

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE ex rel. WAYNE T. DONER, et al.,	:	Case No. 2009-1292
	:	
Relators,	:	Original Action in Mandamus
	:	
v.	:	
	:	
SEAN D. LOGAN, Director,	:	
Ohio Department of Natural Resources, et al.,	:	
	:	
Respondents.	:	

MEMORANDUM OF RESPONDENTS IN OPPOSITION TO RELATORS' MOTION TO EXTEND BY 60 DAYS THE DEADLINES FOR PRESENTATION OF EVIDENCE AND MERIT BRIEFING

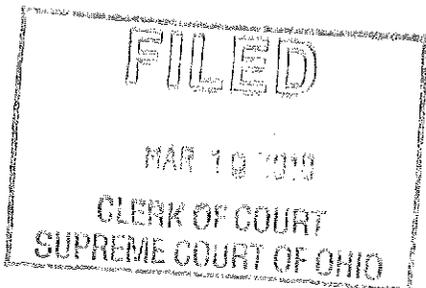
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 Counsel for Respondents



IN THE SUPREME COURT OF OHIO

STATE ex rel. WAYNE T. DONER, et al., : Case No. 2009-1292
: :
Relators, : Original Action in Mandamus
: :
v. : Master Commissioner Andrew J. Campbell
: :
SEAN D. LOGAN, Director, : :
Ohio Department of Natural Resources, et al., : :
: :
Respondents. : :

**MEMORANDUM OF RESPONDENTS IN OPPOSITION TO RELATORS’
MOTION TO EXTEND BY 60 DAYS THE DEADLINES FOR PRESENTATION
OF EVIDENCE AND MERIT BRIEFING**

I. INTRODUCTION

For the second time, Relators ask this Court to extend the deadline for presenting evidence to allow them more time to (1) conduct expert discovery; (2) submit additional evidence of flooding that allegedly occurred recently on some Relator lands; and (3) review deposition transcripts, some of which have not yet been provided by the court reporter to their counsel. This time, Relators seek to extend the evidence-filing deadline by 60 days (i.e., until June 1, 2010).

Relators should not be allowed to conduct further expert discovery because the previously agreed-upon deadline for doing so expires today. When the Court agreed to extend the evidence deadline to April 1, 2010, parties’ counsel agreed to complete non-expert depositions and provide expert evidence by March 1, 2010. They also agreed to cut-off expert depositions on March 19, 2010, but they did not agree to allow expert supplemental rebuttal evidence thereafter. In accordance with this agreement, Respondents completed their depositions of Relators by, and submitted their expert

evidence to Relators' counsel on, the March 1st deadline. Relators chose not to submit any additional expert evidence except for an affidavit they belatedly sent to Respondents' counsel two days later. Although Relators' counsel claims he could not access some of the material contained on a CD-Rom provided by Respondents,¹ the disk did not have "hidden" information as he insists.

Relators should also not be permitted to submit evidence of recent flooding on some of their properties allegedly caused by ODNR's modification of the Grand Lake St. Marys spillway in 1997. Such evidence is immaterial because Relators are seeking relief for an alleged permanent taking, and not for multiple temporary takings.

Although not warranted, if the April 1st deadline for filing evidence is extended, it should be limited to allowing only Relators who were deposed and who have not had an opportunity to read their transcripts to review and make corrections. The Civil Rules permit deponents who do not waive reading to review and correct their deposition transcripts within thirty days of submission by the court reporter. Since none of the Relators who were deposed waived reading, and since their counsel represents that not all of the transcripts have been submitted by the court reporter to them, Respondents agree that they should be afforded a reasonably sufficient time (no more than thirty days from transcript submission) to review and correct their transcripts. Likewise, Respondents should also have an opportunity to further inquire of any Relator who makes any substantive changes to the deposition testimony.

Relators' request for a 60-day extension of the evidence-filing deadline is not warranted. Any extension of the April 1st deadline should be limited to allowing only

¹ The Parties agreed to provide expert reports and documents electronically.

those Relators who have not had an opportunity to read their deposition transcript to do so, and to allow Respondents to re-depose any Relators who make any substantive changes to their testimony. However, if the Court extends time to Relators without restrictions, Respondents request that any extension granted also apply to them.

II. RELEVANT BACKGROUND

Relators' version of the background facts and circumstances is not accurate in all particulars. First, Relators' statement that Respondents sought to extend the evidence-filing deadline from March 1, 2010 to April 1, 2010 is misleading. At that time *Relators* wanted more time to review Respondents' expert evidence before deposing Respondents' experts. During a conference call with the Master Commissioner, counsel for Respondents agreed to extend the evidence-filing deadline to April 1st to accommodate Relators' request. After the Master Commissioner said that he would extend the March 1st deadline to April 1st, on January 12, 2010, counsel for both sides agreed to (1) complete all non-expert depositions and provide expert evidence (affidavits, reports, etc.) by March 1, 2010, and (2) complete any expert depositions by March 19, 2010, leaving them almost two weeks to review transcripts and prepare their evidence for filing with the Court. (Exhibit A, January 12 and 14, 2010 email correspondence from attorney Joseph R. Miller.)

Based on this agreement, Respondents completed their depositions of Relators and other non-expert witnesses by the end of February 2010. Relators' counsel also deposed some of Respondents' non-expert witnesses. On March 1, 2010, Respondents provided Relators' counsel with affidavits and reports of two experts – Stantec Engineering (on disk) and Phillip De Groot. Relators provided no additional expert

evidence on March 1st, but two days later, in violation of the agreement, they sent Respondents' counsel an affidavit of the Lucas County Engineer. (Exhibit B.)

Contrary to Relators' statement, the Stantec data is not "hidden." Rather, the files that Relators claim are hidden are simply two attachments to the report document which is in portable document format (.pdf), a commonly used format distributed by Adobe Systems, Inc. Throughout this litigation Relators have similarly provided documents to Respondents in portable document format. Accordingly, Respondents had no reason to believe that Relators would not be familiar with the Attachment function of Adobe Acrobat.²

Notably, the modeling software programs used to access some of the Stantec files (not the report) are readily available on-line, free of charge, from the United States Army Corps of Engineers Hydrologic Engineering Center (HEC). HEC is well known for its nationally and internationally renowned hydrologic engineering programs. See, <http://www.hec.usace.army.mil/whowearc/history.html>. Therefore, because HEC-RAS and HEC-HMS are industry standards, Respondents also expected that Relators' experts would be readily familiar with the format of the attached files.

III. ARGUMENT

From the beginning of this litigation, Relators have insisted that Respondents are precluded, as the result of litigation in a separate case, from litigating whether the 1997 modification of the Grand Lake St. Marys dam spillway caused an increase in the extent and duration of flooding on Relators' property and whether such increased flooding will frequently and inevitably recur. Relators fought hard early on in the litigation against

² Counsel for Respondents had no trouble accessing the files without special instruction from Stantec, and without consulting their IT department.

Respondents' effort to extend the original writ schedule. Nevertheless, they have now twice asked this Court to extend their time for expert discovery.

- A. Relators should have no more time to conduct expert discovery because they did not seek an extension until after (1) they received Respondents' expert evidence and (2) the agreed-upon deadline for providing additional expert evidence expired.**

Based on these facts, Relators should get no additional time to depose Respondents' experts. (Denying Relators' motion also effectively prevents Respondents from deposing Relators' experts, since Respondents have not done so.) Both sides in this litigation are represented by multiple and able counsel. Both sides agreed to (1) move the evidence-filing deadline to April 1st, (2) provide any additional expert evidence to opposing counsel by March 1st, and (3) complete expert depositions by March 19th. These deadlines were understood to apply equally to both sides.³ Consistent with the Court's original-action procedure for the simultaneous presentation of evidence, the parties did not anticipate and did not agree to another round of supplemental or rebuttal expert evidence after March 1st. Indeed, Relators made no attempt to extend these deadlines until after the deadline passed and their counsel received Respondents' expert evidence. Relators could have provided Respondents' counsel with additional expert evidence on or before March 1st but chose not to do so.

Expert depositions are not essential at this point. Each party has the other's expert evidence. Sometime after April 1st each side will brief the Court on legal issues and the quality of the expert evidence and conclusions. Rather than timely asking Respondents' counsel to schedule its experts for deposition (both sides agreed to make

³ See Joseph R. Miller's January 12, 2010 email stating "we accept your proposal to exchange expert evidence by March 1," attached hereto as Exhibit B.

their experts available without the need for subpoenas), Relators instead sought 60 more days to conduct expert discovery. Accordingly, this Court should deny Relators' belated request.

However, if this Court extends the evidence-filing deadline, it should do so for both sides and not permit Relators to submit any additional expert evidence because both sides agreed to cut-off such evidence after March 1st.

B. Evidence of recent flooding on some Relators' lands is immaterial to Relators' claim that ODNR has caused a permanent continuing taking of their properties.

This Court should also reject Relators' request for more time to prepare and produce evidence of additional flooding that allegedly occurred on some Relators' properties on or after March 13, 2010. Relators are seeking mandamus relief for the permanent continuing taking of their land, not for multiple temporary takings. Therefore, Relators' allegations of subsequent flooding caused by ODNR's 1997 modification of the spillway are immaterial to their claim. Likewise, Relators' counsel agreed to the March 1st non-expert deposition cut-off date. Relators should not be given more time to submit new evidence every time one or more of them believes they have additional flooding allegedly caused by the spillway modification.

However, if this Court permits Relators to submit new evidence of recent flooding, then fairness requires Respondents to have an opportunity to depose those Relators and have their experts address such evidence in a supplemental report.

C. Relators who were deposed should have reasonable time to review their deposition transcripts

Respondents agree that Relators should have reasonable time to review and correct mistakes in their deposition transcripts. Civil Rule 30(E) gives a deposed witness

thirty (not 60) days from submission of the deposition transcript by the court reporter to make any changes in form or substance and sign the transcript. Relators, however, also state that they may seek to “clarify” the transcripts as needed. The errata sheet may not be used as a “take-home exam” to contradict damaging testimony under oath. See *Wyeth v. Lupin* (D.C. Md. 2008), 252 F.R.D. 295, 296-97. Nor do changes negate the original testimony. *Wright v. Honda of Am. Mfg.* (1995), 73 Ohio St.3d 571, 575-76.

Accordingly, Respondents agree that the Court should give those Relators who were deposed, and who have not had an opportunity to read their transcripts, sufficient time (no more than thirty days) to review and make corrections.⁴ In fairness, this Court should also permit Respondents to re-depose any Relator who makes any substantive change to his or her deposition testimony as to those changes.

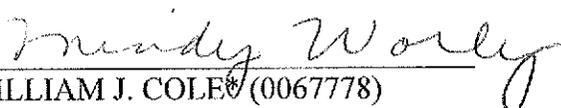
IV. CONCLUSION

No extension of the agreed deadline for submittal of evidence is necessary in this case. If any extension of the April 1, 2010 deadline is granted, it should only permit Relators a reasonably sufficient time to review and correct their deposition transcripts in accordance with Civ.R. 30(E). In that case, ODNR should be permitted to depose any of the Relators who make any substantive change to their transcripts as to those changes. This Court should not permit Relators to engage in any further expert discovery, by submitting additional evidence, by adding expert witnesses, or by deposing ODNR’s expert witnesses. This Court should also not extend time to allow Relators to prepare evidence of alleged recent flooding on some of their properties during last week’s heavy rains.

⁴ On information and belief, counsel believes the remaining deposition transcripts will be available for the Relators to review on Monday, March 22, 2010.

Respectfully submitted:

RICHARD CORDRAY
Ohio Attorney General


WILLIAM J. COLE* (0067778)

**Counsel of Record*

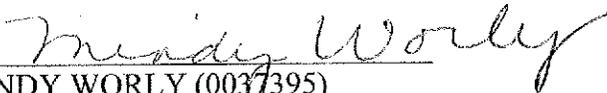
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Counsel for Respondents

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was sent by regular mail on March 19, 2010,
to Bruce L. Ingram, Joseph R. Miller, Thomas H. Fusonie and Kristi Kress Wilhelmy,
Vorys, Sater, Seymour & Pease, P.O. Box 1008, Columbus, OH 43216.


MINDY WORLY (0037395)

William J. Cole

From: Miller, Joseph R. [JRMiller@vorys.com]
Sent: Thursday, January 14, 2010 10:21 AM
To: William J. Cole
Cc: Ingram, Bruce L.; Fusonie, Thomas H.; Wilhelmy, Kristi K.; Mindy Worly; Jennifer Croskey; Rachel H. Stelzer; Dale T. Vitale; Daniel J. Martin; Brewer, Martha C.
Subject: RE: Discovery Issues in State ex rel. Doner v. Logan, 09-1292

Bill,

I obviously disagree with your characterization of your February 15th proposal, but, regardless, as I understand it from your various correspondence, what you are now proposing is as follows:

- March 1st: Relator and non-expert depositions should be completed
- March 1st: Deadline by which ODNR will provide to Relators any reports and affidavits of its expert witnesses
- March 19th: Deadline by which all expert depositions should be completed
- April 1st: Evidence to be submitted, as established by the Master Commissioner's Order

Relators will agree to the schedule above.

You still have not provided us any dates for deposition of the fact witnesses we requested some time ago. Will you provide potential dates to us this week?

Thank you,
Joe Miller

From: William J. Cole [mailto:william.cole@ohioattorneygeneral.gov]
Sent: Wednesday, January 13, 2010 3:35 PM
To: Miller, Joseph R.
Cc: Ingram, Bruce L.; Fusonie, Thomas H.; Wilhelmy, Kristi K.; Mindy Worly; Jennifer Croskey; Rachel H. Stelzer; Dale T. Vitale; Daniel J. Martin; Brewer, Martha C.
Subject: RE: Discovery Issues in State ex rel. Doner v. Logan, 09-1292

Joe:

We are working on dates and locations to depose Relators in Mercer County. We will probably add some more names to the "first round" list I sent you earlier.

During yesterday's phone conferencce, I requested a March 1st deadline for Relator and other non-expert depositions. Feb. 15th was not a compromise proposal, but simply an alternative date if the Master Commissioner was going to decide the issue. Plus, at that time neither side knew which way the Master Commissioner was going to rule on the deadline extension for submittal of evidence. Now that the Master Commissioner has extended that deadline to April 1 and ordered Relator depositions to occur in Mercer County, I request that you agree to a March 1st deadline. Allowing for non-expert depositions in Jan.-Feb., while reserving the expert depositions for March, will in no way prejudice your side. And a March 1st deadline provides both sides with greater flexibility to schedule (and if necessary, reschedule) depositions

3/19/2010



due to conflicts, inclement weather, or otherwise. We will, of course, continue to work with you in scheduling deposition dates and times, and having until March 1st will allow the depositions and their transcription to occur in a more orderly and manageable fashion. Considering that we willingly agreed to the full extension you requested for both the expert-deposition and evidence deadlines to give your side sufficient time to review our expert affidavits and material, we hope you will agree to this reasonable request.

Please advise.

William J. Cole

Senior Assistant Attorney General
Ohio Attorney General Richard Cordray's Office
Executive Agencies Section
30 East Broad Street, 26th Floor
Columbus, Ohio 43215
614.466.2980 (phone), 866.354.4086 (fax)
william.cole@ohioattorneygeneral.gov

From: Miller, Joseph R. [mailto:JRMiller@vorys.com]

Sent: Tuesday, January 12, 2010 1:46 PM

To: William J. Cole; Ingram, Bruce L.; Fusonie, Thomas H.; Wilhelmy, Kristi K.; Mindy Worly; Jennifer Croskey; Rachel H. Stelzer; Dale T. Vitale; Daniel J. Martin

Subject: RE: Discovery Issues in State ex rel. Doner v. Logan, 09-1292

Bill,

Following up on the Court conference of this afternoon and the Court's admonition that the parties agree upon a schedule for the completion of discovery, we accept your proposal to exchange expert evidence by March 1 and conclude expert depositions by March 19. We also accept your compromise proposal during the Court conference that non-expert depositions be completed by each side by February 15.

Joe

From the law offices of Vorys, Sater, Seymour and Pease LLP.

IRS CIRCULAR 230 DISCLOSURE: In order to ensure compliance with requirements imposed by the U.S. Internal Revenue Service, we inform you that any federal tax advice contained in this communication (including any attachments) is not intended or written to be used, and it cannot be used, by any taxpayer for the purpose of (i) avoiding penalties that may be imposed under the U.S. Internal Revenue Code or (ii) promoting, marketing, or recommending to another person, any transaction or other matter addressed herein.

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3/19/2010

William J. Cole

From: Fusonie, Thomas H. [thfusonie@vorys.com]
Sent: Wednesday, March 03, 2010 7:35 PM
To: Fusonie, Thomas H.; Rachel H. Stelzer; Mindy Worly; Dale T. Vitale; Jennifer Croskey; William J. Cole; Daniel J. Martin
Cc: Brewer, Martha C.; Wilhelmy, Kristi K.; Miller, Joseph R.; Ingram, Bruce L.
Subject: Doner, et al. v. Logan, et al.
Attachments: Affidavit of Keith Earley.pdf

Please find attached a supplemental production.

Tom Fusonie

From the law offices of Vorys, Sater, Seymour and Pease LLP.

IRS CIRCULAR 230 DISCLOSURE: In order to ensure compliance with requirements imposed by the U.S. Internal Revenue Service, we inform you that any federal tax advice contained in this communication (including any attachments) is not intended or written to be used, and it cannot be used, by any taxpayer for the purpose of (i) avoiding penalties that may be imposed under the U.S. Internal Revenue Code or (ii) promoting, marketing, or recommending to another person, any transaction or other matter addressed herein.

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3/19/2010



before in western Mercer County.

5. I wrote a series of letters to ODNR officials and other state officials, as well as met at times with ODNR officials during the 1990s, to express these concerns.

6. Attached hereto as Exhibit 1 is a true and accurate copy of a November 19, 1991 letter that I wrote to Francis Bucholzer, then ODNR Director. I offered my opinion at that time that "it appears to me that enlarging the spillway crest would cause more damage than good, even if O.D.N.R. figures are correct." I also stated that "[i]t appears desirable for a lake regulation policy which balances the value and probability of attaining the desired recreation pool during desired periods with the cost of flood damages likely to occur around the lake and along the Beaver Creek."

7. Attached hereto as Exhibit 2 is a true and accurate copy of a February 12, 1992 letter I wrote to Bob Goetemoeller, an ODNR official, to again express concern about increased flooding on the western side of Grand Lake that would result if the new spillway was constructed.

8. Attached hereto as Exhibit 3 is a true and accurate copy of a September 24, 1993 letter I wrote to Jim Morris, then ODNR Chief of the Division of Water, to again express these concerns. I asked that ODNR study and consider the new spillway's effects upon, among other things, downstream agriculture and asked that ODNR study the possibility of at least drawing down lake levels as necessary to try to prevent the flooding on the western side of Grand Lake that I believed would result from the new spillway.

9. Attached hereto as Exhibit 4 is a true and accurate copy of a February 15, 1994 letter I wrote to Mr. Morris of ODNR to clarify my concerns related to the new spillway.

10. Attached hereto as Exhibit 5 is a true and accurate copy of a May 31, 1994 letter I

wrote to Dave Jones of Jones & Stuckey Ltd., an engineering firm performing work for ODNR related to the new spillway, to again express concerns related to the likelihood of flooding on the western side of Grand Lake as a result of the increased outflow from the new spillway.

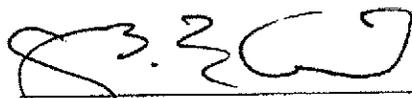
11. Attached hereto as Exhibit 6 is a true and accurate copy of a September 6, 1994 letter I wrote to then Senator Robert Cupp to express these concerns.

12. Ultimately, I believe that ODNR did not listen to or take any specific actions as a result of my concerns. In its design of the spillway, ODNR chose to serve recreational users of Grand Lake by maintaining a constant lake level and to avoid any flooding on the southern end of Grand Lake to the detriment of the owners of structures and farmers on the western side of Grand Lake.

FURTHER AFFIANT SAYETH NAUGHT.


Keith G. Earley, P.E., P.S.

Sworn to before me and subscribed in my presence this ^{February} 26th day of ~~January~~, 2010.



Notary Public SCOTT B. BERNHARD

STATE OF OHIO



MY COMMISSION EXPIRES
MARCH 29, 2011

KEITH G. EARLEY, P.E., P.S.
MERCER COUNTY ENGINEER
101 N. MAIN ST. - COURT HOUSE - ROOM 205
CELINA, OHIO 45822
PHONE 419-586-7759



November 19, 1991

Francis Buchholzer
Director, Ohio Department of Natural Resources
Building 3D
Fountain Square
Columbus, Ohio 43224

RE: Grand Lake West Spillway Replacement

Dear Ms. Buchholzer,

The replacement of the west spillway is an important safety related project. I have reviewed information supplied by O.D.N.R., and I have reviewed the 1981 "Survey Report for Flood Control and Allied Purposes" prepared by the Louisville, Kentucky District of the Army Corps of Engineers. There are wide discrepancies between the two sources of data and I believe additional detailed analysis should be performed.

The Corps Report indicates an observed bankful flow of the Beaver Creek outlet being about 250 c.f.s. O.D.N.R. indicates a capacity of over 700 c.f.s. The Corps report indicates peak stage lake levels for the ten year through 100 year storms being approximately one foot higher than O.D.N.R. based on 51 years of record measurements. If the Corps report is correct, larger outflow will pass uncontrolled for long periods over the proposed 40 percent enlarged spillway to an outletting stream of very limited capacity. This situation could cause very costly damages especially to structures such as the Lakefront Racket and Health Club.

It appears to me that enlarging the spillway crest would cause more damage than good, even if O.D.N.R. figures are correct. Outlet graphs supplied by O.D.N.R. indicate no reduction in lake peak stage elevations for storms smaller than a 50 year storm. Even the 100 year storm only shows a 0.2 foot peak stage reduction. It appears that this minute rarely occurring reduction would be more than offset by increased damages along the Beaver Creek outlet. According to O.D.N.R. charts, the peak discharge is quadrupled for all storms larger than a ten year event and smaller storms were not analyzed.

It appears desirable for a lake regulation policy which balances the value and probability of attaining the desired recreation pool during desired periods with the cost of flood damages likely to occur around the lake and along the Beaver Creek

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ODNR03158

outlet. Perhaps the Beaver Creek outlet could economically be improved to safely handle increased outflows. Perhaps combining this increased capacity with a lake regulation policy, that includes the benefits of weather forecasting, could allow routing of peak flows through the Beaver Creek outlet at times when the outlet can handle the flow, and allow holding back flows during short periods while the peak from local storms subsides. Widening the upper three miles by approximately six feet is one alternative I believe should be studied.

A detailed study such as those designed by the Corps of Engineers Hydraulic Engineering Center (HEC) would be time consuming and expensive, but valuable. It is quite possible that such a study could not only provide much improved results, but even reduce construction cost. The study should include detailed damage analysis around the lake and along the outlet including acres inundated, crop damage, structure damage, transportation and utility damage, along with benefit analysis for different alternatives along with an optimization procedure.

Mercer County maintains ten bridges over the Beaver Creek outlet and has long range plans to replace six of these structures. We intend to utilize federal highway off system funds known as BRZ funds. Perhaps enlarging those structures should also be studied.

I sincerely hope that O.D.N.R. gives these items adequate consideration.

Sincerely,



Keith Earley, P.E., P.S.
Mercer County Engineer

KGE/arn

cc: Mercer County Commissioners
Senator Robert Cupp
Representative Jim Davis

KEITH G. EARLEY, P.E., P.S.
MERCER COUNTY ENGINEER
101 N. MAIN ST. - COURT HOUSE - ROOM 205
CELINA, OHIO 45822
PHONE 419-586-7759



February 12, 1992

Bob Goetemoeller
Ohio Department of Natural Resources
Building 3D
Fountain Square
Columbus, Ohio 43224

RE: Grand Lake West Spillway Replacement

Dear Mr. Goetemoeller,

The additional information which you provided to me was helpful and the meeting was also helpful. The improved lakeside flood relief of the proposed spillway is quite valuable and evidently the dam safety requirements do not allow any reduction in outlet capacity. It also appears that any additional flooding along the Beaver Creek is negligible in the lower portions of the Beaver Creek. However, I still have concerns regarding flooding near the spillway especially at the Lakefront Racquet and Health Club. The ground floor elevation at that facility is 858.8 and the lowest floor elevation is about three feet lower, where there are two racquet ball courts, locker rooms, saunas, whirlpools, tanning beds, baby sitting room, laundry room, and a furnace room, much of which is carpeted. If flood elevations get above 859 there could be some very expensive damage.

It appears certain that the new spillway will increase the likelihood of very damaging flooding to this facility. Perhaps this increased flooding could be eliminated by removing bottlenecks in the upper three miles of the Beaver Creek without any damage to the downstream owners. Perhaps a capacity equal to a twenty-six foot wide bottom width could be obtained at a reasonable price. I believe that floodplain elevations should be determined for the proposed spillway with the existing channel and for the proposed spillway with an enlarged channel. Those elevations should then be compared to the existing floodplain elevations.

The proposed spillway without the enlarged outlet stream will probably be a benefit to many people, but a detriment to a few. With the enlarged outlet stream, it could be a benefit to all. Since FEMA evaluated the current floodplain in 1989, it should be revised for any significant changes in the watershed. It shouldn't take that much additional work to elevate an enlarged channel condition at the same time. If it is relatively certain that the effects of this study would not change the spillway design, then this would not delay that project and could prevent future delays.

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ODNR03160

We appreciate the work and commitment that you have devoted to this project. It is to our mutual benefit that all aspects are adequately studied.

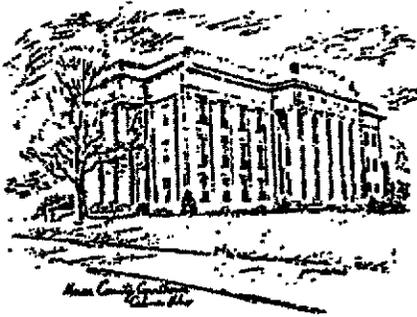
Sincerely,



Keith G. Earley, P.E., P.S.
Mercer County Engineer

KGE/an

cc: file



KEITH G. EARLEY, P.E., P.S.
MERCER COUNTY ENGINEER
COURT HOUSE
CELINA, OHIO 45822

PHONE 419-586-7750
419-586-7759

September 24, 1993

RECEIVED

SEP 29 1993

Div. of Natural Resources
Division of Water

Jim Morris
Chief, Division of Water
Ohio Department of Natural Resources
1939 Fountain Square
Columbus, Ohio 43224

Dear Mr. Morris,

The replacement of the west bank outlet structure to Grand Lake St. Marys is an urgently needed project. This project will significantly affect surrounding public and private property. A detailed analysis of that effect should be a part of the design process. I realize that certain dam safety requirements must be met, and the basic design of the outlet structure as currently proposed may be the best design possible; however, minor modifications to the structure and the receiving stream may be necessary. It is my understanding that at the last local meeting on the project, it was agreed that more study on downstream effects will be conducted. I believe the studies should consider the effects on downstream agriculture, and the potential effect to the Lake Front Racquet and Health Club, the Celina Wastewater Treatment Facility, and the local bridges.

Listed below is a summary of the information that I believe is necessary. These studies would certainly require some time and expense, but this is a major project that impacts many people. I believe we will all be better off thoroughly studying the effects prior to proceeding.

1. A revised Flood Insurance Study for areas surrounding Grand Lake St. Marys and for the western outlet channel which includes 10.6 miles of Beaver Creek and 2.7 miles of the Wabash River. The revised flood profiles along with floodway widths, sections area, mean velocities and base flood elevations will be needed.
2. Hydraulic calculations necessary for federal approval to replace the county maintained Beaver Creek bridges using Federal Bridge Replacements Offsystem (BRO) funding. These calculations include both 10 year and 100 year flood profiles, the discharge at each structure, backwater calculations, and mean velocities along with the expected storm frequencies that would overtop the existing structures.



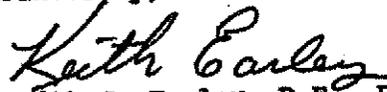
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ODNR02614

3. Comparison of the improved spillway to the existing spillway with regard to estimated average annual flood damages along the Beaver Creek Flood plain.
4. Feasibility study to determine effectiveness of enlarging the upper three miles of the Beaver Creek and possibly construct levees to protect existing buildings. Since we intend to replace several of these bridges soon, this would be the proper time to study the feasibility of enlarging the outlet stream.
5. A study to determine the optimum lake regulation policy. The Corps of Engineers in the 1980 study analyzed the potential benefits of certain drawdown policies under current conditions. I realize that even with the proposed structure, the lake regulation ability is limited and all flooding cannot be eliminated; however, this seems to be the proper time to analyze what benefits could be obtained. Possibly some modifications could be made at little or no additional cost if the analysis was done prior to constructing a new structure. I believe various levels and durations of winter drawdowns should be studied along with a policy on lake drawdowns during summer months when lake levels exceed recreation pool levels. A detailed study using historic lake levels and synthetic storms may be expensive, but by using modern computer methods, development of an optimum operating rule for lake regulation will be cost effective and prevent future losses.

It is not my desire to hold up the project or make it more difficult, but I believe these local concerns need to be thoroughly addressed.

Sincerely,


Keith G. Earley, P.E., P.S.
Mercer County Engineer

KGE/an

cc: Jim Buchy, Ohio State Representative
Board of Mercer County Commissioners

RECEIVED

FEB 28 1994

DEPT. OF NATURAL RESOURCES
CHIEF ENGINEER

KEITH G. EARLEY, P.E., P.S.

MERCER COUNTY ENGINEER

101 N. MAIN ST. - COURT HOUSE - ROOM 205

CELINA, OHIO 45822

PHONE 419-586-7759



RECEIVED

FEB 16 1994

February 15, 1994

James Morris, P.E.
Chief, Division of Water
Ohio Department of Natural Resources
Building 3D
Fountain Square
Columbus, Ohio 43224-1387

DEPT. OF NATURAL RESOURCES
WATER RESOURCES DEVELOPMENT

Dear Mr. Morris,

After receiving your December 22, 1993 reply to my inquiries, I feel that I should clarify my concerns.

In my previous letter, I addressed concerns regarding flooding in the upper three miles of the Beaver Creek after replacement of the existing spillway with a larger structure. My biggest concern was not at the three mile point but upstream from constrictions such as bridges in the upper three miles. The flooding is affected by not only the peak outflow, but by the duration of any outflows above the capacity of those restrictions. Very long periods of uncontrolled outflow could cause significantly more flooding than shorter periods of peak outflow. In addition, the peak outflow upstream from the bikeway bridge is most certainly significantly increased.

The 1981 Corps of Engineers study of Beaver Creek did not study enlarging only the upper three miles and it did not study the proposed conditions. Your last point stated that increasing the gated capacity of the outlet structure would increase flooding, since the proposed capacity approximates the bank full flow of the Beaver Creek. This would not hold true if the capacity of the Beaver Creek was increased.

I still believe that it would be worth studying the costs and benefits of enlarging the upper three miles to a twenty-six foot wide bottom width and enlarging the controlled outlet capacity of the structure. I have no desire to oppose the Ohio Department of Natural Resources on this project. I am simply suggesting an area that I feel deserves further study.

Sincerely,

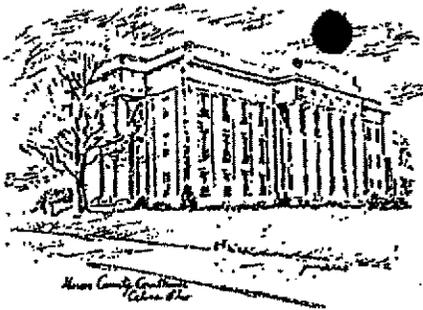
A handwritten signature in cursive script that reads "Keith Earley". The signature is written in black ink and is positioned above the typed name.

Keith G. Earley, P.E., P.S.

KGE/an
cc: file

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ODNR10283



KEITH G. EARLEY, P.E., P.S.
MERCER COUNTY ENGINEER
COURT HOUSE
CELINA, OHIO 45822
PHONE 419-586-7750
419-586-7759

May 31, 1994

Dave Jones
Jones & Stucky LTD
1641 W. Fifth Avenue
Columbus, Ohio 43212

RE: Grand Lake St. Marys Spillway Bridge

Dear Mr. Jones,

We have received the construction drawings relating to the proposed bridge and found them to be satisfactory.

I still have concerns regarding the effect of increased outflow from the spillway immediately downstream and have relayed those concerns to ODNR. My recommendation to them was to seriously consider enlarging the capacity of the upper three miles of the Beaver Creek.

Sincerely,

Keith G. Earley, P.E., P.S.
Mercer County Engineer

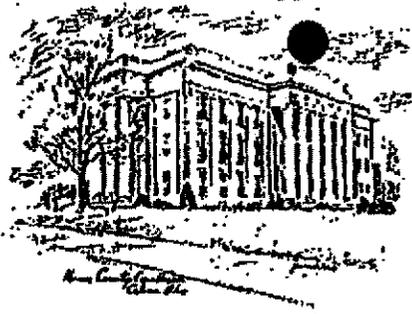
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Established January 8, 1802*

ODNR03009



SEP 30 '94 10:45 No.002 P.03

KEITH G. FARLEY, P.E., P.S.

MERCER COUNTY ENGINEER

COURT HOUSE

CELINA, OHIO 45822

PHONE 419-586-7750
419-586-7739



September 6, 1994

Senator Robert Cupp
3003 West Hume Road
Lima, Ohio 45806

RE: Grand Lake St. Marys Spillway Replacement Outletting into
Beaver Creek

Dear Senator Cupp,

Thank you for your efforts and concerns regarding the spillway replacement project. The Ohio Department of Natural Resources has designed a spillway replacement with outflow capacity necessary to meet nationally accepted dam safety standards. Dam safety has been the paramount concern of the department as well it should be, while they have attempted to balance other sometimes competing concerns. The new spillway has a much larger outlet capacity than the existing structure and many local people are concerned about the downstream effects. I am especially concerned regarding the possible increased flood damage to buildings close to the spillway on the south edge of Celina. Although the flood plain study has not been completed, I expect that the flood elevations and extent of the 100 year flood plain will increase and very expensive flood damage could occur that would not have occurred with the old outlet structure.

I am not certain what improvements downstream would need to be done so that the boundary of the flood plain and the base flood elevations in the urban area are not increased. That might be accomplished by only replacing the bike path bridge and the Meyer Road bridge, which would probably cost around \$200,000.00. The width of the existing channel is not very uniform. I believe it is wider in many places than the plans show, and widening a few spots might improve flow considerably.

Looking at the current flood plain cross sections, it appears that the Mud Pike embankment and bridge cause quite a bottleneck under current conditions. The new spillway could worsen the situation and it might be cost effective to put in an overflow structure at Mud Pike.

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Established January 9, 1803*

ODNR03090

Mercer County maintains ten bridges over the Beaver Creek. Five of those bridges are in very poor condition and need replaced. The bike path bridge and the Meyer Road bridge are in relatively good condition. Two of the five bridges in poor condition were damaged by heavy traffic while S.R. 29 was closed and are currently closed to traffic. All of these five are bottlenecks and should be replaced with larger bridges. It would at least be helpful if the hydraulic analysis included the effect of enlarging those waterway openings. We intend to replace all five of those bad structures using 80% federal funding on the engineering and construction costs of those structures. Right-of-way cost will be 100% local. The local share will probably be around \$200,000.00 Our current plans estimate construction to begin in about six years.

Another problem we are going to have to deal with sometime is the maintenance of Beaver Creek. The continual outflow from the lake prevents vegetation from being established on the bottom four or five feet of the ditch and the banks have sloughed in. Rip-rap over the entire length would prevent this, but be very expensive, probably at least \$50,000.00 per mile. The total length is 10.6 miles, but the upper four miles are the worst. If the water was held back during construction, the sloughed in area could be filled with dirt but it probably would not remain in place very long. Another option would be to lay back the remainder of the bank every ten or twenty years, making the ditch larger and larger. I do not know what the best solution to the bank erosion problem is. Other minor maintenance is needed. The State of Ohio paid two-thirds of the Beaver Creek Improvement cost, but did not make a written commitment to maintenance.

Mercer County has hundreds of other bridges that currently need replaced, and it is going to be difficult to handle all of those problems. Any assistance you can provide would be greatly appreciated. Assistance in the following areas is needed on the Beaver Creek problems:

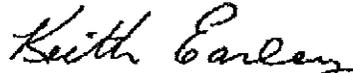
1. Immediate revision of the FEMA flood plain analysis along Beaver Creek for the new spillway along with:
 - a. Recommended waterway openings for the bike path bridge and the Meyer Road bridge.
 - b. Recommended waterway openings for the other five bridges we intend to replace (Wabash Road, Burrville Road, Erastus-Durbin Road, Township Line Road, and Gause Road.)
 - c. Recommended waterway opening of an overflow structure on Mud Pike.
 - d. Revised Flood Plain analysis after the recommended improvements.
2. Financial assistance in the local share of making the recommended bridge improvements along Beaver Creek.
3. Recommendations and assistance on erosion control measures along Beaver Creek.

We certainly want to prevent expensive flood damage from increased outflow that could have been predicted and reasonably accommodated. Many of the bridges need replaced soon even if nothing is done to the spillway. The additional cost of enlarging these structures and the accelerated replacement of others along with necessary stream improvements should be thoroughly investigated as soon as possible.

I do not pretend to have all the answers. I am merely suggesting alternatives that I believe should be investigated further. Some of these studies may be beyond the scope of what should be expected at ODNR on the spillway replacement project, but could be very beneficial.

Thanks again for your concerns. I hope we can all work together to provide the public the needed studies and improvements.

Sincerely,



Keith G. Earley, P.E., P.S.
Mercer County Engineer

KGE/an

cc: Board of Mercer County Commissioners