

# BEFORE THE RECLAMATION COMMISSION

CAROLINE & KEITH JOHNSON,

Appellants,

-vs-

DIVISION OF MINERAL RESOURCES  
MANAGEMENT,

Appellee,

and

CAPSTONE HOLDING COMPANY,

Intervenor.

Case No. RC-10-012

Review of Chief's Decision on  
Bond Release; Permit D-608  
(Capstone Holding Company)

**FINDINGS, CONCLUSIONS &  
ORDER OF THE COMMISSION**

Appearances: Caroline & Keith Johnson, Appellants *pro se*; Mark G. Bonaventura, Molly Corey, George Horvath, Megan DeLisi, Assistant Attorneys General, Counsel for Appellee Division of Mineral Resources Management; Geoffrey Mosser, Counsel for Intervenor Capstone Holding Company.

Date Issued: February 3, 2011

## **BACKGROUND**

On August 30, 2010, Appellants Caroline & Keith Johnson filed with the Reclamation Commission a notice of appeal from a decision of the Division Chief, approving a request for final release of all financial security associated with reclamation on a portion of the coal mining and reclamation permit D-608 area. The Johnsons own an interest in land affected by this mining and reclamation operation. The reclamation concerns raised by the Johnsons specifically address the condition of a pond created during the mining operation, which pond is to be left as a permanent structure on the property at issue [the "Property"].

Permit D-608 is held by Capstone Holding Company ["Capstone"], and Capstone is responsible for the reclamation of lands affected under this permit. On September 27, 2010, Capstone filed a Motion to Intervene into this appeal. On October 6, 2010, the Commission **granted** Capstone intervenor status.

On October 7, 2010, a site view was conducted by the Commission. All parties participated in the view. The Commission, and the parties, visited the Property, and observed the pond at issue in this matter.

This case came on for hearing before the Reclamation Commission on November 17, November 18 and December 14, 2010. At hearing, the parties presented evidence and examined witnesses appearing for and against them. After a review of the Record, the Commission makes the following findings of fact and conclusions of law:

## **FINDINGS OF FACT**

1. Coal mining and reclamation permit D-608 was issued to R & F Coal Company ["R&F"] on August 25, 1986. This permit allowed the surface mining of coal on 261.6 acres of land, located in Guernsey County, Ohio. Township Road 187 runs through the permitted area. Property on both sides of the township road was permitted. Actual mining of coal only occurred on the east side of the township road. Permitted property on the west side of the township road was utilized to control drainage from the mining operation. The pond at issue in this appeal is located on the west side of Township Road 187.

2. Permit D-608 is divided into several segments. The pond at issue is located on the Year 13 Segment of permit D-608. This segment of the permit covers 8.1 acres of land, located on the west side of Township Road 187 and associated with drainage control for the permit area.

3. The original mining and reclamation plan for permit D-608 included design criteria for a temporary siltation pond, to be known as pond #6. Pond #6 was built in March of 1987. An earthen embankment was constructed to act as the impounding dam for this pond. A 13-foot riser pipe, located within the pond, functioned as the pond's principal spillway. The crest of the riser pipe is equipped with an anti-vortex device and a trash rack, to keep debris from clogging the spillway. Based upon the length of the riser pipe, as originally installed, the pond's maximum depth was designed to be 13 feet. When the water level in the pond overtops the inlet to the riser pipe, water discharges from the pond into an unnamed tributary to Wills Creek.

4. Keith and Caroline Johnson have lived in the area of permit D-608 since approximately 1987. In 1991, the Johnsons purchased their current home, which is situated on a 5-acre parcel of land just north of pond #6. In the spring of 1991, the Johnsons began leasing approximately 10 acres of land surrounding pond #6 from the landowners Frank and Rosalie Salerno. The land surrounding pond #6 is in pasture, which the Johnsons utilize to graze their horses.

5. On June 11, 1997, R&F submitted to the Division an application to revise ["ARP"] permit D-608. This ARP was designated as ARP -6. Through this ARP, R&F proposed to leave several ponds, originally constructed as temporary sediment control ponds, as permanent structures. These ponds would remain on the affected properties after the completion of all mining and reclamation. ARP -6 included a request to leave pond #6 as a permanent structure. ARP -6 contained a letter from landowners Frank and Rosalie Salerno, dated May 8, 1997, which stated:

We, Frank A. Salerno and Rosalie M. Salerno, being the surface owners of a portion of the mine area referred to as Wynn-Fausnight, wish to have the impoundment designated as Pond Number 006 left permanently for our use after mining and reclamation is concluded. The pond will be used for agriculture and wildlife habitat following final bond release by R & F Coal Company.

(See Division's Exhibit 3.)

6. ARP -6 included information regarding the design and condition of pond #6. This information indicated that the surface area of pond #6 was 1.2 acres at maximum water capacity, that the drainage area for pond #6 contained 70.3 acres, and the pond's maximum depth was 13 feet. In 1997, pond #6 was still being used as a sediment control structure in support of permit D-608. In 1997, diversion ditches were in place, which transported water and sediment from the mining area to pond #6. As sediment accumulated in the bottom of pond #6 during the course of mining (since 1987), the actual water depth became less than the designed maximum depth of 13 feet. Based upon information produced at hearing, it is unlikely that 13 feet of water existed in pond #6 in 1997.

7. On September 5, 1997, the Division approved ARP -6, thus allowing pond #6 to be left as a permanent agricultural/wildlife impoundment following mining and reclamation.

8. On June 15, 1999, R&F submitted its final map for the permit D-608 area, indicating that all mining on this area had concluded. At some time, in or around 1999, R&F seeded the land surrounding pond #6 (see footnote 1). However, in 1999, mining-related diversion ditches were still in place and directing drainage into pond #6.

9. In August 1999, Capstone purchased R&F, thus acquiring permit D-608, and assuming reclamation responsibility for this area.

10. Sometime in 2002, Caroline Johnson (who was at that time leasing the property surrounding pond #6) contacted the Division regarding pond #6. At this time, Mrs. Johnson was concerned about the existence of a diversion ditch, which interfered with access on this property. The diversion ditch of concern to Mrs. Johnson was ultimately removed. Mrs. Johnson also expressed concern with the depth of pond #6, as she believed the pond was too shallow and contained a large amount of sediment.

11. After the conclusion of mining, pond #6 would function as a sediment control structure until vegetative growth was established on the disturbed area surrounding the pond and until all mining-related diversion ditches were removed. Following the removal of the diversion ditches, pond #6 would no longer function as a sediment control structure and would no longer be considered part of the drainage control system for permit D-608.

12. A Division Inspection Report dated October 2, 2002, reported that the diversion ditches to pond #6 had been removed, seeded and mulched. Therefore, after about October 2002, pond #6 no longer functioned as a part of the drainage control system for permit D-608.<sup>1</sup>

13. In December 2002, Keith and Caroline Johnson entered into an agreement to purchase the Salerno property on land installment contract. Pond #6 is located on this parcel. The land installment contract was signed and recorded in January 2003.

14. On May 21, 2003, the Johnsons contacted the Division for a second time regarding the condition of pond #6. At this time, the Johnsons were concerned that water may have been seeping from pond #6 through the pond's earthen embankment, creating "wet spots" in their pasture. The Johnsons believed that the seepage was evidence of instability in the pond's embankment. The Johnsons indicated that they wanted pond #6 removed.

15. Division Inspector Gerald Young visited pond #6 on June 13, 2003, and reported:

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<sup>1</sup> There was no testimony offered directly on the issue of when vegetative growth was established on the 8.1-acre segment of permit D-608 surrounding, and including, pond #6. A Division Inspection Report, dated October 14, 1999, states that "all areas are backfilled, graded, resoiled with vegetation established except for affectment cause by diversion removal." Additionally, the public notice of Capstone's request for final security release stated that "all reclamation" on this 8.1-acre segment of permit D-608 was complete on June 1, 1999. This suggests that vegetative growth on this area was established by 1999. Once vegetative growth is established, and mining-related diversion ditches are removed, siltation ponds are no longer required and may be removed. However, as pond #6 had been designated as a permanent impoundment, this pond would not be subject to removal. Based upon the fact that the mining-related diversions were removed in 2002, we can assume that pond #6 no longer served a sediment capture function after October 2002. Clearly, by the time period that is relevant to this appeal (2010), pond #6 no longer functioned as a siltation pond on the permit D-608 area.

Pond #06 is 60% full of sediment also there is a slip on the back side of the dam. This slip is approximately 70' long and dropped 7-10' blocking/pinching off the discharge. Very little water is discharging. Either clean out pond sediment and repair the slip or remove the pond. The removal of the diversion ditches, on both the north and south sides of pond #06, is creating an erosion/sedimentation problem. The water that runs off of the permitted area through the culverts under twp. road #187, has no where to go, except into the pasture, causing erosion/sedimentation to occur. These areas must be channeled, rip-rapped and directed to a natural waterway. There has been a landowner complaint filed with DRM [the Division] and OSM [the federal Office of Surface Mining] concerning this pond and drainage problems.

(See Appellants' Exhibit 3-B.)

16. By July 3, 2003, the slip and erosion on the pond #6 embankment, identified by Inspector Young in June 2003, had been repaired by Capstone.

17. There was no evidence presented to establish that accumulated sediment was removed from pond #6 (except for some sediment that was removed in 2009; see Finding of Fact #25).

18. On July 17, 2003, the Division issued a written response to the Johnsons' May 21, 2003 citizen complaint. In its response, the Division indicated that Capstone had repaired the drainage and erosion problems associated with pond #6. The Division also noted that, because pond #6 had been approved as a permanent structure in 1997, the Division could not require Capstone to remove pond #6 from the Property.

19. Between 2003 and 2009, the Johnsons noted muskrat holes in the pond #6 embankment, "wet spots" in their pasture, and algae blooms in the pond during the summer months. During this time period, the Johnsons testified that the maximum pond depth ranged from 4 – 5 feet, and that the pond rarely discharged (*i.e.*, rarely reached its maximum depth).

20. On March 30, 2009, the Johnsons contacted the Division for a third time regarding the condition of pond #6. The Johnsons stated that the pond was full of sediment, and that the pond banks were "falling in."

21. In response to the Johnsons' third complaint, Division Engineer Jason Craven inspected pond #6, and, on April 8, 2009, issued a report regarding this pond.<sup>2</sup> Mr. Craven's report noted the existence of muskrat holes and woody vegetation on the pond's embankment. During Mr. Craven's April 2009 inspection of pond #6, he noted that the pond was not discharging. Mr. Craven's report states in part:

Sediment buildup is apparent looking into the pond ... The maximum depth found is 5 feet toward the middle of the impoundment. The areas where the diversions used to flow have less than 2 feet of water and have hydrophilic vegetation growth.

Through his report, Mr. Craven recommended the following:

1. The muskrat and groundhog holes should be repaired by mudpacking and regrading (see Division of Water Fact Sheet 94-27) or other methods suggested by a professional engineer. Trapping and relocation is also recommended.
2. Brush and other woody vegetation, along with all their root systems, shall be removed from the embankment. This will discourage groundhogs and improve embankment stability.
3. To provide adequate water supply for wildlife and agriculture, 25 percent of the impoundment, roughly 0.3 acres, should be excavated to no less than nine (9) feet of water depth. The excavated material shall be placed upland and seeded and mulched.
4. Keep livestock and other animals off embankment.

(See Division's Exhibit 12, pages 4 and 7.)

22. During the spring or early summer of 2009, Mr. John Dutton (of Capstone) met with Mr. Johnson in regards to the Johnsons' March 30, 2009 complaint. During this meeting, Mr. Dutton indicated that Capstone would remove the collected sediment from the pond<sup>3</sup> and would construct a permanent ditch to pond #6, to increase flow into the pond.

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<sup>2</sup> Mr. Craven gave his engineering report to the Division Inspector responsible for inspecting the permit D-608 site. A copy of the report was eventually provided to the Johnsons. However, it is unclear whether this report was ever shared with Capstone. Mr. John Dutton, of Capstone, testified that he had never seen the Craven Report until the Commission's hearing. Mr. Michael Kearns, the engineer hired by Capstone, also testified that he had not seen the Craven Report.

<sup>3</sup> At some point, Capstone's plan to remove the collected sediment from the pond was changed. Ultimately, Capstone decided to increase the depth of the pond by increasing the height of the principal spillway riser pipe, as opposed to removing sediment from the pond's bottom. A small amount of sediment was removed from the pond in July of 2009 (see Finding of Fact #25). It does not appear that Capstone's change in plans was ever directly communicated to the Johnsons.

23. Mr. Michael Kearns is a professional engineer, working for Hamilton & Associates. Capstone hired Mr. Kearns to conduct engineering work associated with permit D-608 and pond #6. On May 1, 2009, a survey team, under the supervision of Mr. Kearns, recorded elevations in mean sea level ["msl"] of various points within and surrounding pond #6. Mr. Kearns generated a contour map, plotting several hundred field elevations, including approximately 200 elevations within pond #6. (See Intervenor's Exhibit 5.) Comparison of the pond bottom elevations, to the top of the riser pipe, would provide the maximum depth of water at various points within pond #6.

24. In July 2009, Capstone submitted ARP -51 to the Division. This ARP proposed to increase the depth of pond #6 by welding three feet of additional pipe onto the existing principal spillway riser pipe. ARP -51 contained an addendum, addressing the following specifications in the Pond/Impoundment Plan:

If this [pond] is to be retained as a permanent impoundment, submit an addendum to this attachment demonstrating compliance with 1501:13-9-04 of the Administrative Code

In response to this requirement to demonstrate compliance with O.A.C. §1501:13-9-04 (the state regulation addressing protection of the hydrologic systems associated with mining permits), Capstone stated in ARP-51:

a) As shown on the application map, the size and configuration of the above referenced Pond is adequate for its intended purpose. The above referenced pond meets the requirements as set forth in the "Engineering Field Manual" as published by the NRCS for ponds.

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c) The ratio of the watershed area to the pond area at normal pool level will provide a stable water level capable of supporting the post mining land use.

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f) The impoundment will be suitable for the approved post mining land use as demonstrated by items a-e & items g & h of this document.

(See Division's Exhibit 4.)

25. In July 2009, Capstone dredged some sediment from the east side of the pond, using a track hoe operating from the shoreline. Capstone collapsed the muskrat holes on the pond's embankment and filled the holes with material from the area. Capstone constructed a permanent ditch from the culvert under Township Road 187 into pond #6. Construction of this permanent ditch into pond #6, was expected to increase the flow of water into the pond, thus helping to stabilize the pond's water level. Capstone also welded an additional three feet of pipe to the top of the riser pipe, thus raising the principle spillway elevation by 3 feet (from 798 feet msl to 801 feet msl). By raising the principle spillway outlet for the pond, the pond's potential maximum depth was increased by 3 feet, and the surface area of pond #6 was increased to 1.9 acres at maximum water capacity. ARP -51, which addresses these modifications to pond #6, stated that the drainage area to the pond was reduced to 24.8 acres (the original drainage area for this pond, as set forth in ARP -6, was 70.3 acres; see Finding of Fact #6).

26. On September 17, 2009, the Division approved ARP -51.

27. The Johnsons testified that since the additional three feet of pipe have been added to the riser pipe, pond #6 rarely discharges through the riser pipe (rarely reaches its maximum depth). Mrs. Johnson testified that in October 2009, the pond discharged for the first time from the "lengthened" riser pipe. Mrs. Johnson testified that this discharge was in response to a very heavy rain. Mrs. Johnson also testified that the newly-constructed ditch from the culvert under the township road does not carry water, and that water in the ditch collects in shallow puddles, causing algae growth.

28. On November 3, 2009, Capstone submitted a request for a Phase III security release, asking for final approval by the Division of reclamation on the Year 13 Segment of permit D-608. The Year 13 Segment of permit D-608 covers 8.1 acres, and includes pond #6 and the land immediately surrounding pond #6.

29. On December 3, 2009, Division District Manager Michael Kosek and Division Inspector Gerald Young visited pond #6. During this inspection, the Division observed muskrat and groundhog holes on the pond's embankment, and observed that a portion of the inslope of the embankment was marshy. Mr. Kosek testified that, at this time, the embankment needed repair and that he did not believe the pond's water level to be stable.

30. In mid-December 2009, Capstone filled the muskrat and groundhog holes on the pond #6 embankment.

31. On December 23, 2009, Division issued a written response to the Johnsons' March 30, 2009 citizen complaint. The response, written by Division District Manager Michael Kosek, states in part:

I inspected the site with the assigned inspector, Gerald Young, on Thursday, December 3. I also spoke with Jason Craven, an engineer with our Division, regarding the pond. If you will recall, I gave Mrs. Johnson a copy of the engineering report when she last visited our office. During the inspection we found that the pond has instability in the embankment as a result of muskrat holes and burrows. Inspector Young has directed the operator to repair and stabilize the embankment. We have suggested using a clay material. We believe this repair may raise the water level as water is currently seeping through the embankment as a result of these burrows. We also found that water from the road culvert was reaching the pond. The pond is a reclamation pond and does not have a sediment requirement. The pond does, however, have quite a bit of storage volume remaining before reaching discharge.

Once these repairs are made, the pond will meet the criteria needed for final release. ...

(See Division's Exhibit 6.)

32. On January 4, 2010, the Johnsons requested informal review of the Division's December 23, 2009 determination that pond #6, with certain minor repairs, would meet the criteria for final security release.

33. On March 17, 2010, Division District Manager Michael Kosek and Division Engineer Jason Craven again inspected pond #6. During this inspection, they noted that the embankment had been repaired. They further noted that the pond was discharging from its principle spillway. Mr. Kosek and Mr. Craven took depth readings, using a fish finder. Mr. Kosek testified that "most" of the areas measured showed a depth of 8 feet, and that they measured a few 9 foot "holes," and one 11 foot "hole." However, when Mr. Craven was asked during his testimony whether he could state that 25%, or more, of pond #6 had at least 8 feet of depth, he testified that he could not. During this inspection, neither Mr. Craven nor Mr. Kosek observed any "wet spots" around the pond.

34. On March 18, 2010, Division Chief John Husted issued a decision on the Johnsons' January 4, 2010 request for informal review. Chief Husted decision stated in part:

I reviewed your letter dated January 4, 2010 as well as the results of the investigation dated December 23, 2009. It is important to note several important factors. The letter sent by Mr. Kosek on December 23<sup>rd</sup> references deficiencies with the pond and the need for repairs and follow-up by our inspection staff. I have been informed that monthly inspections have taken place. Specifically, Mr. Kosek and Division Engineer Jason Craven inspected the pond on March 17, [2010] and found that the needed repairs have been made. On that date, the pond was discharging and was sounded and found to have an average depth of 8 feet with one area reaching 11 feet in depth. The pond currently meets all requirements of Rule 1501:13-9-04. As mentioned in the letter from Mr. Kosek, you will be notified of the time and date of the release inspection. At that time, the pond will be reviewed again and will not be released unless it meets the requirements of Section 1513 of the Ohio Law and the Rules of Chapter 1501:13.

I concur with the process that is being followed by our staff to assure the pond is meeting the requirements of law and that noted deficiencies with the embankment are being corrected.

(See Division's Exhibit 7.)

35. On July 7, 2010, the Division conducted the Phase III security release inspection, to determine if all reclamation had been successfully accomplished on the 8.1-acre segment of permit D-608 where pond #6 is located. Mr. Johnson attended this inspection. During the inspection, Mr. Johnson identified to the Division Inspector, a "wet spot" on the toe of the north side of the pond #6 embankment.

36. On July 23, 2010, the Division District Manager Michael Kosek and Division Engineer Jason Craven returned to pond #6 to inspect the embankment in response to Mr. Johnson's concerns regarding the "wet spot" observed during the July 7, 2010 security release inspection. Mr. Kosek testified that he observed a "wet, spongy" area during the July 23, 2010 inspection. As a result, the Division contacted Capstone and requested that Capstone "certify" the stability of the pond #6 embankment.

37. On August 2, 2010, Engineer Michael Kearns (on behalf of Capstone) visited pond #6 and prepared a report relating to the stability of the pond #6 embankment. Mr. Kearns observed a "wet spot" on the right abutment approximately 6 feet below the top of the dam. He reported that the "mushy area" – or "wet zone" – had dimensions of approximately 12 feet by 6 feet. Mr. Kearns testified that he found no free-flowing water moving through the embankment and no deposition of sediment in the "wet zone." Therefore, Mr. Kearns concluded that the pond #6 embankment was stable. Mr. Kearns also testified that on August 2, 2010, the water level in pond #6 was below the inlet to the riser pipe.

38. On August 3, 2010, Capstone submitted Engineer Michael Kearns' report on the stability of the pond #6 embankment to the Division.

39. After receiving the Kearns report, Division Engineer Jason Craven returned to pond #6. Mr. Craven testified that, during this inspection, the water level in the pond was "down," and that a "wet spot" existed at the toe of the embankment. However, Mr. Craven agreed with Michael Kearns' conclusion that the pond's embankment was stable.

40. On August 17, 2010, Division District Manager Michael Kosek issued a letter to Mr. and Mrs. Johnson, informing the Johnsons that the Division had determined that pond #6 meets the requirements for final security release, and that the Division had approved the final security release for the 8.1-acre Year 13 Segment of permit D-608.

41. On August 30, 2010, Mr. and Mrs. Johnson filed an appeal to the Reclamation Commission from the Division's August 17, 2010 decision approving final security release on the portion of permit D-608 on which pond #6 is located. This is the appeal now under consideration by the Commission.

## DISCUSSION

### The affect of final security release.

Coal mining operations are permitted and regulated by the Chief of the Division of Mineral Resources Management under the authority of Ohio Revised Code Chapter 1513. Ohio's mining law requires that mining and reclamation activities proceed in accordance with the requirements of Chapter 1513, and consistent with the provisions of mining and reclamation plans approved by the Division of Mineral Resources Management. See O.R.C. §1513.02; O.R.C. §1513.07.

A primary focus of Ohio's mining law is to ensure adequate reclamation of all areas disturbed by mining. To this end, Ohio's mining and reclamation law requires that performance security be posted in support of reclamation of affected areas. See O.R.C. §1513.08. The performance security is intended to provide a guarantee that funds will be available to complete the reclamation of a site, in the event that the mine operator fails to successfully reclaim an area. Performance security is released to the mine operator upon the successful accomplishment of reclamation. Ultimate failure of a mine operator to successfully reclaim a mine site results in the forfeiture of performance security.

The posted security is released in three "phases." Phase I release occurs after the Division determines that the operator has successfully completed backfilling and regrading of an affected area. A Phase I release returns 50% of the posted security to the operator. Phase II release occurs after the Division determines that the operator has successfully completed resoiling and revegetation of an affected area. A Phase II release returns 30% of the posted security to the operator. A Phase III, or final, release occurs after the Division determines that all other requirements of the operator's reclamation plan have been met and that the vegetation has been successfully established for at least a five-year period. A Phase III release returns the remaining 20% of the posted security to the operator.

In this appeal, Capstone is seeking a Phase III, or final, security release on an 8.1-acre segment of permit D-608.

The final security release is significant, as it marks the termination of an operator's reclamation responsibilities for an affected area. Once the operator achieves final security release, the operator will not be required to return to the property for any further reclamation or repair. The final release of security also marks the termination of the Division's jurisdiction over a particular piece of property. If final security is released, the Johnsons, or future landowners, will be solely responsible for the maintenance of pond #6.

### **Sediment pond vs. reclamation pond.**

The facts of this case reveal that pond #6 was constructed in 1987 as a siltation pond associated with the drainage control on permit D-608. A siltation structure, or "sediment pond," is constructed on a permitted area to capture sediment entrained in water runoff from the mining operation. A siltation pond is designed to contain a specific volume of water (to allow for the settlement of entrained sediment in the water) and a specific storage capacity for captured sediment.

While a pond functions as a siltation structure, the law requires that the pond provide adequate sediment storage volume. See O.A.C. §1501:13-9-04(G)(3)(a). The purpose of this requirement is to prevent contributions of suspended solids from a mine site into waters outside the permitted area. See O.R.C. §1513.16(A)(10)(b)(i). To maintain adequate sediment storage volume, accumulated sediment must be periodically removed from the pond. See O.A.C. §1501:13-9-04(G)(3)(a)(iii)(f). Historically, the Division has required that sediment deposited in a pond not exceed 60% of the pond's capacity.<sup>4</sup>

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<sup>4</sup> Historically, the law required that sediment must be removed from a siltation pond when it exceeded 60% of the pond's designed storage capacity. In 1988, the "60% rule" was removed from the law. Currently, O.R.C. §1513.16(A)(10)(b)(i) requires that coal operators minimize disturbances to the prevailing hydrologic balance at a mine site and in associated offsite areas by:

Conducting coal mining operations so as to prevent, to the extent possible using the best technology currently available, additional contributions of suspended solids to streamflow or runoff outside the permit area ...

O.A.C. §1501:13-9-04(G)(3)(1)(iii), which amplifies O.R.C. §1513.16, requires that siltation ponds be designed, constructed and maintained to:

- (a) Provide adequate sediment storage volume;
- (b) Provide adequate detention time to allow the effluent from the ponds to meet state and federal effluent limitations;
- (c) Contain or treat the ten-year twenty-four hour precipitation event ("design event") . . . ;

(f) Provide periodic sediment removal sufficient to maintain adequate volume for the design event;

Therefore, "adequate" sediment storage volume, and the requirement to remove accumulated sediment, is now determined by the ability of a pond to successfully pass the surface drainage generated by a specific storm event. See Ohio Coal & Construction vs. DOR, RBR-5-90-103 (July 24, 1991). However, from the evidence presented, it appears that the "60 % rule" continues to be applied by the Division as a "rule of thumb" regarding the accumulation of sediment in a siltation pond.

Requirements, addressing siltation pond design, assure that mining-generated sediment will settle out of the water and be captured within the pond. Without adequate settlement area, or adequate sediment storage capacity, sediment generated by mining could move through the pond and be transported off the permitted area.

Once vegetative growth on the affected ground is established, and all mining-related diversion ditches are removed, a pond no longer functions as part of the drainage control system for the permit. At this point, operators may remove temporary ponds. However, ponds which have been approved to remain as permanent structures must be retained on the property.

Pond #6 functioned as a sediment control structure for many years. This pond was originally designed and intended as a temporary siltation structure, which would be removed during reclamation of the permitted area. In 1997, at the request of the then-landowners Frank and Rosalie Salerno and pursuant to ARP -6, pond #6 was modified from a temporary structure to a permanent structure. Thereafter, pursuant to the requirements of permit D-608, pond #6 would remain on the property after reclamation and final bond release.

At some point in time, pond #6 ceased to operate as part of the sediment control system on permit D-608, and became what the Division referred to as a "reclamation pond." Regardless of the "name" given to this structure, the important distinction is that the function of the pond had changed. At some point, pond #6 no longer functioned as a structure in which sediment settled out of water pursuant to permit D-608. Nor was it a part of the pond's function to serve as a containment area for sediment generated by mining. During the course of testimony, the parties attempted to establish when this "change" in function occurred. The evidence did not provide a clear date in this regard. However, it appears from the evidence presented, that pond #6 ceased to function as part of the sediment control system on permit D-608 in circa 2002.

As pond #6 no longer functioned as a sediment control structure after about 2002, the legal requirement that the pond contain "adequate" storage volume for mining-generated sediment no longer applied.

There was no evidence presented to establish that accumulated sediment was ever removed from pond #6, with the exception of some sediment that was removed along the eastern shoreline in July of 2009. Thus, it appears that pond #6 currently contains mining-generated sediment collected from 1987 until about 2002.

While sediment in pond #6 clearly exists today, the question of whether the pond contains 60% sediment, or "adequate" storage volume, is not relevant. Because pond #6 no longer functions as a sediment control structure, there is no legal requirement that Capstone clean the sediment from the pond for purposes of assuring adequate settlement area or adequate sediment storage volume. Any sediment in pond #6 is now relevant only to the extent that the existence of accumulated sediment in this pond affects the depth of water contained in the pond.

### **What standards apply to a permanent agricultural ... pond?**

In 1997, pond #6 was reclassified, for purposes of permit D-608, from a temporary siltation pond to a permanent impoundment. Pond #6 continued to function as part of the permit D-608 sediment control system while diversion ditches brought mining-generated sediment into the pond. However, after the diversion ditches were removed, the pond was no longer a sediment control structure. The evidence indicates that pond #6 ceased to function as part of the permit D-608 sediment control system in about 2002.

In requesting that pond #6 remain as permanent, the landowners stated that pond #6 would be used in the future for agricultural and wildlife habitat purposes. This request was incorporated into ARP -6. There has been no dispute amongst the parties that pond #6's post mining land use, pursuant to ARP -6 and ARP -51, is for agriculture and wildlife habitat purposes. A permanent impoundment left on a reclaimed area for agricultural and wildlife habitat purposes must meet certain design and performance requirements established by law, as well as the requirements set forth in the permit. It is the responsibility of the operator to design, construct and maintain<sup>5</sup> the pond to meet these requirements. It is the responsibility of the Division to assure that the operator designs, constructs and maintains<sup>5</sup> the pond, so as to meet these requirements.

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<sup>5</sup> Maintenance responsibilities continue until final financial security on the permitted area has been released.

As persuasively argued by the Division, the controlling legal standard for the depth of an agricultural pond in the State of Ohio is Natural Resources Conservation Service ["NRCS"] Code 378.<sup>6</sup> NRCS Code 378 specifically addresses the minimum depth requirement for agricultural ponds, and requires that "[a]t least 25 percent of the pond area at normal water level shall have a minimum depth of 8 [feet]."<sup>7</sup>

Even though the "8 feet over 25%" standard of depth is clearly stated in NRCS Code 378, there was conflicting testimony at hearing regarding the depth-requirement for this particular pond. Division District Manager Michael Kosek stated that a 6-foot minimum depth was required, but that he defers to the Division's engineering staff when issues relating to the requirements of pond depth are raised. Michael Kearns, the engineer for Capstone, testified that no depth requirements applied to "reclamation ponds," but that a 6-foot depth should be adequate for pond #6. Mr. John Dutton, of Capstone, testified that he was not aware of any depth requirement for permanent impoundments left on a reclaimed mine site, but that such depth requirements could exist. However, NRCS Code 378 does set forth the controlling standard.

In ARP -51, Capstone, in its demonstration of compliance with Ohio law for permanent impoundments left on reclaimed ground, specifically stated:

As shown on the application map, the size and configuration of the above referenced Pond is adequate for its intended purpose. The above referenced pond meets the requirements as set forth in the "Engineering Field Manual" as published by the NRCS for ponds.

(Emphasis added.)

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<sup>6</sup> Ohio's mining and reclamation law, at O.R.C. §1513.16(A)(8), sets forth certain performance standards that apply to permanent ponds constructed on reclaimed ground. This section of Ohio law does not specify a minimum depth for agricultural ponds, but rather, at O.R.C. §1513.16(A)(8)(b), requires that permanent impoundments be designed in compliance with the "Watershed Protection and Flood Prevention Act," 16 U.S.C. §1001. Regulations promulgated under the "Watershed Protection and Flood Prevention Act" authorize the Department of Agriculture, Natural Resources Conservation Service ["NRCS"] to develop technical standards and criteria for the design and construction of various types of ponds, including agricultural ponds and wildlife habitat ponds. These technical standards include criteria for minimum pond depths. The NRCS Engineering Field Manual provides national standards relating to ponds, but directs state agencies to apply state-specific NRCS standards, where they exist. NRCS Code 378 sets forth the criteria for ponds located in the State of Ohio.

<sup>7</sup> While there was some factual dispute as to whether the controlling depth standard from NRCS should be 8 or 9 feet of depth over 25% of the pond, there was no dispute by the parties that pond #6 was, in fact, an agricultural pond. Nor was there any dispute to the Division's legal argument that NRCS Code 378 was the controlling legal standards for the design and performance of pond #6.

The NRCS Engineering Field Manual provides a "national" depth requirement, which, for pond #6, would be 9 feet over 25% of the pond's surface area. As noted in footnote 6, *supra*, the NRCS Field Manual also references compliance with "state-specific" NRCS standards. Again, the state-specific standard for pond #6, which has been classified as an agricultural/wildlife habitat pond, as set forth in NRCS Code 378, is that "at least 25% of the pond at normal water level shall have a minimum depth of 8 feet ...".<sup>8</sup> It must be noted that Capstone stated that pond #6 met the requirements of the NRCS Engineering Field Manual in its ARP -51. However, the witnesses called by Capstone at the hearing, Mr. Dutton and Mr. Kearns, indicated that they were unaware of specific depth requirements for pond #6. While Mr. Dutton and Mr. Kearns may not be aware of the depth requirement for a pond classified as "agricultural" pursuant to the NRCS Field Manual, Mr. Dutton certified, by signing ARP -51, that:

I, the undersigned, a responsible official of the applicant, do hereby verify the information contained in this revision request is true and correct to the best of my information and belief.

Further, Mr. Kearns signed, and sealed with his professional engineer's stamp, the Pond/Impoundment Plan for pond #6 that was attached to ARP -51, wherein Mr. Kearns certified that pond #6 would meet the requirements set forth in the NRCS Engineering Field Manual. Thus, the two witnesses presented by Capstone, and the certifying parties for ARP -51, appeared to be unfamiliar with the requirements regarding depth for pond #6.

It is also significant to note that Capstone did not, at any time during the hearing, by virtue of presentation of evidence, examination of witnesses or legal argument, attempt to contest the Division's evidence and legal argument that NRCS Code 378 sets forth the controlling depth requirement for pond #6. These facts, juxtaposed with:

1. the undisputed testimony of Jason Craven that the NRCS Field Manual incorporates NRCS Code 378 as the Ohio-specific depth requirement for agricultural ponds, and that the depth requirement for pond #6 is 8 feet at normal water level for 25% of the pond,

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<sup>8</sup> While the NRCS articulates a depth requirement for agricultural ponds, no similar depth requirement is provided for wildlife habitat ponds. As no depth requirement is set forth for wildlife habitat ponds, when considering depth requirements for pond #6, this Commission utilizes the standards applicable to agricultural ponds.

2. the Division's legal argument that NRCS Code 378 is the controlling standard, which was supported and articulated in writing, by the decision in In The Matter of Horizon Coal Company (1983), case numbers SHA-131-82, SHA-132-82 (1983), pages 6 - 7,<sup>9</sup>
3. the failure of Capstone to present any reliable evidence of what the depth requirements were for pond #6, and
4. the fact that ARP-51, filed with the Division by Capstone, states that pond #6 will meet the requirements of the NRCS Engineering Field Manual,

leads to the conclusion that Capstone agrees with the Division, that NRCS Code 378 sets forth the applicable depth standards as a matter of law and by virtue of the incorporation of the commitment to comply with NRCS Engineering Field Manual in Capstone's ARP -51. The Johnsons never contested the applicability of NRCS Code 378 to pond #6. Their only argument was that Jason Craven should be prohibited from changing his position in testimony, from that of his written report, regarding the required depth of pond #6.<sup>10</sup> Thus, based upon the Division's undisputed, very cogent legal and factual analysis, the applicable depth standard for pond #6 is: "at least 25% of the pond at normal water level shall have a minimum depth of 8 feet."

The failure of the Division, following the Johnsons' complaint regarding pond #6's depth in March of 2009, to clearly articulate the correct and applicable standard for the depth of an agricultural pond, was both arbitrary and capricious. Mr. Craven's report established a reasonable expectation by the Johnsons that a specific depth (9 feet over 25% of the pond) would be required by the Division for pond #6. Yet, this standard was not, ultimately, applied to pond #6.

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<sup>9</sup> This decision was distributed to all of the parties by the Division prior to closing arguments, and was specifically cited as support for the Division's analysis that NRCS Code 378 was the controlling standard in its closing argument.

<sup>10</sup> Division Engineer Jason Craven, who investigated the pond and generated a report on the pond, stated in his report that the pond must show a 9-foot depth over 25% of its surface area (the "national" NRCS standard). At hearing, Mr. Craven testified that he was aware of the "8 feet over 25% of the pond" state standards set forth in NRCS Code 378, but "suggested" a 9 feet over 25% depth in an attempt to be "generous" and avoid future depth concerns. Yet, the language of Mr. Craven's report specifically states:

To provide adequate water supply for wildlife and agriculture, 25 percent of the impoundment, roughly 0.3 acres, should be excavated to **no less than nine (9) feet of water depth**. The excavated material shall be placed upland and seeded and mulched.

(Emphasis added.) At hearing, Mr. Craven testified that the applicable standard is 8 feet over 25% depth.

The depth requirements of NRCS Code 378 are not new standards, but rather are standards that have been in existence for at least 25 years, and, therefore, should have been readily known by both the Division and Capstone.

### **The depth of the pond.**

The Johnsons identified a concern relating to the depth of pond #6. The pond was originally designed to hold a maximum depth of 13 feet of water. The collection of sediment, over the course of the mining, reduced the depth of the pond to a maximum depth, in 2009, of approximately 5 feet. In 2009 Capstone, cleaned some sediment from the eastern edge of the pond, and added 3 feet to the riser pipe to the pond's principal spillway. By increasing the height of the principal spillway, the maximum depth and surface area of the pond were, correspondently, increased.

Once pond #6 ceased to function as a sediment control structure, the depth requirement for "permanent agricultural ponds" applied. Thus, as detailed in our preceding discussion (at pages 16 - 20), the pond must now achieve a minimum depth of 8 feet, at normal water level, over at least 25% of its surface area.

The measurements of the pond's depth, recorded by Mr. Kearns in May 2009, were reviewed by the Commission. These measurements do not conclusively indicate that, after lengthening the riser pipe by 3 feet, 25% of the pond's surface area achieves a minimum depth of 8 feet at maximum capacity.<sup>11</sup> Based upon a review of these figures, it cannot be established that the pond meets the depth requirements set forth in law. Significantly, when questioned at hearing, Division Engineer Jason Craven could not unequivocally state that the pond achieves a depth of 8 feet over 25% of its area. In this regard, Mr. Craven suggested that he would "have to review" information relating to the pond's depth. Nor did any other witness testify that "at least 25% of the pond at normal water level [had] a minimum depth of 8 feet...". Based upon the evidence presented, the Commission cannot find that the Division had reasonable evidence to conclude that the minimum depth requirement for agricultural ponds was successfully met in this case.

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<sup>11</sup> The Commission compared the pond bottom elevations to an elevation of 801 msl (the current top of the "lengthened" riser pipe) to calculate the depth of the pond at the pond's maximum water depth (where water has reached the top of the riser). No evidence was presented at hearing to show an interpretation of the information on Intervenor's Exhibit 5, which would establish compliance with the applicable standard.

### **The condition of the pond bottom.**

The Johnsons are also concerned that the pond has a "soft bottom." The Johnsons keep horses on their property, and would like to be able to use the pond to water their horses. However, Mrs. Johnson testified that horses have become stuck in the "soft" bottom of pond #6. Pond #6 clearly contains sediment, which accumulated in the pond while it functioned as a sediment control structure. However, in reviewing the standards that apply to permanent agricultural/wildlife ponds, there are no requirements addressing the "softness" of the bottom of a pond. Thus, the Commission cannot find that the condition of the pond bottom violates any legal standards.

### **The existence of leaks in the impoundment.**

The Johnsons also raised a concern regarding the existence of leaks in the impoundment to pond #6. In this regard, the Commission heard testimony relating to "wet spots" found in the land surrounding the pond.

Testimony by witnesses at hearing, specifically Mr. Kearns and Mr. Craven, established that ponds with earthen embankments inevitably experience some leakage due to the saturation of materials in the embankment. These witnesses also testified that such leaks, or seeps, do not necessarily compromise the stability of the impounding dam. Engineer Michael Kearns, on behalf of Capstone, generated a report wherein he concluded that the pond #6 embankment was stable. Mr. Kearns testified that, while a "wet zone" existed on the embankment, there was no free-flowing water moving through the embankment and no sediment entrained in flowing water. The Division accepted Mr. Kearns' report, and no evidence was presented that contradicted Mr. Kearns' testimony. The Commission finds that the evidence did not establish that the embankment to pond #6 is unstable.

## CONCLUSIONS OF LAW

1. The ultimate burden of persuasion in this matter is placed upon the Appellants Caroline & Keith Johnson to prove by a preponderance of the evidence that the Division's decision to approve final security release for the Year 13 Segment of permit D-608, which would include a finding that reclamation of pond #6 was proper and complete, was arbitrary, capricious or otherwise inconsistent with law. See O.R.C. §1513.13(B).

2. O.R.C. §1513.16(F)(3)(c) sets forth the performance standards for final security release on mining operations, and provides:

(c) When the operator has completed successfully all coal mining and reclamation activities, .... the chief shall release all or any of the remaining portion of the performance security for all or part of the affected area under a permit, except that the chief may adopt rules for a variance to the operator period of responsibility . . . provided that no performance security shall be fully released until all reclamation requirements of this chapter are fully met.

3. O.R.C. §1513.16(A)(8) sets forth the performance standards for permanent impoundments, created as part of a mining operation. This section of law provides:

(A) Any permit issued under this chapter to conduct coal mining operations shall require that the operations meet all applicable performance standards of this chapter and such other requirements as the chief of the division of mineral resources management shall adopt by rule. General performance standards shall apply to all coal mining and reclamation operations and shall require the operator at a minimum to do all of the following:

(8) Create, if authorized in the approved mining and reclamation plan and permit, permanent impoundments of water on mining sites as part of reclamation activities only when it is adequately demonstrated by the operator that all of the following conditions will be met:

\* \* \*

(a) The size of the impoundment is adequate for its intended purposes.

(b) The impoundment dam construction will be so designed as to achieve necessary stability with an adequate margin of safety compatible with that of structures constructed under the "Watershed Protection and Flood Prevention Act," 68 Stat. 666 (1954), 16 U.S.C. 1001, as amended.

\* \* \*

(d) The level of water will be reasonably stable.

(Emphasis added.); see also O.A.C. §1501:13-9-04(H) (performance requirements for permanent impoundments located on reclaimed ground).

4. 16 U.S.C. §1001 of the "Watershed Protection and Flood Prevention Act," referenced in O.R.C. §1513.16(A)(8), sets forth the federal government's general policy of cooperation between federal, state and local government agencies, in the protection of water resources. While 16 U.S.C. §1001 does not set forth specific standards relative to pond design and construction, federal regulations promulgated under this statute make reference to technical standards published by the Natural Resources Conservation Service ["NRCS"]. The federal regulations give the NRCS responsibility for administering watershed protection and flood prevention programs. See 7 C.F.R. §600.1. The NRCS also has the authority to develop technical standards and criteria to insure the technical adequacy of conservation practices. See 7 C.F.R. §653.1.

5. The technical standards promulgated by the U.S. Department of Agriculture, NRCS apply to the present case because these standards are incorporated into Ohio law by reference. These technical standards are binding on Ohio coal mine operators. See: In the Matter of Horizon Coal Company, case nos. SHA-131-82 & SHA-132-82 (Section of Hearings and Appeals, February 18, 1983).

6. The technical standards promulgated by the U.S. Department of Agriculture, NRCS apply to the present case because these standards were included within the pond design for pond #6, pursuant to ARP -51.

7. Chapter 11 of the Engineering Field Manual provides a national standard for the depth of agricultural ponds. At pages 11-8 and 11-9 of the manual, minimum pond depths are recommended. However, at page 11-8, the manual directs government agencies to follow any applicable state standards, which might provide minimum pond depths.

8. NRCS Code 378 sets forth the minimum depth requirement for agricultural ponds located in the State of Ohio. This code addresses the acceptable depth of such agricultural ponds, and states:

At least 25 percent of the pond area at normal water level shall have a minimum depth of 8 ft., or a minimum depth of 6 ft. for spring fed ponds, or at least 50 percent of the pond area shall have a minimum depth of 6 ft., when excavation is restricted by underlying material.

No persuasive evidence was presented to establish that pond #6 was spring fed or that excavation restrictions limited the potential depth of pond #6.

9. The NRCS Code does not set forth any minimum depth requirement for ponds to be used as wetland/wildlife habitat. (See NRCS Code 644.)

10. The evidence in this case did not establish that the pond at issue, which has been designated as a permanent agricultural/wildlife habitat pond, meets the minimum depth requirements of law.

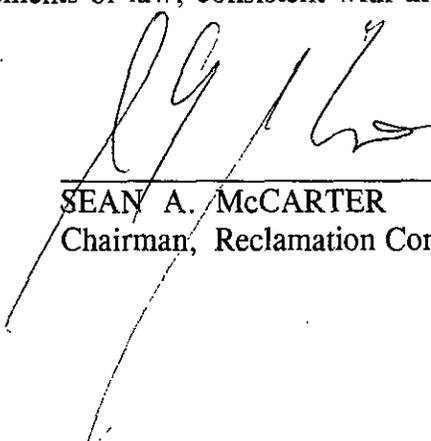
11. The Division's failure to articulate, or apply, a consistent depth requirement for pond #6 was arbitrary and capricious.

12. The Division's approval of final security release on the Year 13 Segment of permit D-680, without reasonable evidence that pond #6 met the minimum depth requirement of NRCS Code 378, was inconsistent with law.

## ORDER

Based upon the foregoing findings of fact and conclusions of law, the Commission hereby **REMANDS** this matter to the Division to make a determination that permanent impoundment #6 meets all of the requirements of law, consistent with the findings and conclusions of the Commission.

2/3/11  
\_\_\_\_\_  
DATE ISSUED

  
\_\_\_\_\_  
SEAN A. McCARTER  
Chairman, Reclamation Commission

### INSTRUCTIONS FOR APPEAL

This decision may be appealed to the Court of Appeals, within thirty days of its issuance, in accordance with Ohio Revised Code §1513.14 and Ohio Administrative Code §1513-3-22. If requested, copies of these sections of the law will be provided to you from the Reclamation Commission at no cost.

#### DISTRIBUTION:

Caroline & Keith Johnson, Via Certified Mail #: 91 7108 2133 3936 6680 6196 & Regular Mail  
Molly Corey, George Horvath, Megan DeLisi, Via Inter-Office Certified Mail #: 6606  
Geoffrey Mosser, Via Certified Mail #: 91 7108 2133 3936 6680 6189

# BEFORE THE RECLAMATION COMMISSION

CAROLINE & KEITH JOHNSON,

Appellants,

-vs-

DIVISION OF MINERAL RESOURCES  
MANAGEMENT,

Appellee,

and

CAPSTONE HOLDING COMPANY,

Intervenor.

Case No. RC-10-012

Review of Chief's Decision on  
Bond Release; Permit D-608  
(Capstone Holding Company)

## INDEX OF EVIDENCE PRESENTED AT HEARING

**Before:** Sean A. McCarter.

**In Attendance:** A. Thomas Althausser, Richard Babb, Richard Cappell, James McWilliams, Craig Porter, Ray Rummell and Hearing Officer Linda Wilhelm Osterman.

**Appearances:** Caroline & Keith Johnson, Appellants *pro se*; Molly Corey, Assistant Attorney General, Counsel for Appellee Division of Mineral Resources Management; Geoffrey Mosser, Counsel for Intervenor Capstone Holding Company.

## WITNESS INDEX

### **Appellants' Witnesses:**

Keith Johnson  
John Dutton  
Caroline Johnson  
Michael Kosek

Direct Examination; Cross Examination  
Cross Examination  
Statement on Record; Cross Examination  
Cross Examination

**Appellee's Witnesses:**

Michael Kosek  
Jason Craven

Direct Examination; Cross Examination  
Direct Examination; Cross Examination

**Intervenor's Witnesses:**

John Dutton  
Michael Kearns

Direct Examination; Cross Examination  
Direct Examination; Cross Examination

**EXHIBIT INDEX**

**Appellants' Exhibits:**

Appellants' Exhibit 1

Inspection/Annual Reports prior to Johnsons' purchase of property in 2002; all reports state depth of all ponds remained constant regardless of draught, rain or time of year measured;

- a Engineer's Annual Impoundment Certification; August 25, 1999 – August 25, 2000;
- b Engineer's Annual Impoundment Certification; August 25, 1998 – August 25, 1999;
- c Division's Inspection Report; October 14, 1999;
- d Division's Inspection Report; November 4, 1998;
- e Engineer's Annual Impoundment Certification; August 25, 1997 – August 25, 1998;
- f Division Inspection Report; September 8, 1998;
- g Division Inspection Report; January 27, 1998;
- h Division Inspection Report; March 18, 1997;
- i Division Inspection Report; April 30, 1997;
- j Division Inspection Report; February 18, 1997;
- k Engineer's Annual Impoundment Certification; August 1996 – August 1997;
- l Engineer's Annual Impoundment Certification; August 1995 – August 1996;
- m Engineer's Annual Impoundment Certification; August 25, 1994 – August 25, 1995;

- n Engineer's Annual Impoundment Certification; August 25, 1993 – August 25, 1994;
- o Engineer's Annual Impoundment Certification; August 1992 – August 1993;
- p Engineer's Annual Impoundment Certification; August 1991 – August 1992;
- q Engineer's Annual Impoundment Certification; August 1990 – August 1991;
- r Division Inspection Report; January 31, 1991;
- s Division Inspection Report; May 2, 1991;
- t Division Inspection Report; July 31, 1990;
- u Engineer's Annual Impoundment Certification; August 1989 – August 1990;
- v Division Inspection Report; April 11, 1988;
- w Engineer's Annual Impoundment Certification; August 1988 – August 1989;
- x Division Inspection Report; May 23, 1988;
- y Division Inspection Report; April 4, 1990;
- z Division Inspection Report; September 28, 1987;
- aa Division Inspection Report; August 18, 1987;
- bb Division Inspection Report; July 15, 1987;
- cc Division Inspection Report; April 3, 1987.

Appellants' Exhibit 2

2002 Report; report state all water sources were removed from pond; however in August the report states water depth was 13 ft – this was not possible without water flowing into it;

- a Division Inspection Report; October 2, 2002;
- b Engineer's Annual Impoundment Certification; August 25, 2001 – August 25, 2002.

Appellants' Exhibit 3

2003; May 2003 – Filed complaint on flooding issues and depth of pond requesting it be removed because of it; June 2003 – pond found to be 60% full of sediment; July states flooding issue resolved, slip on dam fixed, however depth not addressed, pond still remained full of sediment and depth was still an issue; July – letter from ODNR stating everything fine, they would not take any further action on our issue of the pond; August annual report states water level still at 13 ft.;

- a General Complaint Form; May 21, 2003;
- b Division Inspection Report; June 13, 2003;
- c Division Inspection Report; July 2, 2003;
- d Engineer's Annual Impoundment Certification; August 25, 2002 – August 25, 2003;
- e Letter, Clark to Johnson; dated July 17, 2003.

Appellants' Exhibit 4

Annual reports for years 2004 through 2007; No inspection reports provided; Pond continued to deteriorate; Due to letter in 2003 during this time period we did not believe there was anything we could do;

- a Engineer's Annual Impoundment Certification; August 25, 2006 – August 25, 2007;
- b Engineer's Annual Impoundment Certification; August 25, 2005 – August 25, 2006;
- c Engineer's Annual Impoundment Certification; August 25, 2003 – August 25, 2004.

Appellants' Exhibit 4-A

Pictures showing condition of pond by 2009 that we were forced to live with since it was still under their bond we could not do anything permanent with it;

- a-1 Photograph (condition of pond #6, 2009);
- a-2 Photograph (condition of pond #6, 2009);
- b-1 Photograph (condition of pond #6, 2009);
- b-2 Photograph (condition of pond #6, 2009);
- c-1 Photograph (condition of pond #6, 2009);
- c-2 Photograph (condition of pond #6, 2009);
- d-1 Photograph (condition of pond #6, 2009);
- d-2 Photograph (condition of pond #6, 2009);
- e-1 Photograph (condition of pond #6, 2009);
- e-2 Photograph (condition of pond #6, 2009);
- f-1 Photograph (condition of pond #6, 2009);
- f-2 Photograph (condition of pond #6, 2009);
- g-1 Photograph (condition of pond #6, 2009);
- g-2 Photograph (condition of pond #6, 2009);
- h-1 Photograph (condition of pond #6, 2009);
- h-2 Photograph (condition of pond #6, 2009);
- i-1 Photograph (condition of pond #6, 2009);
- i-2 Photograph (condition of pond #6, 2009);
- j-1 Photograph (condition of pond #6, 2009);
- j-2 Photograph (condition of pond #6, 2009);
- k-1 Photograph (condition of pond #6, 2009);
- k-2 Photograph (condition of pond #6, 2009);
- l-1 Photograph (condition of pond #6, 2009);
- l-2 Photograph (condition of pond #6, 2009).

Appellants' Exhibit 5

Engineer's report (April 2009); Complaint; 2008 Annual report, please see pg 3, 4, 5, 6, for specific issues and discrepancies;

- a Engineering Report (Craven); dated April 8, 2009, 8 pages;

- b General Complaint Form; dated March 30, 2009;
- c Engineer's Annual Impoundment Certification; August 25, 2007 – August 25, 2008.

Appellants' Exhibit 6

Engineer's report (April 2009); Recommendations from Engineer and Ohio Department of Natural Resources, Division of Water Fact Sheet; Follow-up letter stating the average depth was only found to be 8 ft.;

- a Engineering Report (Capstone); 1 page;
- b Division of Water Fact Sheet, "Dam Safety: Rodent Control;" 2 pages;
- c Division of Water Fact Sheet, "Dam Safety: Trees and Brush;" 1 page;
- d Page 11-9; from DMRM (??), Craven Report (??);
- e Letter, Husted to Johnson; dated March 18, 2010
- f-1 Photograph;
- f-2 Photograph.

Appellants' Exhibit 7

Sheet of three photographs, Wet spots – leaks – north side of pond (seepage); taken late October or early November 2010.

Appellants' Exhibit 8

Land Installment Contract, cover page, showing signature date of December 20, 2002, and recording date of July 14, 2010.

Appellants' Exhibit 9

Sheet of two photographs, Pond showing cattails surrounding all edges where ledge was formed.

Appellants' Exhibit 10

Sheet of two photographs, Growth of weeds – more than 5 ft. out from edge; Weeds growing in middle of pond to edges.

Appellants' Exhibit 11

Sheet of four photographs, Drain pipe from overflow – no water – animals eating in it.

Appellants' Exhibit 12

Division Inspection Reports

- a Division's Inspection Report; January 26, 2010;
- b Division's Inspection Report; February 12, 2010;
- c Division's Inspection Report; March 18, 2010;
- d Division's Inspection Report; June 10, 2010;
- e Division's Inspection Report; July 7, 2010.



Intervenor's Exhibits:

- |                        |  |
|------------------------|--|
| Intervenor's Exhibit 1 | Land Installment Contract, Frank A. and Rosalie M. Salerno to Caroline Johnson, signed January 18, 2003, recorded January 21, 2003 |
| Intervenor's Exhibit 2 | Photograph, welding extension on pond #6 riser pipe  |
| Intervenor's Exhibit 3 | Photograph, north side of pond #6, mulching and seeding of material taken from pond  |
| Intervenor's Exhibit 4 | Photograph, pond #6, looking west - southwest  |
| Intervenor's Exhibit 5 | Working map of survey point, pond #6.  |
| Intervenor's Exhibit 6 | Letter (report), Kearns to Bear, regarding pond #6, dated August 3, 2010, with 4 pages of attached photographs.                    |