

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 Commission Campbell
	:	
SEAN D. LOGAN, Director,	:	
Ohio Department of Natural Resources, et al.,	:	
	:	
Respondents.	:	

**MEMORANDUM OF RESPONDENTS IN OPPOSITION TO RELATORS'
MOTIONS TO STRIKE RESPONDENTS' PRESENTATION OF EVIDENCE,
TABS E-N AND THE AFFIDAVIT OF JAY DORSEY**

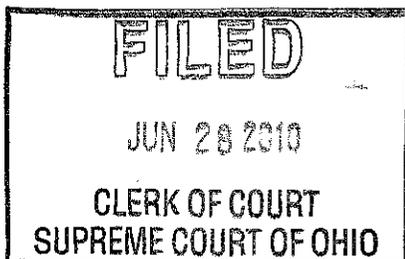
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TABS E-N AND THE AFFIDAVIT OF JAY DORSEY**

I. INTRODUCTION

This Court should not strike Respondents’ documentary evidence of Relators’ participation in the Conservation Reserve Program and their crop insurance claims. While Relators challenge the authenticity of these documents, Relators themselves provided the documents to Respondents, labeled each page of them, and testified to nearly all of them in their depositions. Moreover, Relators do not dispute that the copies are true copies of the originals kept in their own files.

The Court should also deny Relators’ motion to strike the affidavit of Jay Dorsey. The affidavit refers to the “affidavits and reports submitted by the parties’ experts in this litigation” that Mr. Dorsey reviewed. Relators have not moved to strike any of this evidence. Therefore, to the extent this evidence (the reports and affidavits) is admitted by this Court, or is perceived by Mr. Dorsey, he can rely upon it. And no conclusion can be reached from the plain language of Mr. Dorsey’s short affidavit other than a conclusion that his opinion is based on the facts and data provided in and relied upon in the parties’ expert affidavits and reports submitted as evidence in this case.

II. ARGUMENT

- A. Respondents' evidence of Relators' participation in the Conservation Reserve Program and their crop-insurance documents (Respondents' Tabs E-N) should not be stricken because such evidence was provided by Relators themselves, labeled by Relators' counsel, and testified to in nearly all of Relators' depositions.**

As this Court may recall, Relators initially refused to answer certain interrogatories and produce the Conservation Reserve Program ("CRP") and crop insurance documents that Respondents sought in discovery. This Court ordered, inter alia, Relators to answer the interrogatories and produce the requested documents. (See Jan. 13, 2010 Master Commissioner Order & Entry.) Relators' counsel produced those documents between January 25, 2010 and February 27, 2010. **Exhibit A** (correspondence from Relators' counsel accompanying production). Relators now seek to strike evidence they were ordered to turn over to Respondents in discovery.

These documents can be divided into two general Categories: (1) Tabs E-K pertain to properties of several Relators that participate in the CRP, (2) Tabs L-N pertain to crop insurance documents. The CRP is a subsidy paid by the United States Department of Agriculture ("USDA") to farmers who agree to not farm land adjacent to waterways, such as Beaver Creek and Wabash River. The documents are issued by USDA and include CRP Contracts, Disbursement Statements, correspondence, and tax records. Relators argue these documents have not been properly authenticated and do not meet the appropriate format for presentation.

Supreme Court Practice Rule X(7) describes how evidence in an original action shall be presented. Besides an agreed statement of facts, the rule states: "All other evidence shall be submitted by affidavits, stipulations, depositions, and exhibits." Rule

X(2) provides that in all original actions “these rules shall govern the procedures and the form of documents filed in the actions.” Tabs L-N are “exhibits” that include documents produced by Relators in discovery.

Relators were deposed in February 2010. They testified to crop damages as a result of flooding allegedly caused by Respondents’ actions. Their crop insurance documents provide detail of the losses actually incurred and claimed by Relators. These copies were produced by Relators themselves, and Relators do not dispute that the copies are true copies of the originals kept in their files.

It is well-established that “[t]he evidence necessary to support a finding that the document is what a party claims it to be has a very low threshold, which is less demanding than the preponderance of the evidence.” *Burns v. May* (12th Dist. 1999), 133 Ohio App.3d 351, 355; see, also, *State v. White* (4th Dist.), 2004-Ohio-6005, ¶ 61; *Alexander v. Urban Comm. Television, Inc.* (2d Dist.), 2000 Ohio App. Lexis 2715, at *16. Further, Evid. R. 901(B)(4) states that a document may be authenticated simply through the “[a]pppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.” The distinct nature of the documents in question taken in conjunction with the manner in which they were produced is ample evidence of their authenticity.

In *Haymond v. BP Am.*, when faced with whether a photograph was admissible, the Eighth District Court of Appeals held the plaintiff “authenticated the photograph by her response to the requests for admissions and her production of the photograph.” 2006-Ohio-2732, ¶11. In this case, Respondents specifically asked for documents from Relators that are related to any crop insurance and property that participates in the CRP.

Following an order from the Master Commissioner to produce these documents, Relators produced the documents in Tabs E-N. Unless Relators are questioning the reliability of their own documents, there is no reason why their production of these documents should not be sufficient evidence to reach the “very low threshold” for authentication.

Additionally, many of the Relators spoke of their crop loss and their participation in the CRP in their depositions. For example, Janet K. Doner specifically testified that her farm number 3839 participated in the CRP. (Jt. Ex. Vol. 1, Tab 6, Depo. p. 45). This farm number is the same farm number that is indicated on the conservation contract in Respondents’ Tab E. Additionally, Ms. Doner also talked about insurance claims for her crop loss. (Id. pp. 17, 22) This also matches with the documents in question.

Relator David McNeilan discussed his participation in the wetlands reserve program and the conservation reserve program through wetlands and filter strips. (Jt. Ex. Vol. 4, Tab 27, Depo. pp. 17-18). His testimony matches with the documents in Respondents’ Tab G. Mr. McNeilan also discussed his insurance claims for crop loss in 2003 and 2005. (Id. p. 16.) This testimony is reflected in documents in Respondents’ Tabs M and N.

The same type of testimony continues through nearly all of the depositions. Relators Timothy Alan Knapke, Thomas Powell, Linda Sheets, Rodney Sheets, and Rita Suhr all testified to their participation in the CRP. (Jt. Ex. Vol. 4, Tab 23, Timothy Alan Knapke Depo. p. 12; Jt. Ex. Vol. 6, Tab 39, Thomas Powell Depo. pp. 8, 10, 14; Jt. Ex. Vol. 7, Tab 49, Linda Sheets Depo. p. 17; Jt. Ex. Vol. 7, Tab 50, Rodney Sheets Depo. pp. 22-23; Jt. Ex. Vol. 9, Tab. 59, Rita Suhr Depo. p. 35 & ex. B.) And Chad M. Knapke, Darrell Kuhn, Melvin Kuhn, Duane Sheets, Rodney Sheets, Carl A. Sutter, Judith Ann

Sutter, and Michael Zumberge (for Relator Z-Farms Inc.) all testified to insurance claims made for crop loss. (Jt. Ex. Vol. 4, Tab 21, Chad M. Knapke Depo. p. 18; Jt. Ex. Vol. 4, Tab 24, Darrell Kuhn Depo. pp. 21-22; Jt. Ex. Vol. 4, Tab 25, Melvin Kuhn Depo. pp. 20-21; Jt. Ex. Vol. 7, Tab. 48, Duane Sheets Depo. p. 38; Jt. Ex. Vol. 7, Tab. 50, Rodney Sheets Depo p. 14; Jt. Ex. Vol. 9, Tab 59, Carl A. Sutter Depo. p. 11; Jt. Ex. Vol. 9, Tab. 60, Judith Ann Sutter Depo. p. 8; Jt. Ex. Vol. 10, Tab. 67, Michael Zumberge Depo. pp. 33-34.)

Respondents' evidence of Relators' CRP participation and crop loss claims should not be stricken. Relators' testimony, plus the fact that Relators themselves produced the documents in question during discovery¹ leaves no doubt as to the reliability and authenticity of these exhibits. Accordingly, this Court should Relators' motion to strike these documents.

B. The affidavit of Jay Dorsey (Respondents' Tab O) should not be stricken because the expert opinion therein is based on the facts and data provided in and relied upon in the parties' expert affidavits and reports submitted as evidence in this case.

Relators also move to strike the affidavit of Jay Dorsey, arguing that it does not comply with Evidence Rules 703 or 705. Because these arguments have no merit, Relators' motion should be denied.

Evidence Rule 703 provides that the facts or data in the case upon which an expert bases an opinion or inference "may be those perceived by the expert or admitted in evidence at the hearing." In this case, no "hearing" has been held, but the parties have submitted a significant number of volumes of evidence to this Court. Those volumes include the "affidavits and reports submitted by the parties' experts in this litigation" that

¹ Every page of Respondents' Tabs E-N has been bates-labeled by Relators' counsel.

Mr. Dorsey testifies in his affidavit that he reviewed. (Respondents' Tab. O, Dorsey Aff. ¶ 3.) Relators have not moved to strike any of this evidence and to the extent this evidence (the reports and affidavits) is admitted by this Court, or is perceived by Mr. Dorsey, he can rely upon it. "Evid.R. 703 does not specify that only evidence that is admitted at trial *prior* to the time the expert testifies may be used as a basis for the expert's opinion." (Emphasis sic.) *Stephenson v. Guda* (4th Dist.), 1995 Ohio App. Lexis 1032; see, also, *Loura v. Adler* (1st Dist.), 105 Ohio App.3d 634, 642.

Further, no conclusion can be reached from the plain language of Mr. Dorsey's short affidavit other than a conclusion that his opinion is based on the facts and data provided in and relied upon in the parties' expert affidavits and reports submitted as evidence in this case. Mr. Dorsey's affidavit opines on the reliability of the Stantec Consulting Services, Inc.'s modeling. (Respondents' Tab O, Dorsey Aff. ¶¶ 4-5.) In order to reach the conclusion that Stantec's modeling "reliably represents the hydrology and hydraulics of the Grand Lake, Beaver Creek and Wabash River watershed to the Indiana state line" (id. ¶ 5), Mr. Dorsey reviewed Stantec's affidavits and reports as well as the other experts' work in this case. (Id. ¶ 3.) Surely, Relators cannot complain that Mr. Dorsey, a certified professional engineer and ODNR employee familiar with Grand Lake St. Marys, is without knowledge and expertise to provide an affidavit in this matter.

Relators' interpretation of Evidence Rule 705 is not persuasive. The majority of case law cited on pages 4-5 of their motion to strike concerns the ability of an expert to reach conclusions of law and is inapplicable in this case. Nowhere does Mr. Dorsey's Affidavit reach a legal conclusion. Instead, Mr. Dorsey's opinion, after reviewing the parties' expert reports, is that "Stantec appropriately followed standard engineering

procedures in conducting its hydraulic and hydrological analysis of the impact from ODNR's modification of the western spillway," and that "the models developed by Stantec reliably represent the hydrology and hydraulic of the Grand Lake, Beaver Creek and Wabash watershed to the Indiana state line." (Respondents' Tab O, Dorsey Aff. ¶¶ 4-5.)

Further, it is sufficient that the facts and data providing the basis for Mr. Dorsey's opinion are incorporated by reference to the work performed by another of Respondents' experts. Evidence Rule 705 should not be read to require an exhaustive itemized list of each piece of data that was prepared and submitted by Stantec. (If such a list were required, Relators' expert affidavits would be faulty as well.)

Relators have not moved to strike Stantec's evidentiary submissions, so it is appropriate for Mr. Dorsey to rely on material in evidence. Nor do Relators argue that Mr. Dorsey is not competent to form his opinion. A detailed curriculum vitae is attached to Mr. Dorsey's Affidavit which documents his extensive work and academic experience, as well as voluminous publication and presentation background.

Finally, Relators can claim no prejudice or surprise here. Respondents disclosed Mr. Dorsey as an expert witness to Relators during discovery. **Exhibit B** (Respondents' Responses to Relators' First Set of Interrogatories, Answer to Interrogatory No. 5). He also sat as Respondents' designated representative during several expert depositions. Mr. Dorsey is a stormwater engineer for the ODNR, Division of Soil and Water Resources. Relators could have deposed Mr. Dorsey to further inquire to their satisfaction about his knowledge about this case, any opinions he formed, and the basis and underlying facts

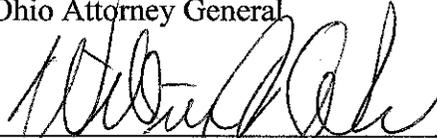
relied upon, but did not do so. Therefore, his affidavit should not be stricken from Respondents' evidence.

III. CONCLUSION

For the foregoing reasons, Relators' motions to strike should be denied.

Respectfully submitted:

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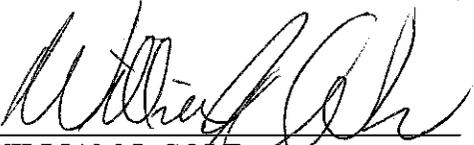
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Counsel for Respondents

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was sent by electronic and regular mail on June 28, 2010, to Bruce L. Ingram, Joseph R. Miller, Thomas H. Fusonie, Kristi Kress Wilhelmy, and Martha C. Brewer, Vorys, Sater, Seymour & Pease, P.O. Box 1008, Columbus, OH 43216.


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January 25, 2010

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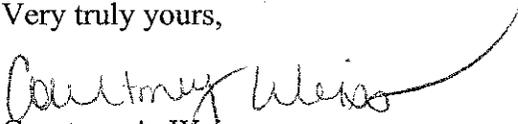
EXECUTIVE AGENCIES

Re: *Doner et al. v. Logan, et al.*
Case No. 2009-1292 (Supreme Court of Ohio)

Dear Counsel:

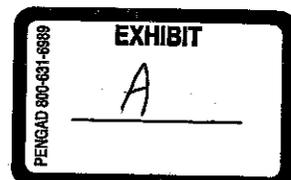
Enclosed please find a supplemental production (DON001274-DON001794)
produced by Relators' in the above-reference litigation.

Very truly yours,


Courtney A. Weiss
Litigation Paralegal

CAW/caw
Enclosure

cc: Bruce L. Ingram
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Re: *Doner et al. v. Logan, et al.*
Case No. 2009-1292 (Supreme Court of Ohio)

Dear Counsel:

Enclosed please find a supplemental production (DON001795-DON001917) produced by Relators in the above-referenced litigation.

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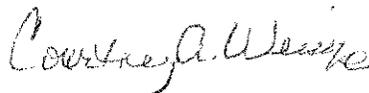
EXECUTIVE AGENCIES

Re: *Doner et al. v. Logan, et al.*
Case No. 2009-1292 (Supreme Court of Ohio)

Dear Counsel:

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FEB 09 2010

EXECUTIVE AGENCIES

Re: *Doner et al. v. Logan, et al.*
Case No. 2009-1292 (Supreme Court of Ohio)

Dear Counsel:

Enclosed please find a supplemental production (DON002077-DON002216) produced by Relators in the above-referenced litigation.

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Sent: Saturday, February 27, 2010 3:30 PM
To: 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.
Follow Up Flag: Follow up
Flag Status: Completed
Attachments: DON002259-2286.pdf

Please find attached a supplemental production (DON002259-2286).

Tom Fusonie

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

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6/25/2010

IN THE SUPREME COURT OF OHIO

STATE OF OHIO EX REL.
WAYNE T. DONER, ET AL.

Relators,

v.

Case No.: 2009-1292

SEAN D. LOGAN, DIRECTOR
OHIO DEPARTMENT OF
NATURAL RESOURCES, ET AL.

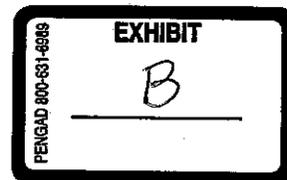
Respondents.

**RESPONDENTS' RESPONSES TO
RELATORS' FIRST SET OF INTERROGATORIES TO RESPONDENTS**

Pursuant to Rule 33 of the Ohio Rules of Civil Procedure, Relators direct the following Interrogatories to Respondents the Ohio Department of Natural Resources and its Director, Sean D. Logan (collectively "ODNR") to be answered in writing and under oath within 28 days of service in accordance with the provisions of Rules 26 and 33 of the Ohio Rules of Civil Procedure and in any event no later than December 24, 2009, in accordance with the November 19, 2009 Order of the Master Commissioner.

DEFINITIONS

1. "You", "your" or "ODNR" means Respondents Ohio Department of Natural Resources, Sean D. Logan, Director Ohio Department of Natural Resources, and ODNR's present or former employees, officers, directors, officials, representatives, agents, contractors, and attorneys. Further, when knowledge or information is requested, you are required to furnish all knowledge or information that is available to you or subject to your reasonable inquiry, including information in the possession of your attorneys, agents, advisors, employees or other



persons directly or indirectly employed by or connected with you or your attorneys, and anyone else otherwise subject to your control.

2. "Relators" means Wayne T. Doner, Janet K. Doner, Richard L. Adams, Nancy L. Adams, Paul A. Agnello, Rhonda E. Powell, also known as Rhonda E. Agnello, The Baucher Farms, Inc., David M. Doner, Karen S. Doner, Lawrence J. Dwenger, Joyce A. Dwenger, Stanley M. Ebbing, Vicki L. Ebbing, Carman R. Ellis, Jill E. Ellis, H. Edward Gilbert, Mary E. Gilbert, David L. Granger, as Trustee of the David L. and Esther L. Granger Living Trust dated May 22, 2007, Robert E. Highley, Patricia L. Highley, Jason E. Hines, Emily A. Hines, Daniel W. Johnsman, David A. Johnsman individually and as Trustee of the Ruth M. Johnsman Irrevocable Trust dated September 14, 1988, and as Trustee of the Leroy J. Johnsman Irrevocable Trust dated September 14, 1988, Jean A. Karr as Trustee of the Jean A. Karr Revocable Trust dated October 9, 2001, Chad M. Knapke, Andrea M. Knapke, Mark L. Knapke as Trustee of the Mark L. Knapke Revocable Living Trust dated August 2, 1994, and amended July 7, 1997, Timothy A. Knapke, Thomas L. Krick, Candace L. Krick, Darrell D. Kuhn, Marvin E. Kuhn, Kuhn Farms, Inc., Marilyn M. Kuhn, Linda B. Linn, Lee A. Fennig as Trustee of the Calvin A. Fennig Trust dated March 20, 1993, David J. McDonough, Deborah A. McDonough, David J. McNeilan, Laura B. McNeilan, Lois J. McNeilan, Charles J. Meier, Mary K. Meier, Jerome L. Meyer, Amy L. Meyer, William M. Muhlenkamp, Carolyn J. Pierstorff, Opal L. Post, Jerry W. Powell as a Trustee of The Powell Living Trust dated December 22, 2005, Betty L. Powell as a Trustee of The Powell Living Trust dated December 22, 2005, M. Leone Powell, Thomas L. Powell, Brends S. Powell, Larry V. Pugsley, William J. Ransbottom, Timothy Rasawehr, Thomas D. Rasawehr, Carl W. Rose, Lucile M. Rose, Dorothy K. Schroyer, Robert E. Searight, Bonita S. Searight, Duane R. Sheets, Rodney E. Sheets, Linda J. Sheets, Jeff A.

Siefring, Mark A. Siefring, Neil J. Siefring, Mary K. Siefring, Ronald J. Siefring, Carol L. Siefring, David J. Suhr, Rita K. Suhr, Carl A. Sutter, Judith A. Sutter, Gale A. Thomas, Nelda G. Thomas, Marilyn L. Uhlenhake, Jerry Weisman, Vicki L. Weisman, Charles F. Zumberge as a Trustee of the Virginia L. Zumberge Trust dated January 31, 1990 and as a Trustee of the John H. Zumberge Trust dated January 31, 1990, Jennifer M. Zumberge individually, and as a Trustee of the Virginia L. Zumberge Trust dated January 31, 1990 and as a Trustee of the John H. Zumberge Trust dated January 31, 1990, and Z-Farms Inc.

3. "Third party" means and includes any person or persons other than plaintiff or defendants in this action.

4. "Person" or "persons" means and includes any natural person, corporation, partnership, proprietorship, association, joint venture, governmental or other public entity, or any other form of organization or legal entity, and all their officials, officers, employees, representatives and agents.

5. "Document" or "documents" is intended to be as comprehensive as the meaning provided in Rule 34 of the Ohio Rules of Civil Procedure, and includes, without limitation, the original and any non-identical copy of any and all written, printed, typed, recorded, graphic, computer-generated or other matter of any kind from which information can be derived, whether stored on paper, cards, tape, film, electronic facsimile, computer storage device, audio recording device, stored in any format electronically, or any other medium in your possession, custody or control. The term "document" or "documents" shall include each copy that is not identical to the original or to any other produced copy, and any preliminary drafts of any document or working paper relating thereto.

6. Electronically stored information shall be produced in a searchable format.

7. "Mandamus Complaint" shall mean the Complaint for Writ of Mandamus filed in this action on July 17, 2009.

8. "Communication" shall mean any conversation or other oral or written contact, formal or informal, at any time or place, under any circumstances whatsoever, whereby information of any nature was transmitted or transferred, whether or not subsequently recorded in any document. "Communication" includes, but is not limited to, meetings, telephone conversations, discussions, memoranda, correspondence, and oral requests for information.

9. In order to bring within the scope of these interrogatories any and all conceivable relevant matters or documents which might otherwise be construed to be outside of their scope:

a. The singular of each word shall be construed to include its plural and vice versa;

b. "And" as well as "or" shall be construed both conjunctively and disjunctively;

c. "Each" shall be construed to include "every" and vice versa;

d. "Any" shall be construed to include "all" and vice versa; and

e. The present tense shall be construed to include the past tense and vice versa.

10. "Identify" shall mean:

a. With respect to a natural person, state the full name, home address, business address, employer and position or positions within each organization employing such person. If the person's full name is not available provide the portion of the name known, and any identifying physical characteristic or job responsibilities;

b. With respect to a corporation, partnership, or other business or government entity, state the full name and principal business address and the address, location or modality at which any communication occurred of such person;

c. With respect to an oral communication, state the speaker, each person spoken to or who otherwise heard the communication, the substance of the communication and the time and place of the communication;

d. With respect to a document, state its title and a description of its subject matter, the identity of the person or persons who prepared it, the identity of the addresser and addressee or recipients thereof, its date, and if undated, its date of preparation, and its location and custodian; and

e. With respect to an event or occasion, state the date(s) and time(s) at which it occurred, the location at which it occurred and any witnesses to it or persons present at it.

INSTRUCTIONS

1. These interrogatories are continuing in nature and answers require supplementation with any subsequently obtained relevant information in accordance with Rule 26(E) of the Ohio Rules of Civil Procedure.

2. If any identification of a document is withheld under the claim of privilege or work product, furnish a list identifying each document for which the privilege or work product is claimed, together with the following information for each such document: date, sender, recipient, person to whom copies were furnished, job titles of each of these persons, subject matter of the document, number of pages, the basis on which the privilege or work product is claimed, paragraph or paragraphs of each of these interrogatories to which the document

responds, and whether any matter which is not privileged or not work product is discussed in that document.

3. In regard to any other information or identification that is withheld under claim of privilege or work product or on some other basis, state the basis on which plaintiff asserts a claim of privilege, work product or other reason for withholding the information requested, person(s) known to plaintiff who have or had access to, now or at any other time, the information requested, the paragraph or paragraphs of the interrogatories to which the information relates, and whether the information withheld includes any matter that is not privileged or not work product.

INTERROGATORIES

1. Identify each person participating in the answering and/or providing of substantive information used in the answering of these Interrogatories and/or responding to Relators' Document Requests, and for each such person, specifically describe their participation and/or what substantive information each person provided.

ANSWER:

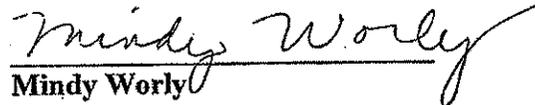
ODNR's employees, 2045 Morse Road, Columbus, Ohio 43229-6693: David Mohr, Chief Engineer (Construction records and Engineering Studies and analysis), Bob Sneller, Survey Administrator (Surveys, maps, property instruments, analysis, and data), Gene Wells, Real Estate Administrator (real estate instruments and analysis), Division of Engineering; Bruce Motsch, GIMS Manager, Office of Information Technology (GIS information, maps); Mark Ogden, Dam Safety Administrator, Jay Dorsey, Stormwater Engineer, Division of Soil and Water Resources (dam safety, stormwater, hydraulic, and hydrologic analysis); Glen Cobb, Field Support Manager (Operations, historical records and analysis), Brent Culver, Planning and Development Manager (Planning and development records), (Brian Miller, Assistant Park Manager, GLSM (park management records, photographs, and correspondence), Steve Dorsten, Miami and Erie Canal Operations Superintendent (Canal operations and historical, and gauge records and data) 834 Edgewater Drive, St. Marys, Ohio, 45885), William J. Cole, Assistant Attorney General, 30 East Broad St., 26th Fl., Columbus, OH 43215; Charles G. Rowan, ODNR Deputy Chief Counsel, 2045 Morse Road, Columbus, OH 43229.

Stantec Consulting Corporation, Bryon Ringley and Thadd Henson, 1500 Lake Shore Drive Suite 100, Columbus, Ohio 43204

2. Identify all affirmative defenses you intend to raise in response to the Mandamus Complaint, including those affirmative defenses you intend to raise in an Answer to the Mandamus Complaint or in your Merit Brief.

ANSWER:

Objection. Absent a court order, ODNR is precluded from filing an answer to the mandamus complaint, having timely filed a motion to dismiss in lieu thereof. S. Ct. Prac. R. X(5) (see attached 12/3/09 email from Supreme Court staff attorney Justin Kudela).

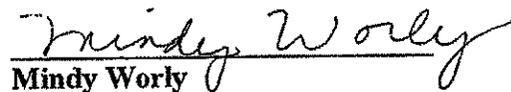

Mindy Worly

Subject to the above objection, at this time ODNR expects to raise the affirmative defenses of statute of limitations and/or laches, waiver, and estoppel. ODNR reserves the right to raise other affirmative defenses based upon Relators' responses to ODNR's discovery requests, witness deposition testimony, evidence, and arguments.

3. Identify all factual and legal bases for each affirmative defense ODNR intends to raise in response to the Mandamus Complaint, including those affirmative defenses ODNR intends to raise in an Answer to the Mandamus Complaint or in your Merit Brief.

ANSWER:

Objection. Absent a court order, ODNR is precluded from filing an answer to the mandamus complaint, having timely filed a motion to dismiss in lieu thereof. S. Ct. Prac. R. X(5) (see attached 12/3/09 email from Supreme Court staff attorney Justin Kudela).


Mindy Worly

Subject to the above objection, ODNR's statute of limitations and/or laches defense is based on Relators' failure to sue ODNR within the 4-year limitations period in R.C. 2305.09 or the 6-year limitations period in R.C. 2305.07 (see ODNR's motion to dismiss, filed 8/20/09). Relators' failure to timely sue or otherwise act also constitutes a waiver. Due to Relators' failure to timely sue or otherwise act, they are estopped from asserting a mandamus claim against ODNR. ODNR reserves the right to raise other bases for any affirmative defenses based upon Relators' responses to ODNR's discovery requests, witness deposition testimony, evidence, and arguments.

4. Identify all fact witnesses from whom you intend to or may obtain statements, affidavits, or testimony for inclusion in your Presentation of Evidence to the Court and the subject matter(s) which each of those fact witnesses may testify.

ANSWER:

Any and all Relators in this action

Any and all witnesses identified by Relators

Any and all other persons who Relator(s) identify as having knowledge of any or all allegations or claims in Relators' mandamus complaint

David M. Mohr, Chief Engineer, ODNR Division of Engineering, 2045 Morse Road, Columbus, Ohio, 43229-6693

Keith Banachowski, Dam Safety Engineering Program Manager, 2045 Morse Road, Columbus, Ohio 43229-6693

Stantec Consulting Corporation, Bryon Ringley and Tadd Henson, 1500 Lake Shore Drive Suite 100, Columbus, Ohio 43204

Gary Harsenye, Engineer, ODNR Engineering, 2045 Morse Road, Columbus, Ohio 43229-6693

BBC&M Engineering, Inc., 6190 Enterprise Court Dublin, Ohio 43016

Burgess & Niple, Limited, 5085 Reed Road, Columbus, Ohio 43220

Conestoga-Rovers & Associates, 9033 Meridian Way, West Chester, Ohio 45069?

Doyle Hartman, Hartman Engineering, 150 S. Parkway Drive, Delaware, Ohio 43015

J.C. Warns, P.E., Hydrologic Engineer, 7276 Jackman Rd., Temperance, MI 48182

Jim Will, District Conservationist, USDA-NRCS, 220 W. Livingston St., Suite 1 Celina, Ohio 45822

Jerry Linn, 5003 S.R. 219, Coldwater, Ohio 45828

See Answer to Interrogatory #1.

5. Identify all expert witnesses from whom you intend to or may elicit testimony and include in your Presentation of Evidence to the Court, and, with respect to each such witness, specify the subjects upon which he or she will testify and opinions he or she intends to offer, all

data and documents the expert has reviewed and/or upon which the expert has relied, the qualifications and a list of all publications of each such expert, and all matters in which the expert has testified within the last four years.

ANSWER:

Any and all expert witnesses identified by Relators

Stantec Consulting Corporation, Bryon Ringley and Tadd Henson, 1500 Lake Shore Drive Suite 100, Columbus, Ohio 43204 – hydrology and hydraulics analysis

Keith Banachowski, Dam Safety Engineering Program Manager, 2045 Morse Road, Columbus, Ohio 43229-6693 – dam safety and hydraulics

Mark Ogden, Dam Safety Administrator – dam safety and hydraulics, Jay Dorsey, Stormwater Engineer, Division of Soil and Water Resources – hydrology and hydraulics analysis; Dave Mohr, ODNR Chief Engineer—project coordination and engineering

BBC&M Engineering, Inc., 6190 Enterprise Court Dublin, Ohio 43016—hydrology and hydraulics analysis, dam design

Burgess & Niple, Limited, 5085 Reed Road, Columbus, Ohio 43220—hydrology and hydraulics analysis, dam design

Doyle Hartman, Hartman Engineering, 150 S. Parkway Drive, Delaware, Ohio 43015--hydrology and hydraulics analysis

Jim Will, District Conservationist, USDA-NRCS, 220 W. Livingston St., Suite 1 Celina, Ohio 45822—hydrology and hydraulics analysis

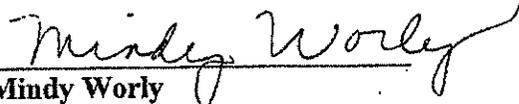
Phil DeGroot, Ph.D., P.E. Hydrosphere Engineering, P. O. Box 360530, Cleveland, Ohio 44136—hydrology and hydraulics review and analysis

The above experts have not yet reviewed all data and documents upon which they will rely for their opinions.

6. Identify all evidence you intend to or may include in your Presentation of Evidence to the Court.

ANSWER:

Objection. Request is overbroad.


Mindy Worly

Subject to this objection, ODNR answers as follows:

Answers, responses, and documents provided in response to written discovery requests (requests for production, requests for admission, interrogatories)

Lay and expert witness testimony

Expert report(s), hydraulic and hydrologic data on Grand Lake St. Marys, Wabash River, Beaver Creek, and adjacent, nearby, and/or surrounding parcels, including properties alleged by Relators as being or having been subject to increased and/or severe flooding as a result of ODNR's modification of the Grand Lake St. Mary's dam spillway and/or lake-level management practices since 1997

Since the deadline to present evidence to the Ohio Supreme Court is March 1, 2010, ODNR reserves the right to identify additional evidence, not presently known or anticipated, that it may present to the court.

7. Identify all nonprivileged communications by or among ODNR, and/or any of its representatives which concern, refer, or relate to any of the Relators and/or any of Relators' allegations or claims set forth in the Mandamus Complaint.

ANSWER:

Objection. The request is overly burdensome.

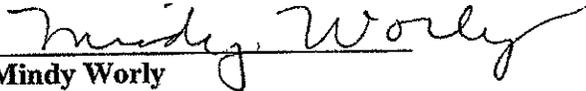

Mindy Worly

Subject to this objection, all requested communications are included in ODNR's document production.

8. In addition to any information disclosed in Interrogatory No. 7, please specifically identify whether ODNR or any of its representatives or agents or employees have had any communications with J. Anthony Logan which concern, refer, or relate to any of the Relators and/or any of Relators' allegations or claims set forth in the Mandamus Complaint and/or the litigation captioned *State of Ohio ex rel., Leo Post, et al. v. Samuel W. Speck, Director of Ohio Department of Natural Resources*, Case No. 01-CIV-091, Court of Common Pleas, Mercer County, Ohio, including any and all appeals related to that litigation, and if any such communications have been had, specifically describe those communications.

ANSWER:

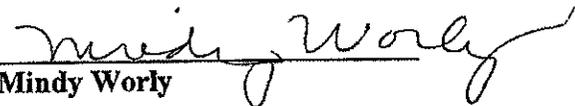
Objection. The request is vague and overbroad as it is not restricted with regard to time. Further objecting, the substance of any settlement discussion that Mr. Logan had with ODNR representatives and counsel is exempt from disclosure under Evid.R. 408. Further objecting, any substantive legal discussions Mr. Logan had with ODNR or any of its representatives or agents about the *Post* case during the time period he was employed at ODNR are subject to the attorney-client and/or work product privileges.


Mindy Worly

9. Identify all persons with knowledge of any or all Relators' allegations or claims set forth in the Mandamus Complaint and/or identify all persons with knowledge of any or all affirmative defenses you intend to raise in response to the Mandamus Complaint, including those affirmative defenses you intend to raise in an Answer to the Mandamus Complaint or in your Merit Brief, and for each such person, describe his or her knowledge.

ANSWER:

Objection. Absent a court order, ODNR is precluded from filing an answer to the mandamus complaint, having timely filed a motion to dismiss in lieu thereof. S. Ct. Prac. R. X(5) (see attached 12/3/09 email from Supreme Court staff attorney Justin Kudela). Further objecting, this Interrogatory is overbroad to the extent it asks ODNR to identify all persons with knowledge of claims and/or affirmative defenses.


Mindy Worly

Subject to the above objections, ODNR identifies the following persons:

Relators, their counsel, lay and expert witnesses, and other persons they identify as having knowledge of any or all allegations or claims in the mandamus complaint

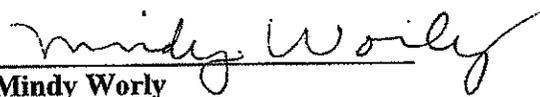
ODNR's counsel: William J. Cole, Mindy Worly, Jennifer Croskey, Raymond Studer, Rachel Stelzer, Dale Vitale, Ohio Attorney General's Office, 30 E. Broad St., Columbus, Ohio; Charles Rowan, ODNR Office of Legal Services, 2045 Morse Rd., Columbus, Ohio

All persons listed in response to Interrogatories 1 and 4

10. Identify all studies or reports that concern, refer to, or relate to the frequency, severity, duration, or extent of flooding of the lands west of Grand Lake St. Marys and/or any data of which you have knowledge related to such subjects.

ANSWER:

Objection: this interrogatory requests studies or reports that are protected by the attorney-client and/or work product privileges.


Mindy Worly

Subject to this objection, the following reports are identified:

Grand Lake St. Marys-Western Embankment Grand lake St. Marys-Eastern Embankment, Burgess & Niple, December 1978

Final Report Hydrologic and Hydraulic Analysis Grand Lake St. Marys, BBC&M Engineering, Inc., February 1990

Subsurface Investigation Final Design West Spillway Replacement Grand Lake St. Marys Dam, BBC&M Engineering, Inc., July 1990

Subsurface Investigation Preliminary Design West Spillway Replacement grand Lake St. Marys Dam, BBC&M Engineering, Inc., September 1989

Survey Report for Flood Control and Allied Purposes, US Army Corps of Engineers-Louisville District, May 1981

Interim Report Preliminary Information Hydrologic and Hydraulic Analyses Grand Lake St. Marys Auglaize and Mercer Counties, Ohio, BBC&M Engineering, Inc., July 1989

Grand Lake St. Marys-Hydrologic and Hydraulic Analysis Case Leasing and Rental, Inc. Property, Hartman Engineering, July 2006

Hydrologic and Hydraulic Analysis Grand Lake St. Marys Discharge to Beaver Creek Mercer and Auglaize Counties, Ohio-Case Leasing and Rental, Inc. Properties Celina, Ohio, Conestoga-Rovers & Associates, May 2006

Grand Lake Saint Marys-Spillway Analysis and Downstream Flood Study, Hartman Engineering, March 2004

Warns Report from Post Case, J.C. Warns Engineering, Inc., undated

**Addendum to the Hydrologic and Hydraulic Analysis Grand Lake St. Marys Discharge to
Beaver Creek Mercer and Auglaize Counties, Ohio-Case Leasing and Rental, Inc.
Properties Celina, Ohio, Conestoga-Rovers & Associates, November 2006**

Respectfully submitted:

RICHARD CORDRAY
Ohio Attorney General


WILLIAM J. COLE (0067778)*
**Counsel of Record*

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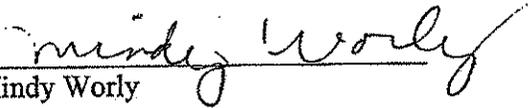
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raymond.studer@ohioattorneygeneral.gov
rachel.stelzer@ohioattorneygeneral.gov

Counsel for Respondents

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been sent by hand delivery on December 24,
2009, to Bruce L. Ingram, Joseph R. Miller, Thomas H. Fusonie, and Kristi Kress Wilhelmy,

VORYS, SATER, SEYMOUR AND PEASE LLP, 52 E. Gay St., P.O. Box 1008, Columbus,
OH 43216-1008.


Mindy Worly

ASSISTANT

ASSISTANT

