

**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.	:	

**MOTION OF RESPONDENTS  
TO STRIKE APPENDICES A & B FROM RELATORS' REPLY BRIEF**

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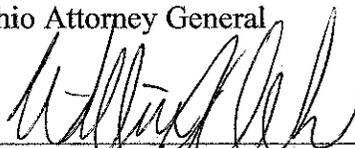
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Respondents move to strike the following material attached to Relators' 20-page reply brief: (1) the three-page table showing claims of alleged flooding on Relators' parcels from January 2008 to March 2010 ("Appendix A"); and (2) the three-page table entitled "Clarifications of Respondents' Mischaracterized Deposition Cites" ("Appendix B"). A supporting memorandum follows:

Respectfully submitted:

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**MEMORANDUM IN SUPPORT OF RESPONDENTS' MOTION  
TO STRIKE APPENDICES A & B FROM RELATORS' REPLY BRIEF**

On November 9, 2010, Relators filed their reply brief on the merits of this mandamus case. While the reply brief has the maximum number of pages (20) permitted by S.Ct.Prac.R. 6.4(B),<sup>1</sup> it also has additional pages attached thereto, including: (1) a three-page table showing claims of alleged flooding on Relators' parcels from January 2008 to March 2010 (identified as "Appendix A"); and (2) another three-page table entitled "Clarifications of Respondents' Mischaracterized Deposition Cites" (identified as "Appendix B"). Neither table is part of the evidence on record in this case.

The attached tables which make up Relators' Appendices A and B are argumentative, a one-sided mischaracterization of the evidence as composed and organized by Relators' attorneys and the functional equivalent of additional briefing. The "Appendix A" table includes seven footnotes that highlight statements made in supporting affidavits. (Reply Br., Appx. A, fn. 3-9.) Relators' "Appendix B" table is even more flagrant, as its stated purpose is to *refute* Respondents' contentions about pre-existing flooding, including what Relators argue are "blatantly false and intentionally misleading deposition cites." (*Id.* at Appx. B, fn. 1.) Appendices A and B are Relators' thinly-disguised attempt to add argument beyond what is permitted by Rule. Because Relators neither sought nor obtained leave to exceed the 20-page limitation for reply argument, Appendices A and B should be stricken from their reply brief.

Further, Appendices A and B do not comport with this Court's Rule governing the content of an appendix. Supreme Court Practice Rule 6.2(B)(5) provides a list of documents appropriate for an appendix, which include the following:

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<sup>1</sup> The page limit on reply briefs applies to original actions, pursuant to S.Ct.Prac.R. 10.8.

- (a) The date-stamped *notice of appeal* to the Supreme Court, the notice of certified conflict, or the federal certification order, whichever is applicable;
- (b) The *judgment or order* from which appeal is taken;
- (c) The *opinion*, if any, relating to the judgment or order being appealed;
- (d) All *judgments, orders, and opinions* rendered by any court or agency in the case, if relevant to the issues on appeal;
- (e) Any *relevant rules or regulations* of any department, board, commission, or any other agency, upon which appellant relies;
- (f) Any *constitutional provision, statute, or ordinance* upon which appellant relies, to be construed, or otherwise involved in the case;
- (g) In appeals from the Public Utilities Commission, the appellant's *application for rehearing*.

(Emphases added.) Not by any tortured parsing of this Rule would argumentative tables, such as those submitted by Relators in Appendices A and B, be appropriately included in an appendix.

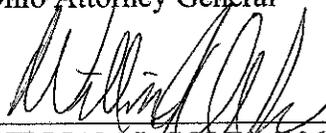
For the foregoing reasons, Appendices A and B should be stricken from Relators' reply brief.<sup>2</sup>

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<sup>2</sup> Relators' reply brief also includes a request to reconsider a ruling by the Master Commissioner that struck "for an unstated reason" an untimely affidavit of one of their experts (Campbell). (Reply Br. p. 14, fn. 18.) Relators' request comes nearly *four months* after the Master Commissioner's ruling. (See Entry dated July 13, 2010.) Respondents did file with the Court their grounds for striking the affidavit, i.e., because Relators did not provide Respondents with the affidavit until the due date for filing evidence, which was three months after the parties' mutually agreed-upon deadline for exchanging expert evidence. (See Respondents' Motion to Strike dated June 18, 2010.) Inasmuch as the Master Commissioner's ruling striking the untimely affidavit was supported by good cause shown, it should not be reconsidered.

Respectfully submitted:

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Counsel for Respondents

**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing was sent by regular and electronic mail on November 19, 2010, to Bruce L. Ingram, Joseph R. Miller, Thomas H. Fusonie, Kristi Kress Wilhelmy and Martha C. Brewer, Vorys, Sater, Seymour and Pease, LLP, 52 East Gay Street, P.O. Box 1008, Columbus, OH 43216



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