

## **2.6 Statutory Law**

### **2.6.1 Introduction**

The inadequacies of the common law or court-made laws of drainage led to a gradual enlargement and modification of the common law rules by legislative mandate. In the absence of statute, the common law rules adopted by State courts determine surface water drainage rights. If the common law rules have been enlarged or superseded by statutory law, the statute prevails. In general, statutes have been enacted that affect drainage in one way or another in the subject areas described below.

### **2.6.2 Eminent Domain**

In the absence of an existing right, public agencies may acquire the right to discharge highway drainage across adjoining lands through the use of the right of eminent domain. Eminent domain is the power of public agencies to take private property for public use.

In Connecticut this is accomplished for highway purposes, through condemnation. It is important to remember, however, that whenever any property is taken under eminent domain, the private landowner must be compensated for the loss.

### **2.6.3 Drainage Statutes**

There are several statutes which empower the Commissioner of ConnDOT to construct, drain, and control highways. Other statutes exist to specifically address drainage of properties, blockage of watercourses, etc. Some of these statutes are listed below for reference:

- Obligations pertaining to culvert capacity and length

CGS Section 19a-336

The State is obligated to maintain culverts of adequate capacity to conduct natural watercourses under state highways. The State is only obligated for piping that portion of the system within the highway area which is necessary to provide a safe highway for the traveling public. The State is not obligated to pipe the entire width of the right-of-way.

CGS Section 52-461

It is the obligation of each property owner to maintain the flow of a stream so as not to create an obstruction to the flow of the watercourse. Should an abutting owner desire to extend a state culvert which conducts a stream, it is their responsibility to accomplish this totally at their expense. The private installation must be of adequate capacity so as not to create an obstruction to the flow of the watercourse. Permits issued by the Department to private owners for such extensions should carefully state these requirements.

- Blockage of watercourses

There are two statutes relating to procedures for clearing watercourses:

CGS Section 13a-138 empowers the Commissioner of Transportation to clear a watercourse.

CGS Section 52-461 must be administered by the selectman in the particular town involved

- Upon discovering an obstructed watercourse causing a real or potential problem to state facilities, notify the property owner by certified mail of the obligation to remove the obstruction. State in this letter that if the obstruction is not removed within 30 days, we will refer the matter to the Attorney General's Office for legal resolution. If the obstruction has not been removed after 30 days, request the Attorney General's Office by memorandum to investigate the matter for appropriate action. The request should detail all the facts of the case and attach maps, photographs and all records and correspondence available.
- If the obstruction causes imminent danger to highway facilities or flooding which is hazardous to the highway user, take immediate action to remove the obstruction with state forces. A full report should be sent to the Attorney General's Office for such action as necessary to avoid future problems.

#### 2.6.4 Water Rights

The water right itself which attaches to a watercourse is a right to the use of the flow, not ownership of the water itself. This right of use is a property right, entitled to protection to the same extent as other forms of property, and is regarded as real property. After the water has been diverted from the stream flow and reduced to possession, the water itself becomes the personal property of the riparian owner.

- **Riparian Doctrine** – Under the riparian doctrine, lands contiguous to watercourses have prior claim to waters of the stream solely by reason of location and regardless of the relative productive capacities of riparian and nonriparian lands.
- **Relocation of watercourses** – Neither an individual nor a governmental agency may relocate a watercourse so as to deprive the abutters of their riparian rights without obtaining recorded releases from such abutters. Likewise, an individual and a government agency may obtain the rights necessary to change the location of the point of discharge of a watercourse onto an abutter's property.
- **Erosion of private property** – The erosion of private property caused by state highway drainage outlets such as leakoffs, culverts and storm sewers is the responsibility of the State to correct. These cases are quite frequent and may be costly if the condition is not corrected as soon as it is discovered. However, when land use at the outlet has been modified and erosion is caused by the owner or developer's activities, the State should not accept the responsibility of correcting the condition.

Where the State possesses drainage rights by prescription, it may be necessary to acquire a drainage right-of-way in order to resolve the problem, or to extend a present drainage right-of-way where the erosion occurred beyond the easement.

- **State's right to outlet highway drainage** – The State has the well-established right to outlet highway drainage into a natural watercourse within the highway right-of-way, provided such a watercourse is the eventual natural recipient of the collected runoff. This right is not impaired even though the State, in the performance of its governmental duties, increased the rate or quantity of water discharged from highway by changing the runoff characteristics of areas being drained or by installing pipe and other drainage facilities. The right is impaired only if the State increases the size of the drainage area from which the runoff is collected. If the natural drainage area is exceeded, then deeded drainage rights must be acquired from all owners adversely affected by the diversion. Should the State make drainage improvements within an existing drainage area draining to a watercourse, which results in an increased rate of flow causing an existing pipe on private property to be of inadequate capacity, the State is not obligated for improvements necessary on private property. The State also has the right to increase the size of a culvert conducting a watercourse under a state highway without acquiring drainage rights. The State must also conform to all applicable environmental laws, some of which are noted in Section 2.6.5.

Generally, what is important for highway designers to keep in mind in the matter of water rights is that proposed work in the vicinity of a stream should not impair either the quality or quantity of flow of any water rights to the stream.

### 2.6.5 Environmental Law

In addition to Federal laws which affect designs with regard to pollution, dredging and filling, Connecticut has several statutes pertaining to these aspects as well as flooding, dams and wetlands. The present statutes are as follows and are under the jurisdiction of the ConnDEP.

- Inland Wetland and Watercourse - CGS 22a-36 to 45

This statute and regulations cover all inland wetlands and watercourses in the state. The wetlands are defined by soil type and the watercourses are defined as any body of water, standing or flowing, natural or artificial. Any impacts on wetlands or watercourses require a permit. However, if an activity requires a tidal wetlands or structure and dredging permit, then the ConnDOT is exempt from the inland wetland and watercourses process.

- Stream Channel Encroachment Lines - CGS 22a-342 to 349

The State has established encroachment lines along major flood prone rivers. Any encroachment or activity riverward of these lines regardless of elevation requires a permit.

- Water Diversion – CGS 22a-365 to 378

A diversion is any withdrawal, alteration, modification or diminution of the volume of water that would occur at a point at any given moment. Wells or well systems withdrawing more than 50,000 gallons per day, stream relocation, stream channelization, stream bypass and storm drainage system collecting surface water runoff from areas of 100 acres or more in size; and dams and impoundments are among the activities requiring permits. However, any DOT highway project is exempt from this permit process if other permits are required from D.E.P.

- Dam Maintenance and Construction - CGS 22a-401 to 411

Construction, alteration, rebuilding, substantially repairing, adding to, replacing or removing a dam requires a permit.

- Flood Plain Management - CGS 25-68b through 25-68h

Any action proposed by any state agency in, or affecting a floodplain, or which impacts storm drainage, including but not limited to structures, obstructions, site development, grants, loans, or programs regulating flood flows must be certified and approved by D.E.P. This statute enforces FEMA flood plain management standards.

- CGS 13a-94 CGS (Construction over or Adjacent Streams) requires that all structures to be built over, or structures or embankments to be built adjacent to, streams in connection with state highway projects conform to the requirements of DEP as determined by Sections CGS 22a-342 to 22a-348.
- Structures and Dredging Permit – CGS 22a-359 through 22a-363f for regulated activities conducted waterward of the high tide line in tidal, coastal, or navigable waters.
- Tidal Wetland Permit – CGS 22a-29 –for regulated activities conducted within tidal wetlands

### **2.6.6 Sewage Draining into Highway Area**

When it is discovered that contaminated water has been directed to a state highway system or is outletting into a highway area, an investigation into the source should be conducted. The following procedure should be pursued:

1. Notify the property owner by certified letter that he is creating a nuisance within the state highway area in violation of the Sanitary Code of the State of Connecticut, and request that the nuisance be abated within a given period, generally 30 days.
2. If the property owner ignores this request, refer a copy of the correspondence to the local health officer asking that action be taken by him/her under their statutory authority. It may sometimes be necessary for the District Drainage Engineer to assist the local health officer in making a definite determination as to the source of contamination. The use of “Uranine Water Soluble” (sodium fluorescein) may be used as a tracing material for this purpose.
3. If the local health officer fails to make acknowledgement or to take action within 15 days, refer the entire matter to the Director of the Bureau of Sanitary Engineering, State Health Department, requesting positive action to insure the abatement of the nuisance.
4. During the foregoing procedure, send copies of all correspondence to: (1) Director of Environmental Health Services, State Health Department, (2) Department of Environmental Protection, when the case involves pollution of “waters” of the State.