

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.	:	

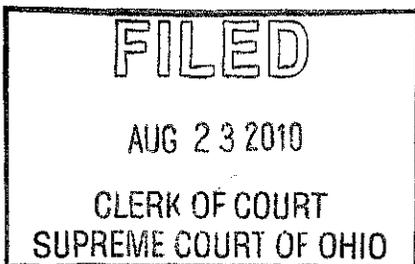
**MEMORANDUM OF RESPONDENTS IN OPPOSITION TO
RELATORS' MOTION FOR LEAVE TO FILE SUPPLEMENT TO
PRESENTATION OF EVIDENCE**

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

**MEMORANDUM OF RESPONDENTS IN OPPOSITION TO
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PRESENTATION OF EVIDENCE**

I. INTRODUCTION

Relators seek leave of Court to supplement their evidence months after the Court-ordered June 1, 2010 deadline with: (A) gauge data from 1964 to 2008 at Linn Grove station in Indiana (Ex. A & B)¹, and (2) newspaper articles and press releases concerning toxic algae blooms in Grand Lake St. Marys (“the Lake”) (Ex. C-K). Because Relators’ evidence is untimely, unauthenticated, and irrelevant, Relators’ motion should be denied.

II. ARGUMENT

A. Data from a stream gauge on the Wabash River thirty (30) miles away from the Lake (Ex. A & B) is untimely, unauthenticated, and irrelevant.

Relators give no reason why they could not timely submit over forty (40) years of stream gauge data. All of the data in existed prior to June 1, 2010 (see Ex. A, B), and could have been easily discovered by Relators or their experts by the evidence-

¹ Relators’ motion actually contains only one exhibit, the affidavit of attorney Thomas Fusonie. (Ex. 1.) Relators’ Exhibit 1, however, includes eleven exhibits labeled A-K. As referred to in this memorandum, exhibit-label references are to the exhibits to Relators’ Exhibit 1.

submission deadline. Relators do not and cannot argue that this data was a surprise discovery that could not have been found and timely submitted.

The data in Exhibits A and B are also unauthenticated. Relators ask the Court to accept an affidavit of attorney Thomas Fusonie that seeks to authenticate data obtained from a website maintained by the United States Geological Survey (“USGS”). While Relators claim that they are public records, Evidence Rule 902(4) requires public records to be certified. The data are not “under seal” and do not “bear the signature” of an official, and therefore, are not admissible under Evid. R. 902(1) or Evid. R. 902(2).

Relators’ requested submission is also neither relevant nor helpful to understanding the issues of this case. Linn Grove, Indiana is 30 miles from Grand Lake St. Marys and there are numerous named and unnamed tributaries, in addition to Beaver Creek, that contribute water to the Wabash River at Linn Grove. (See Respondents’ Evid. Tab A, Ex. A, Report 2 (Discussion and Mapping), Appx. A.) Even if the Court finds these data are somehow relevant, it should not be admitted because gauge data 30 miles from Relators’ claimed source is certain to confuse the issues in this case. See Evid. R. 403(B).

Relators argue that the data are relevant because it shows high stream flows after 1997. However, the data also show periods of high flow before the 1997 spillway modification and periods of low flow after the 1997 modification. So Relators’ argument that the data shows a relationship between high stream flow in the Wabash River in Indiana and the 1997 ODNR spillway modification is contradicted on its face. The data are not relevant and, if anything, are outweighed by the uncertainty and inconclusiveness of the same data.

There is no reference in the requested supplemental submission to any use or reliance on this data by any of the experts, nor any technical or scientific explanation of how it helps sort out any of the facts or opinions about the alleged taking of Relators' property. Counsel has simply read the data and a graph (Exhibit B) and prepared an affidavit wherein counsel essentially verifies that the data is a "true and accurate copy" of records from the USGS website. Counsel then argues in page 2 of its Motion, the supposed significance of the data. This is nothing more than statement of counsel and amounts to making additional argument beyond the page limits of the merit brief. See S.Ct.Prac.R. 6.2(C).² The statements of counsel are simply insufficient to authenticate this data as "evidence." Proper verification or authentication would normally involve obtaining a certified copy of the data from the custodian, or some testimony or declaration from a representative of USGS.

Respondents disagree with Relators' assertion that Respondents will not be prejudiced by this late submission. Respondents and their experts will not have sufficient time before their briefing deadline to review and analyze the data, find countervailing data if possible, and analyze the deficiencies in these data if the Court allows Relators to supplement their evidence with the data in Exhibits A and B.

B. News articles and press releases regarding algae blooms in the Lake (Ex. C-K) are untimely, inadmissible hearsay, and irrelevant.

Relators' Exhibits C-K consist of newspaper articles and press releases/public information from several Ohio agencies pertaining to algal blooms at the Lake, apparently obtained from the internet by counsel for Relators. The subject matter of the materials, algae blooms at the Lake, is a subject that has been widely written about and

² Relators' amended merit brief is at the 50-page limit.

discussed publicly since at least the summer of 2009. Here again, there is no recent surprise for Relators to argue. Relators cannot therefore argue that only recently could they have discovered that algae blooms caused by excessive nutrient run-off were the source of public health concerns in the Lake. Relators and their counsel knew or should have known about reports of the Lake's condition well before the June 1st evidence-submission deadline. See **Exhibits A-E** (media reports of algae in the Lake).

Also, the newspaper articles included in the proposed submission, even if properly authenticated, may not be admitted for the truth of the matters asserted, and would be inadmissible hearsay under Evidence Rule 802. Relators' counsel presumes to accept the truth of the facts asserted in the articles and contends that they must be helpful to resolving the issues in this case. While news articles may be self-authenticating under Evidence Rule 902(6), they are inadmissible if offered to prove the truth of a matter asserted in an out-of-court statement, and are generally inadmissible as hearsay, if not duplicate hearsay, and are not within any exception. See *Consumer Portfolio Servs. v. Staples* (6th Dist.), 2007-Ohio-1531, ¶ 28.

The information in Exhibits C-K is also irrelevant to Relators' mandamus claims. Relators base their lawsuit on claims that their property has been taken due to "continuing, persistent, frequent, and inevitable increased severe flooding." (Complaint ¶¶ 5-93.) Relators give no explanation and cite no legal authority for the proposition that depositing a certain type of water on their lands somehow changes or affects the determination of whether a taking has been proved. The news articles and press releases are not relevant to the determination whether Respondents have taken Relators' lands—the only issue before the Court in this mandamus proceeding.

Relators also insinuate that algal blooms have adversely impacted their properties. (Relators' Motion for Leave, p. 3.) However, they present no technical or scientific evidence to substantiate these assertions. Relators do not provide any expert or witness testimony or declarations explaining how algae blooms in the water are relevant or helpful in determining whether their property was taken by Respondents. There is no reference made to them by experts or any indication that the information in the articles is verified and relevant to determining whether Respondents have taken Relators' properties.

Respondents also disagree with Relators' assertion that Respondents will not be prejudiced by this late submission. If Relators' motion is granted, Respondents will be unable to respond appropriately in the time remaining before their merit brief is due.

III. CONCLUSION

For these reasons, Relators' motion for leave to supplement their evidence should be denied.

Respectfully submitted:

RICHARD CORDRAY
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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 August 23, 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.



WILLIAM J. COLE



22 of 24 DOCUMENTS

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The Associated Press State & Local Wire

May 23, 2009 Saturday 2:31 PM GMT

SECTION: STATE AND REGIONAL

LENGTH: 133 words

HEADLINE: Officials: Algae in Ohio lake poses health risks

DATELINE: ST. MARYS Ohio

BODY:

Ohio park officials say an abundance of toxic algae at a western Ohio Lake poses a health risk for swimmers and boaters.

The algae at Grand Lake St. Marys releases a neurotoxin that can cause skin rashes and sore throats and kill small animals.

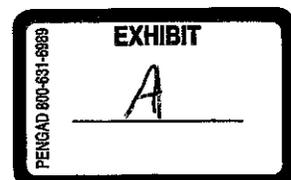
State environmental officials say a water sample this week showed the toxin level at four times the low-risk level set by the World Health Organization. Officials have posted water-quality warnings as the swim season begins.

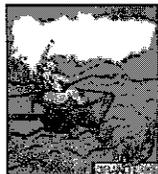
The 13,000-acre lake in Mercer and Auglaize (AW'-glayz) counties is considered one of the state's most polluted and is its first inland lake where algae has created a health risk.

Local activists say fertilizers and manure from nearby farms have contaminated the lake.

Information from: The Columbus Dispatch, <http://www.dispatch.com>

LOAD-DATE: May 24, 2009





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Wednesday, June 3rd, 2009

By William Kincaid

Celina may harvest Grand Lake algae for energy if study goes well

The city of Celina may harvest the algae in Grand Lake to create methane gas and carbon dioxide if a proposed pilot study at the water treatment plant is authorized and found viable.

Celina Planning and Community Development Director Kent Bryan informed city council members on Tuesday night of what he called a drinking water source protection project.

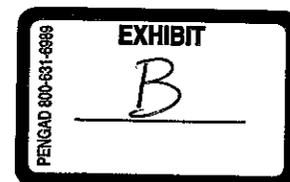
If successful, Bryan says the plan could clean the lake, stabilize water treatment costs and lead to the creation of electricity and renewable bio-commodities.

The city is in negotiations with three companies that offer Dissolved Air Flotation (DAF) - a technology that Bryan says would use tiny bubbles to cause silt and algae from incoming lake water to float to the top of the plant's concrete settling tanks.

The floating algae could be harvested and sent to a bio-reactor to be transformed into methane gas and carbon dioxide, which could, among other things, power a gas turbine and produce electricity, Bryan says.

Currently, plant employees use costly chemicals that settle the silt and algae to the bottom of the plant's concrete settling tanks, which then are pumped to ponds and eventually removed at an annual cost of \$60,000, Bryan says.

Bryan wants to use DAF technology - which would be shipped in on



a semitrailer - for a pilot study. Most likely, it would cost the city upwards of \$40,000 to use the equipment for a four-month study period, he said.

Bryan said the city knows the DAF technology works.

Through the pilot study, the city could determine how effective the process is and if it also would remove suspended materials and dissolved organics - reducing the chemical, ozone and carbon costs of treating the lake water.

The Ohio Department of Natural Resources and the Ohio EPA are philosophically on board with the city's plans, Bryan says.

No exact numbers were given on how much money the overall project would cost or possibly save the city in treatment costs in the future.

The U.S. Department of Agriculture - which Bryan says received funds from the federal stimulus package and likes drinking water improvement projects - could be a source of funding.

Bryan says the city could be eligible for a grant to finance 40 percent of the project, as well as a loan to pay for the remaining portion. Because the city is not considered a rural area, which is required for USDA funding, Mercer County would be the lead applicant for the grant, he says.

"It's something that we've been working on for a long time," Bryan says.

Bryan suggested the county's 60 acres of land on Fleetfoot Road be used for the bio-reactor, as well as dredged material from Grand Lake - a second part of the project that could lead to the creation of a salable soil.

Council members on Tuesday night seemed to be excited about the prospect, but some were concerned about the costs, specifically the initially \$40,000 needed for the pilot study.

Some suggested asking ODNR to waive the city's \$33,000 annual fee it pays for using lake water for drinking water as a means to fund the study.

Last November, Bryan had said the city along with Wright State University-Lake Campus was considering applying for a \$3 million grant through Ohio's Third Frontier program to explore turning algae into oil, nutritional supplements and plastic. However, that application was never turned in because the main Wright State campus in Dayton was applying for a similar project, according to Bryan.

No action was taken on Tuesday night but Bryan said he would come back to council soon with additional information.

Celina has plans for going green:

The city of Celina could be on the verge of participating in the much hyped green movement in the U.S., says Celina Planning and Community Development Director Kent Bryan.

The possibilities include lowering water treatment costs, creating electricity, selling carbon credits to coal plants and transforming dredge material from the lake into a commodity.

But everything rests on the results of a possible pilot study of Dissolved Air Flotation (DAF) - a technology where algae would be harvested from the lake and sent to a bio-reactor to be transformed into methane gas and carbon dioxide. Bryan says the technology is established and works.

Methane and carbon dioxide could be collected and used to create

electricity, and perhaps even more lucrative, be used as carbon credits under President Barack Obama's proposed cap and trade system, Bryan said.

For instance, if big coal plants are mandated to either spend millions of dollars on updating their facilities to meet federal environmental standards or purchase carbon credits from others, they most likely would choose the later. Celina could possibly sell carbon credits based on the city making electricity from algae.

During the processing of algae into methane gas and carbon dioxide, residual solids also would be created as a byproduct.

The solids could be added to dredged material from Grand Lake to create a soil amendment, such as potting soil, Bryan says.

Bryan says the lake sediment contains no metals or contaminants and is essentially rich topsoil that has collected over the last hundred years.

The city also envisions a Celina Renewable Energy Center, a collaboration of public and private partnerships for the creation of energy independence.

Bryan says businesses could be enticed to the area, bringing with them new jobs, to take advantage of green, renewable energy sources.

For example, the U.S. Air Force is searching for new ways of producing bio-jet fuel.

Ultimately though, the city's three fundamental concerns would be stabilizing water treatment plant costs, creating a self-sufficient method of cleaning the lake and generating revenue from the bio-products of the process, Bryan says.

- William Kincaid

Additional online stories for this date

- **It could have been more than property loss**
- **Process begins to improve historic canal through Minster**

Print edition only stories for this date

- **Tradition planted in annual strawberry festival**
- **Increase in water rates recommended**
- **Residents speak out about effect on Grand Lake**
- **Washington Twp. landowners object to ditch assessment**
- **A new place to stop for a drink, music**
- **New bait shop tries to lure fishermen to Montezuma**
- **Cavaliers and Rams have some similarities**
- **Grand Lake area well-represented again at state**
- **Prelude to the Dream at Eldora tonight**
- **Eldora a special place for the racers and the fans**
- **Time schedule for 2009 state track meet for local participants**

Weather forecast
for Friday:
Partly cloudy



Photo Albums

Tuesday, August 17



Scenes from
the Mercer
County Fair



Online Video

Monday, August 16



Harness
Racing at
the Mercer
County Fair
small - big

Saturday, August 14



Tug-a-Truck
at Mercer
County Fair
small - big

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Wednesday, August 19th, 2009

By William Kincaid

Celina officials negotiating for equipment to study harvesting Grand Lake algae

Effort would be first step in lake restoration project

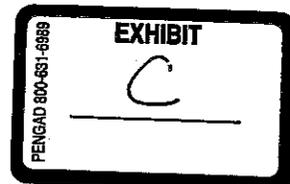
The city of Celina is negotiating with several companies to acquire equipment for a pilot study to determine if it is feasible to harvest algae from Grand Lake and turn it into electricity.

The city already has an offer from P-Tec, a company in Charlotte, N.C., to use their equipment for \$20,000. However, water plant Superintendent Mike Sudman says he may be able to get the equipment cheaper, as he is in negotiations with a few other companies.

The pilot study is the first part of the city's \$4 million lake restoration plan, which includes harvesting the algae, dredging sediment from the lake and creating a partnership with private industry to use the dredged up soil.

Harvesting algae from the lake would begin with dissolved air flotation technology, which would use tiny bubbles to push silt and algae to the top of the water plant's concrete settling tanks, according to Celina Planning and Community Development Director Kent Bryan.

The floating material then would be harvested and sent to a bioreactor to be transformed into methane gas and carbon dioxide,



which could, among other things, power a gas turbine and produce electricity, Bryan says.

Bryan said the city knows the technology works, but it wants to determine if water treatment costs could be reduced through lowered chemical and carbon usage.

Sudman would be able to process 120 gallons of water a minute for three months to determine how much suspended materials and dissolved organics would be removed by using dissolved air flotation technology.

Bryan said he is confident an ordinance to appropriate \$20,000 from the general fund to the water fund to finance the study will be passed as an emergency measure by city councilors on Monday. Council meets at 7 p.m. in the conference room of the GAC water plant.

But the first attempt to get it passed as an emergency measure did not fly.

During a council meeting last week, the ordinance moved to second reading because council did not have enough votes to pass it as an emergency measure as councilor Mike Sovinski was absent and councilor Ed Jeffries voted no.

Asked why he is against the initiative, Jeffries said the lake restoration project is too expensive. Ultimately, he fears utility customers would see higher rates.

Bryan originally wanted the algae pilot study to be conducted during the months of July, August, September and October, when algae blooms are at their highest. The study now will have to wait until at least September, he said.

Additional online stories for this date

• **Celina teachers, board tentatively approve contract**

• **St. Henry wins county title at The Fox's Den**

Print edition only stories for this date

- **Mercer County Fair booth weighs in on the truth of those snack binges**
- **Decision to waive past school fees up to BOE**
- **Logo unveiled**
- **OK given to proceed with practice football field**
- **Harness racing is finished at the Fair**
- **Redskins come out on top of five-team invite**
- **A place built for power lifters**
- **Year round flea market opens in Celina**
- **Fitness center planned for Sept. in Celina**

Weather forecast
for Friday:
Partly cloudy



Photo Albums

Tuesday, August 17



[Scenes from the Mercer County Fair](#)



Online Video

Monday, August 16



[Harness Racing at the Mercer County Fair](#)
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Saturday, August 14



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The Columbus Dispatch

The Columbus Dispatch (Ohio)

September 6, 2009 Sunday
Correction Appended
Home Final Edition

SECTION: NEWS - SCIENCE; Pg. 03G

LENGTH: 566 words

HEADLINE: Testing the waters;
Ohio EPA gets back in the business of monitoring inland lakes

BYLINE: Spencer Hunt, THE COLUMBUS DISPATCH

BODY:

The deepest spot in Griggs Reservoir is just north of the dam that turned a 6-mile stretch of the Scioto River into a long, narrow lake.

It's there, where the muddy bottom is 21 feet from the surface, that many of the lake's secrets will be revealed with the help of discs, dredges, probes and tubes lowered into the green water.

Ohio Environmental Protection Agency researchers use these tools to measure, among other things, sediment, algae, metals and toxins, in an effort to grade Griggs' water quality.

Each test the agency performs will help set standards for 447 lakes that dot Ohio, many of which provide drinking water for residents.

"Lakes are now the final piece in a total understanding of water quality in Ohio," said Linda Merchant-Masonbrink, the EPA's inland lake program manager.

The Ohio EPA halted lake testing in 1995 after federal funding was cut. At the time, officials believed measuring pollution in streams that feed and drain lakes would provide a general picture of water quality in Ohio lakes.

Anthony Sasson of the Ohio Nature Conservancy said lakes are different because they store pollutants that streams flush away.



Testing the waters; Ohio EPA gets back in the business of monitoring inland lakes The Columbus Dispatch (Ohio)
September 6, 2009 Sunday Correction Appended

"It's been a gap over the last decade," Sasson said. "I hope the new attention (on lakes) will help close that gap."

Columbus Public Utilities officials test lake water from Griggs, two other large reservoirs, and the streams that feed into them, once a week for pollutants that can threaten drinking water.

The tests "give us an opportunity to adjust our treatment and be prepared," said Lynn Kelly, the city's water treatment coordinator.

One of the top concerns is atrazine, a popular weed killer that runs off of farmland and can pose a health risk in drinking water.

Tests at Griggs in July showed an unhealthy level. Kelly said carbon filters at the Dublin Road water plant reduced atrazine to a safe level.

But drinking water tests don't provide a full picture. The state wants to know if lakes are safe for wildlife as well as people, Masonbrink said.

For example, many cities don't measure algae unless it causes a taste or odor problem. But algae can cause problems. Big problems.

The state got back into testing in 2007 when the U.S. EPA sent a \$170,000 grant to test 20 lakes in a national lake survey.

Test results from Grand Lake St. Marys revealed huge quantities of microcystin, a toxin created by blue-green algae. It can sicken people and animals.

Subsequent Ohio EPA tests done in May showed the toxin was at levels two to four times higher than World Health Organization safety standards.

Tests at Buckeye Lake in June and July also found microcystin, but at safer levels. Finding the algae helped convince the Ohio EPA to renew lake testing.

"It's important to know what you're swimming in," Masonbrink said.

Ohio EPA experts visited eight lakes in 2008. They plan to visit 15 this year.

The findings also will help define pollution threats posed by farms, where rain washes pesticides, herbicides, fertilizers and manure to streams and lakes.

Manure and fertilizers release phosphorus and nitrogen, which help create huge algae blooms that form oxygen-starved dead zones that threaten wildlife in lakes.

Tests taken last year at Buckeye Lake, for example, showed algae concentrations eight times higher than what researchers consider typical for a healthy lake.

Masonbrink said 10 tests are performed at each lake over summer months.

shunt@dispatch.com \

CORRECTION-DATE: July 7, 2010

CORRECTION:

* Microcystin is a liver toxin. Because of a reporter's error, a series of stories published this year and last year in

Testing the waters; Ohio EPA gets back in the business of monitoring inland lakes The Columbus Dispatch (Ohio)
September 6, 2009 Sunday Correction Appended

The Dispatch indicated otherwise.

GRAPHIC: Graphic with Map, TIM MEKO / DISPATCH

LOAD-DATE: July 7, 2010



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The Columbus Dispatch

The Columbus Dispatch (Ohio)

April 6, 2010 Tuesday
Correction Appended
Home Final Edition

SECTION: NEWS; Pg. 01B

LENGTH: 325 words

HEADLINE: GRAND LAKE ST. MARYS;
For now, warning signs gone from shore

BYLINE: Spencer Hunt, THE COLUMBUS DISPATCH

BODY:

Signs warning visitors at Grand Lake St. Marys of toxic algae in the water have been taken down. For now.

Officials of the Ohio Department of Natural Resources, which manages the 13,000-acre lake and state park, and the Ohio Environmental Protection Agency said they took down the signs after wintertime water tests showed low levels of microcystin, a neurotoxin created by the blue-green algae growing in the lake.

They also said the signs, which went up in May, will be reposted if the levels rise with warmer weather.

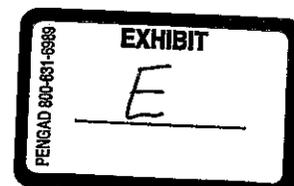
Natural Resources spokesman Mike Shelton said he expects microcystin to increase.

However, "right now, they are not at levels where they would be a problem," Shelton said. "If we left the signs up, they would, in fact, be incorrect."

Anthony Sasson, freshwater-conservation coordinator for the Ohio Nature Conservancy, said he expects the warnings will be back, and soon.

"I think the signs may be back in a few weeks," Sasson said. "This is April, and summertime is only a few months away."

State officials posted the warning signs last spring after an Ohio EPA water sample showed levels of microcystin four times as high as a "low-risk level" set by the World Health Organization for swimmers and 82 times as high as its



GRAND LAKE ST. MARYS; For now, warning signs gone from shore The Columbus Dispatch (Ohio) April 6, 2010
Tuesday Correction Appended

standard for drinking water.

The lake has long been considered one of Ohio's most polluted. Fertilizers and manure from Mercer and Auglaize county farms provide food for the algae.

The microcystin problem surprised state officials. Grand Lake St. Marys was the first inland lake in Ohio where algae posed a health threat. Lake Erie has had toxic algae blooms for several years.

Subsequent tests found lower levels of microcystin in Buckeye Lake in 2009.

Weekly water tests for microcystin levels at Grand Lake St. Marys didn't drop below the WHO's swimming standard until Nov. 19.

Dina Pierce, an Ohio EPA spokeswoman, called it "a good assumption" that microcystin warnings could return this summer.

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CORRECTION-DATE: July 7, 2010

CORRECTION:

* Microcystin is a liver toxin. Because of a reporter's error, a series of stories published this year and last year in The Dispatch indicated otherwise.

GRAPHIC:

LOAD-DATE: July 7, 2010