

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.

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

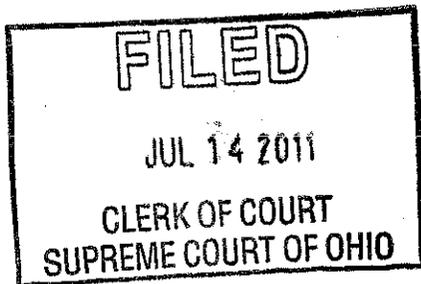
Bruce L. Ingram (0018008)
(Counsel of Record)
Joseph R. Miller (0068463)
Thomas H. Fusonie (0074201)
Martha C. Brewer (0083788)
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
Tel.: (614) 464-6480
Fax: (614) 719-4775
blingram@vorys.com
jrmiller@vorys.com
thfusonie@vorys.com
mcbrewer@vorys.com

Attorneys for Relators

William J. Cole (0067778)
(Counsel of Record)
Mindy Worly (0037395)
Jennifer S.M. Croskey (0072379)
Assistant Attorneys General
30 East Broad Street, 26th Floor
Columbus, Ohio 43215
Tel: (614) 466-2980
Fax: (866) 354-4086
william.cole@ohioattorneygeneral.gov
mindy.worly@ohioattorneygeneral.gov
jennifer.croskey@ohioattorneygeneral.gov

Dale T. Vitale (0021754)
Daniel J. Martin (0065249)
Tara L. Paciorek (0082871)
Assistant Attorneys General
Environmental Enforcement Section
2045 Morse Road # D-2
Columbus, Ohio 43229
Tel.: (614) 265-6870; Fax: (614) 268-8871
dale.vitale@ohioattorneygeneral.gov
daniel.martin@ohioattorneygeneral.gov
tara.paciorek@ohioattorneygeneral.gov

Attorneys for Respondents



MEMORANDUM IN OPPOSITION

I. INTRODUCTION

The attached photograph (Exhibit A) evidences the floodwaters rushing from Respondents' western spillway ("Spillway") to the Grand Lake St. Marys onto Relators' land on March 1, 2011. On July 6, 2011, this Court admitted the photograph into evidence, along with other visual evidence of flooding from the Spillway in February and March, 2011. It did so upon Relators' March 10, 2011 Motion for Leave to File Supplement to Presentation of Evidence and their Supplemental Motion for Leave to File Supplement to Presentation of Evidence filed on March 21, 2011 (hereafter Relators' Motions for Leave referred to collectively as "Relators' Motions"). Respondents opposed those Motions.

In their Oppositions, Respondents argued four reasons why this Court should deny Relators' Motions. (Opp'n of 3/21/11 & Opp'n of 3/30/11) ("Oppositions"). Those four arguments included Respondents' claim that "[t]here is nothing extraordinary about Relators' latest proposed submissions. They are merely evidence that, when there is a heavy rain in Mercer County, some of it falls on their properties." (Opp'n of 3/21/11 at 3). Over Respondents' arguments, this Court granted the Relators' Motions.

In their Oppositions, Respondents also requested that if this Court granted Relators' Motions, then "the case should be re-opened, and Respondents and their experts should be given sufficient time to evaluate...Relators' evidence and to submit their response to the Court." (Opp'n of 3/21/11 at 5). In granting Relators' Motions, this Court did not order the re-opening of the case. Instead, on the same day it granted Relators' Motions, this Court granted Relators' Request for Oral Argument. On July 8, 2011, the Court scheduled oral argument for September 20, 2011.

Now, despite claiming there is nothing “extraordinary” about Relators’ supplemental evidence, Respondents ask this Court for leave to supplement their presentation of evidence and for “at least 90 days” to do so. This Court should reject Respondents’ request.

II. ARGUMENT

First, Respondents rehash contentions already rejected by this Court. In their March 21, 2011 Opposition, Respondents devoted a full section to requesting the same relief they seek now. (Opp’n of 3/21/11 at 5). Respondents made that request in response to Relators’ contention that granting their Motion for Leave “will not prejudice ODNR” as it “had the opportunity to depose Relators” on the flooding of their property and “[e]vidence of 2011 flooding merely updates Relators’ prior submissions...” (Rels Mot. for Leave of 3/10/11 at 4). Thus, the Court had squarely before it the issue of whether the case should be “re-opened” and declined to order that relief.

Second, Respondents’ request delays justice for Relators. Respondents manage the Grand Lake St. Marys and its Spillway. They knew about the flooding from the Spillway contemporaneously with its occurrence. As shown by the attached photo, the flooding from the Spillway was clear and vast. Respondents also know that their Spillway and management practices cause more flooding, more often, and for longer periods of time downstream of the Spillway. Yet, Respondents argue that they should not be “penalized for prudently awaiting” for the Court to rule on Relators’ Motions. So a governmental agency and its director, knowing that their actions cause flooding downstream including on Relators’ land, took no steps to concern themselves with the magnitude of that flooding. Yet, now that justice for Relators is near, they claim they need at least 90 days to take depositions, have an expert review Relators’ submissions and evaluate the 2011 flooding.

Relators have suffered long enough without Respondents doing what is required of them by the Ohio Constitution and Revised Code § 163.59(J) (“No head of an acquiring agency shall intentionally make it necessary for an owner to institute legal proceedings to prove the fact of the taking of the owner’s real property”). Moreover, “[w]hen the state elects to take private property without the owner’s consent, simple justice requires that the state proceed with due concern for the venerable rights it is preempting.” *Norwood v. Horney*, 110 Ohio St. 3d 353, 2006-Ohio-3799, ¶ 38. Respondents’ request provides another example of their refusal to comply with *Norwood*. Simple justice requires this case proceed to oral argument and a ruling on its merits.

Third, Respondents’ request is inconsistent with their previous posturing in this case. Respondents previously claimed that Relators’ supplemental evidence is “nothing extraordinary” and just evidence that some “heavy rain”¹ falls on their properties. Now supposedly the inconsequential evidence requires 90 or more days for Respondents to respond to it.

Also, despite full knowledge of flooding in 2008, 2009 and March, 2010 of Relators’ land by the Spillway, Respondents did not submit any evidence in response to those floods as part of their June 1, 2010 presentation of evidence. Yet, now, they claim to need at least 90 days to have “experts” evaluate the 2011 flooding. Respondents’ theory on this case has been that despite every expert agreeing the Spillway and ODNR’s new lake-level management practices have caused more acres to flood, more frequent flooding and longer lasting flooding that the serial hypothetical modeling of “average” conditions by its “expert” somehow disproves the overwhelming visual and testimonial evidence of the extent, frequency and duration of flooding on Relators’ parcels caused by the Spillway. Respondents have not explained why their flawed

¹ The aerials attached to Floyd E. Wicks’ Affidavit (Rels Mot. for Leave of 3/10/11 at Ex. 3) show the absurdity of Respondents’ just heavy rain claim. They show (1) water forcefully rushing out of the Spillway; (2) vast flooding downstream of the Spillway; and (3) no flooding on land far enough removed from the overflow of water from the Spillway to be safe from its floodwaters.

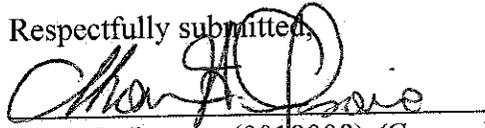
position requires so-called expert evidence on the 2011² flooding when they did not submit any evidence as to the 2008, 2009 or 2010 flooding.

Fourth, Relators' submissions speak for themselves. The evidence consists of visual documentation of flooding from the Spillway and affidavits attesting to that fact. Respondents do not suggest that the video or photographic evidence has been altered. Therefore, Respondents have not shown any need to conduct discovery as to Relators' submissions about the February and March, 2011 flooding.

To the extent this Court considers granting Respondents leave, Relators request that the Court set the deadline for Respondents to supplement their evidence to fourteen days from the date leave is granted. The oral argument on September 20, 2011 should not be jeopardized by Respondents' request. Indeed, Respondents failed to articulate any reason why they need at least 90 days. Moreover, since March, 2011, Relators have suffered flooding from the Spillway. In fact, most Relators suffered multiple flood events this Spring after the Spillway overtopped; all having significant impacts on their use and enjoyment of their property. If Respondents are granted leave to supplement presentation of evidence, Relators should be entitled to fourteen days to submit evidence of the further flood events that occurred this Spring.

² In contrast, Relators have consistently included additional floods to demonstrate the severity of Respondents' frequent flooding of their land.

Respectfully submitted,



Bruce L. Ingram (0018008) (*Counsel of Record*)

Joseph R. Miller (0068463)

Thomas H. Fusonie (0074201)

Martha C. Brewer (0083788)

Vorys, Sater, Seymour and Pease LLP

52 East Gay Street, P.O. Box 1008

Columbus, Ohio 43216-1008

Tel.: (614) 464-6480

Fax: (614) 719-4775

blingram@vorys.com

jrmiller@vorys.com

thfusonie@vorys.com

mcbrewer@vorys.com

Attorneys for Relators

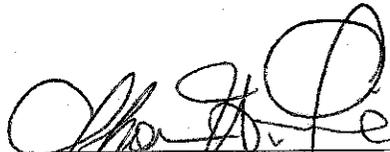
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing was served upon the following, via U.S. Mail postage prepaid, this 14th day of July, 2011:

William J. Cole
Mindy Worly
Jennifer S.M. Croskey
Assistant Attorneys General
30 East Broad Street, 26th Floor
Columbus, Ohio 43215

Dale T. Vitale
Daniel J. Martin
Tara L. Paciorek
Assistant Attorneys General
Environmental Enforcement Section
2045 Morse Road # D-2
Columbus, Ohio 43229

Attorneys for Respondents



Thomas H. Fusonie



PENGAD 800-631-8989
EXHIBIT
A