


**Ohio Drainage
and Water Laws**

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**Examples of Drainage Issues:
"What Can I Do?"**

- Neighbor has blocked drainage and water is backing up on my property, causing flooding and tile blow outs.
- I have standing water on my property and need cooperation of neighbors for good drainage.
- Upstream person has altered the flow of water onto my land, causing flooding, erosion or swampy conditions.

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**Legal Framework
for Drainage Issues**

- Statutory Law
 - Petition Ditch Law
 - Petition to Soil and Water Conservation District
 - Petition to County Commissioners
 - Drainage Mitigation Regulations
- Case Law
 - Reasonable Use Doctrine

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**Statutory Provisions
for Petition Ditch Projects**

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**Petition Ditch Projects with
Soil and Water Conservation Districts**
ORC Chapter 1515

- Grants SWCD authority to:
 - Cooperate or enter into agreements
 - With occupier of lands
 - Within the district
- To accomplish:
 - Projects for flood prevention,
 - Conservation, development, utilization, and management of natural resources.

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**Petition Ditch Projects with
Soil and Water Conservation Districts**
ORC Chapter 1515

- Landowner initiated projects
 - A formal process that begins with a landowner petition.
 - SWCD accepts or rejects the petition.
 - Based on a preliminary assessment.
 - Accepted petitions:
 - Set for a "view" and a hearing.
 - Notice given to affected landowners.
 - Need approval by County Commissioners.

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**Petition Ditch Projects with
Soil and Water Conservation Districts**
ORC Chapter 1515

- SWCD may approve petition when it finds:
 - After due notice and public hearing,
 - That construction of an improvement is in the public welfare,
 - That the project will improve water management to the benefit of the lands therein,
 - That benefits of improvement will be greater than cost, and
 - That the improvement will benefit the lands by promoting the economical, industrial, and social development of the area.

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**Petition Ditch Projects with
Soil and Water Conservation Districts**
ORC Chapter 1515

- Upon approval, the SWCD shall:
 - Draft plans, specifications and cost estimates.
 - Determine the land area (watershed) benefited by improvement.
 - Benefited land is subject to assessment for cost of project.
 - Certify such findings to Board of County Commissioners.
 - Along with copies of preliminary report, plans, specifications and estimates.

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**Petition Ditch Projects with
Soil and Water Conservation Districts**
ORC Chapter 1515

- Upon certification from SWCD, the County Commissioners must accept or reject petition within 60 days.
- Considerations:
 - Cost
 - Land that must be taken or acquired for project
 - Benefit to public welfare
 - Impact drainage will have on lower landowners
 - Any other “proper matter”

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**Petition Ditch Projects with
Soil and Water Conservation Districts**
ORC Chapter 1515

- If accepted, County Commissioners may:
 - Adopt a resolution to levy assessment on property within the project area for construction and maintenance costs.
 - Conducts final hearing on objections to assessments
 - Assess property at a uniform or varied rate
 - Varied Rate – Assessed according to benefit received:
 - Increased productivity
 - Increased development potential
 - Includes public bodies (State, County, Township)

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**Petition Ditch Projects with
Board of County Commissioners**
ORC Chapter 6131

- Landowner(s) file a petition with the county commissioners to:
 - Construct, recondition, widen, deepen, straighten, or alter the course of a
 - Ditch, drain, watercourse or floodway
- The petition may be amended by any benefited landowner.

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**Petition Ditch Projects with
Board of County Commissioners**
ORC Chapter 6131

- Upon petition, Commissioners shall:
 - Provide for a viewing between 25 and 90 days after the filing.
 - Provide for a first hearing between 10 and 90 days after the viewing.
 - Send a notice to all the affected land owners announcing the viewing/hearing and publish the notice in one local newspaper.

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**Petition Ditch Projects with
Board of County Commissioners**

ORC Chapter 6131

- Affected landowners may:
 - File statements supporting or opposing improvement any time before final order.
 - Make oral statements at hearings.
- Commissioners shall decide if the cost of the proposed improvement will be less than the benefits.

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**Petition Ditch Projects with
Board of County Commissioners**

ORC Chapter 6131

- "Benefit" includes:
 - Elimination or reduction of damage from flood;
 - Removal of water conditions that jeopardize public health, safety, or welfare;
 - Increased value of land resulting from the improvement;
 - Use of water for irrigation, storage, regulation of stream flow, soil conservation, water supply, or any other purpose incidental thereto; and
 - Providing an outlet for the accelerated runoff from artificial drainage (example, parking lots).

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**Petition Ditch Projects with
Board of County Commissioners**

ORC Chapter 6131

- The County Engineer shall prepare:
 - A preliminary estimate of costs,
 - Comment on feasibility, and
 - Give opinion on whether the cost of the proposed improvement will be less than the benefits.
- The Engineer may submit alternate proposals.

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**Petition Ditch Projects with
Board of County Commissioners**

ORC Chapter 6131

- If Commissioners find at the first hearing, that the proposed improvement:
 - Is not necessary,
 - Will not be conducive to the public welfare,
 - Fails the benefits vs. costs analysis,
- Then the Board shall dismiss the petition
 - Any affected landowner may appeal.

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**Petition Ditch Projects with
Board of County Commissioners**

ORC Chapter 6131

- If Board approves petition:
 - Project goes to County Engineer
 - Drafts plans, maps and cost estimates.
 - Estimates the benefit to each landowner.
 - Makes recommendation for assessments.
 - Final hearing is scheduled
 - Landowners can challenge Engineer's plan.

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**Petition Ditch Projects with
Board of County Commissioners**

ORC Chapter 6131

- Board considerations for final approval:
 - Cost of project
 - Compensation for land or other property to be taken
 - Effect on land along or in vicinity of the improvement
 - Effect of improvement on land below the lower terminus of the improvement
 - Sufficiency or insufficiency of the outlet
 - Benefits to the public welfare
 - Any other proper matter that will assist it in finding for or against the improvement

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Petition Ditch Projects with Board of County Commissioners

ORC Chapter 6131

- Grounds for Appeal - 21 days from final approval
 - Is the improvement necessary?
 - Will the improvement be conducive to the public welfare?
 - Is the cost of the improvement greater than the benefits conferred?
 - Is the route, termini, or mode of construction the best to accomplish the purpose of the improvement?
 - Are the assessments levied according to benefits?
 - Is the award for compensation or damages just?

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Petition Ditch Projects Ditch Maintenance Fund

ORC Chapter 6137

- For drainage improvements post 8/23/57.
- County commissioners shall establish and maintain a fund for the repair, upkeep, and permanent maintenance of each improvement constructed under ORC Section 6131.

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Statutory Provisions for Drainage Mitigation Regulations

Drainage Mitigation Regulations

ORC 307.37

- Preventative approach to drainage interference issues.
- New law, effective October 29, 2003.
- Grants counties authority to require drainage mitigation.
- Only applicable to counties with county building codes.

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Drainage Mitigation Authority

ORC 307.37

- A county building code may include regulations that provide for:
 - Reasonable drainage mitigation requirements for new construction.
 - Reasonable alteration of a proposed new construction to mitigate adverse effects on existing surface or sub-surface drainage.
- May deny building permit if project does not meet mitigation regulations.

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Common Law Provisions: Ohio's Reasonable Use Doctrine

Ohio's Reasonable Use Doctrine

- "A possessor of land is not unqualifiedly privileged to deal with surface water as he pleases, nor is he absolutely prohibited from interfering with the natural flow of surface waters to the detriment of others ... He incurs liability only when his harmful interference with the flow of surface water is unreasonable."
 - McGlashan v. Spade Rockledge, 62 Ohio St. 2d 55, 58 (1980).

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McGlashan v Spade Rockledge

- Facts of case:
 - Condo developers cleared and graded higher elevation land.
 - Made no provision for run-off during construction.
 - Heavy rains carried mud, rocks and concentrated water flow to lower elevation home owners.
 - Sued for damage caused by mud, rocks, flooding.

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McGlashan v. Spade Rockledge

- Trial Court
 - Applied a modified "civil rule": "If Spade Rockledge, by clearing and grading its land did no more than increase the volume and accelerate the flow of surface water ... [they] are not liable".
- Ohio Supreme Court
 - REJECTED the civil law rule in favor of the Restatement of Tort's "reasonable use" rule.

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"Reasonable Use" Analysis

- Reasonable Use factors (Restatement of Torts):
 - Utility of the water/drainage use
 - Purpose of the use? Suitability of the use to the are? Economic and social values of the use?
 - Gravity of the harm to innocent landowner
 - Is harm minor or serious?
 - Practicality of providing adequate drainage
 - Could harm be avoided at a reasonable cost?
 - Justice of requiring others to bear losses caused by the use.

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"Reasonable Use" Applied

- Huggins Farms, Inc. v. Bucyrus Plaza, et al, 1989 Ohio App. LEXIS 1728, 3rd App. Dist., Crawford Co. (May 9, 1989).
 - Blockage of natural drainageway caused dominant (upland) farm to flood.
 - City of Bucyrus held jointly liable with developers for negligently issuing building permits.
 - City's approval of plans that failed to provide for adequate drainage was deemed negligent.
 - Developer's negligence in design was attributed to City, based on City's approval of design.

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"Reasonable Use" Applied

- Horrisberger v. Mohlmaster, 102 Ohio App. 3d 494, 9th App. Dist. Wayne County (1995).
 - Lower landowner filled open ditch and installed pipe inlet at higher elevation than higher landowner's field tile outlet that drained into ditch.
 - Higher landowner subjected to flooding, tile "blow-outs" and septic problems.
 - Court applied reasonable use doctrine, held landowner failed to act with reasonable care when interfering with surface water flow.

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"Reasonable Use" Applied

- Franklin County Board of Health v. Paxson, et al 152 Ohio App. 3d 193, 10th App. Dist., Franklin County (2003).
 - School site retaining pond discharged overflow within a few feet of landowner's property, causing flooding
 - "Best efforts" are not always enough
 - Engineering solution for retention pond overflow was inadequate and created unreasonable interference with landowners.

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Ohio Drainage Law – Imperfect Solutions?

- Petition ditch laws are antiquated (+150 years old) and in need of revision.
 - New social issues require new approaches.
- "Reasonable use" doctrine places burden on harmed party.
 - Can we extend mitigation regulation approach to other situations?
 - Many communities do not have resources to develop mitigation regulation programs.

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Rights to Use Water

Water as a Property Right

- Ohio Supreme Court: *McNamara v. Rittman* (2005)
 - "the title to property *includes* the right to use the groundwater beneath that property... that right is one of the fundamental attributes of property ownership and an essential stick in the bundle of rights that is part of title to property."

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Water as a Property Right

- Ohio Supreme Court: *McNamara v. Rittman* (2005)
 - Governmental interference with one's groundwater can amount to a constitutional "taking" of property that requires compensation to the landowner who has lost the property right.

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Riparian Water Rights

- Ohio common law
 - A landowner may use the flowing water from a waterway, as long as that use is "reasonable."

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Riparian Water Rights

- Ohio statutory law – Nuisances
 - (C) No person shall unlawfully obstruct or impede the passage of a navigable river, harbor, or collection of water, or corrupt or render unwholesome or impure, a watercourse, stream, or water, or unlawfully divert such watercourse from its natural course or state to the injury or prejudice of others. ORC 3767.13

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How Much Water?

- “Reasonable use”, again
 - A landowner may make a reasonable use of the water beneath his/her property.
 - Another landowner has a legal cause of action where one’s water use causes an “unreasonable” interference with his/her water use.

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How Much Water?

- Factors for determining “reasonable use” for water withdrawals – ORC 1521.17
 - (1) The purpose of the use;
 - (2) The suitability of the use to the watercourse, lake, or aquifer;
 - (3) The economic value of the use;
 - (4) The social value of the use;

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How Much Water?

- Factors for determining “reasonable use” for water withdrawals – ORC 1521.17
 - (5) The extent and amount of the harm it causes;
 - (6) The practicality of avoiding the harm by adjusting the use or method of use of one person or the other;
 - (7) The practicality of adjusting the quantity of water used by each person;

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How Much Water?

- Factors for determining “reasonable use” for water withdrawals – ORC 1521.17
 - (8) The protection of existing values of water uses, land, investments, and enterprises;
 - (9) The justice of requiring the user causing harm to bear the loss.

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Large Water Withdrawals

- Ohio Statutory Law:
 - Water withdrawals in excess of 100,000 gallons per day must register with ODNR

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Water Wars?

- Ohio law does not have a water allocation system
 - Many states utilize permit programs to regulate water use
- McNamara case highlights potential of “water wars”
- Should Ohio consider a permit program?

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