed the power of the states to provide for the use and control of such lands. At the same time, federal jurisdiction was confined to the natural resources of the seabed of the continental shelf seaward from the state boundaries.

The phrase *land beneath navigable waters* was defined by the act as falling into the following classes:

1. *Non-tidal* waters, navigable under federal law at the time the state entered the union, up to the ordinary high-water mark.
2. *Land permanently or periodically covered by tidal waters* up to the line of mean high tide, and seaward to a line three miles distant from the coast line.
3. *Filled-in, made, or reclaimed lands* which were formerly lands beneath navigable waters, as defined in the first two classifications.

It is virtually impossible for the property owners, acting alone, to accomplish drainage or watershed control. Drainage problems which affect a particular property are partially caused elsewhere, and their solution requires extensive action and the consent of many property holders. Thus, effective water control is dependent primarily on public action.

Municipalities in New Jersey have no general authority to undertake drainage or flood control operations out of general local revenues. They may, however, undertake land and stream reclamation as local improvements. When such improvements are undertaken individually they must be financed by special assessments against those properties which benefit from the improvements. It is only when several such improvements are combined into a general improvement program, or when repairs and maintenance of local improvements are undertaken, that financing from general tax revenues is allowable (NJSA 40:56-1, 40:56-52).

Generally, solutions to drainage questions require the creation of special agencies. By means of a variety of laws, intermunicipal contracts can be drawn up for joint performance of any service that the municipalities involved are authorized to perform singly. In a similar way, municipal-contractual cooperation is possible.

Legislation passed at the turn of the century allows the formation of

intramunicipal or intermunicipal drainage districts by those municipalities bordering on tidewater, but these are somewhat inflexible because such districts can finance operations only by means of stipulated special assessments.

Soils conservation districts probably offer the most useful instruments for undertaking drainage programs. They have, however, only limited financial resources or flexibility and are generally tied to grant programs of the federal Department of Agriculture. However, this association with a federal agency can be an asset in that such agencies provide a source of valuable skills and resources, and can assist greatly in formulating an overall policy related to drainage.

Watercourse Regulation

At least two distinct functions are involved in the regulation of water and of watercourses. One is controlling and preventing obstruction of drainage ways to facilitate safe disposal of water. The other is control of stream flow so that height and velocity of morning water do not overburden drainage facilities or result in flood damage.

One means of achieving these objectives is the enactment of stream encroachment laws. There are legal provisions which enable the formulation and enforcement of such regulations by public agencies on all levels. To the extent that they regulate private property, encroachment laws represent an exercise of police power, and modify the riparian rights of private property owners.

The basic regulatory authority over both public and private watercourses in New Jersey is the state itself. As has already been indicated the State has actual title to the navigable waters within its boundaries. In this connection the Department of Environmental Protection has general supervisory power over tidewaters and navigable waters, and is authorized to regulate encroachment upon them. However, this power is not applicable to non-navigable drainage ways in the state.

The State Encroachment Law is couched in very broad language. It provides that no "structure" within the "natural and ordinary highwater mark of *any stream*" shall be made by any public agency or private person without notifying the Division of Water Policy and Supply nor without its approval. In addition, the Division can order the removal or repair of any existing structure built subsequent to the enactment of the encroachment law in 1929, within the natural and ordinary highwater mark of any stream. The term *structure* has been interpreted broadly to include dams, bridges, culverts, walls, landfills, construction of channel improvements, and pipe crossings, among others.

Nonetheless, there are inherent limits in the statute. It contains no mandate for the Division of Water Policy and Supply to take the initiative in establishing and marking encroachment lines for stream channels. Such determination is not made until applications or complaints are filed. Thus, only a general administrative policy has been developed in interpreting the natural and ordinary high-water mark. Further, regulation extends only to structures; that is, to artificial or non-natural obstructions. Thus, the statute does not impose responsibility for maintenance of streams obstructed as a result of natural causes, or of causes difficult to determine.

The Water Policy and Supply Council does not require the approval of new projects involving stream channels draining an area of less than one-half square mile, although it does require anyone who proposes to undertake a project on or adjacent to *any* stream, whatever its size, to *notify* the Council of such plans. The Council has thus, in effect, delegated responsibility for regulating smaller streams to municipalities. When this responsibility is not assumed by a particular municipality, gaps occur in the regulation of many of the streams where critical flooding problems may occur.

The power granted to municipalities to establish encroachment lines and to regulate encroachments may be more far-reaching than the authority assigned to the State Division of Water Policy and Supply. Municipalities are authorized to define location, and establish width, grade, and elevation of any "Stream, creek, river, or other waterway" (NJSA 40:56-70). This provision, if it were interpreted broadly, could be applied to less defined storm drainageways such as depressions and swales, as well as to stream channels. Unfortunately, however, exercise of this power at the municipal level seldom occurs, in part because of cost and the lack of the necessary skills and data required.

In water management, as in most other areas of resource management, our achievement has been woefully limited. In part, this has been due to the diffuseness of responsibility embodied in the legislation which has been cited above. Even more, however, it is probably due to general ignorance of the powers which do exist.