STATE OF MICHIGAN IN THE COURT OF CLAIMS

CHRISTOPHER FORBES and LAURA FORBES, Individually and on behalf of all others similarly situated, Case No: 20-000103-MM

Plaintiffs,

Hon. James Robert Redford

v.

MICHIGAN DEPARTMENT OF ENVIRONMENT, GREAT LAKES & ENERGY,

Defendant.

ROBERT WOODS and HOLLY JOHNSON, on behalf of themselves and all others similarly situated

Case No. 20-000116-MM

Plaintiffs,

Hon. James Robert Redford

v.

THE MICHIGAN DEPARTMENT OF ENVIRONMENT, GREAT LAKES & ENERGY; THE MICHIGAN DEPARTMENT OF NATURAL RESOURCES; and THE MICHIGAN DEPARTMENT OF ATTORNEY GENERAL,

Defendants.

PLEASANT BEACH MOBILE HOME RESORT, LLC, CAROL AND DAVE CLARKSON, BRIAN MATTHIAS, PATRICK AND PATRICIA PANGLE, RONALD AND SANDRA STREETER, JARED NICKEL, MID MICHIGAN PRESSURE CLEANING, LLC AND MID MICHIGAN WINDOW CLEANING & POWERWASHING, LLC D/B/A MID Case No. 20-000156-MM

Hon. James Robert Redford

Document received by the MI Court of Claims.

MICHIGAN CARPET CLEANING, JULIE VAN AMEYDE AND JOHN SMILNAK, RANDALL AND KIM MIER, individually and on behalf of

Plaintiffs,

v.

MICHIGAN DEPARTMENT OF ENVIRONMENT, GREAT LAKES & ENERGY and MICHIGAN DEPARTMENT OF NATURAL RESOURCES

Defendants.

Case No. 20-000103-MM

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CONSOLIDATED AMENDED CLASS ACTION COMPLAINT

Plaintiffs Christopher and Laura Forbes (Case No. 20-000103), Robert Woods and Holly Johnson (Case No. 20-000116), and Pleasant Beach Mobile Home Resort, LLC, Carol and Dave Clarkson, Brian Matthias, Patrick and Patricia Pangle, Ronald and Sandra Streeter, Jared Nickel, Mid Michigan Pressure Cleaning, LLC and Mid Michigan Window Cleaning & Powerwashing, LLC (d/b/a Mid Michigan Carpet Cleaning), Julie Van Ameyde and John Smilnak, and Randall and Kim Mier (Case No. 20-000156) (collectively, "Class Plaintiffs"), individually and on behalf of all others similarly situated, file this Consolidated Amended Class Action Complaint against Defendants, THE MICHIGAN DEPARTMENT OF ENVIRONMENT, GREAT LAKES & ENERGY ("EGLE") and THE MICHIGAN DEPARTMENT OF NATURAL RESOURCES ("MDNR") (collectively "State Defendants" or "State"). Plaintiffs hereby demand monetary,

declaratory, and injunctive relief from State Defendants in the Michigan Court of Claims, under MCL § 600.6401, *et seq*. Plaintiffs allege upon personal knowledge as to their own actions, and upon the investigation of counsel as to all other matters, as follows:

INTRODUCTION

- 1. Class Plaintiffs, individually and on behalf of all others similarly situated, bring this class action lawsuit pursuant to Michigan Court Rule 3.501 against State Defendants EGLE and the MDNR to recover damages, and obtain other remedies, arising from the taking, destruction, and/or devaluation of their personal and real property, which were caused by State Defendants' affirmative actions with respect to the knowingly dangerous and deficient Edenville Dam (the "Dam").
- 2. The State received and confirmed numerous, repeated reports regarding dire threats to nearby human life and property posed by the defective and inadequate condition of the Dam. Nonetheless, after taking jurisdiction and control of the Dam, the State proceeded to take numerous affirmative actions to effectuate dangerous water levels on Wixom Lake, the manmade reservoir abutting the Dam.
- 3. Because of State Defendants' affirmative acts, Wixom Lake was raised to dangerous levels just weeks prior to the dam failure, causing the catastrophic and historic flooding of communities throughout Mid-Michigan.
- **4.** Throughout the day on May 19, 2020, the Edenville Dam was placed at risk by ever-increasing waters that the Dam could not safely pass due to its grossly deficient and inadequate condition.

- **5.** On the evening of May 19, the Edenville Dam catastrophically, but predictably, failed after being overwhelmed by the dangerous water levels, causing tens of billions of gallons of water from Wixom Lake to invade downstream communities.
- 6. The Edenville Dam failure was reported by Midland County 911 at approximately 5:43 p.m. on Tuesday, May 19, and an immediate evacuation was ordered for area residents, including Sanford area and residents of Midland living west of Eastman Road and south of U.S. 10. Residents were told to go as far east and west of the Tittabawassee River as possible.
- 7. The immediate aftermath of the Edenville Dam failure was videotaped from a helicopter flying over what had previously been known as Wixom Lake. The video depicts floodwaters rushing uncontrolled over the Dam's catastrophically eroded earthen embankment, with extraordinary force powerful enough to uproot fully grown trees and level structures.

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 $^{^1}$ <u>https://www.facebook.com/rkaleto/videos/10100276786854416/?t=5</u> (last accessed March 18, 2024).

8. The Edenville Dam failure triggered a foreseeable ripple effect, including the breach and failure of the Sanford Dam, which released billions more gallons of water on a calamitous path of destruction throughout the floodplain on and around the Tittabawassee River,



stretching from Gladwin and Midland Counties into Bay and Saginaw Counties. The waters ripped through everything in their path, including roads, bridges, woodlands, homes, businesses, and automobiles.²

9. The Governor of the State of Michigan declared a State of Emergency and upwards of 11,000 residents were ordered to immediately abandon their valuables and evacuate their homes to seek shelter in nearby schools, or with friends and family, as the flood waters overtook their land.

² Photos captured on Saturday, June 20, 2020 at the M-30 bridge, one mile south of the Dam.

- 10. Adding to the terror of suddenly evacuating to shelter, the mandatory evacuations occurred in the midst of the Covid-19 pandemic, which required people to maintain an appropriate social distance in order to avoid further spread of the virus—a virtually impossible measure under such sudden and emergent circumstances.
- 11. As the sun rose over Lake Huron on May 20, 2020, cataclysmic, ruinous damage was revealed. Properties were entirely submerged in the ever-rising, muddy waters. Private property, including cars, boats, and houses, continued to be swept away by the devastating currents.

12. Thousands began to realize the extent to which their lives had been upended, receiving messages from friends and absorbing news reports about the unspeakable harm wrought upon thousands of properties by the glut of water.^{3 4}



³ Top image depicts Downtown Sanford. https://www.aljazeera.com/gallery/2020/5/21/pictures-michigan-faces-500-year-flood-event-after-dams-fail/ (last visited March 18, 2024).

⁴ Bottom image depicts Midland, approximately 18 miles south of Edenville Dam. https://www.cnbc.com/2020/05/21/photos-show-devastating-impact-of-michigan-floods.html (last visited March 18, 2024).



13. The Edenville Dam failure further caused Wixom Lake to be indefinitely drained, causing extraordinary loss of property use and value to lakefront businesses and residents.⁵



⁵ https://www.ourmidland.com/news/article/Photos-Wixom-Lake-destruction-May-21-2020-15287363.php (last visited March 18, 2024).

- 14. Ultimately, the rising waters along the Tittabawassee River would not crest until May 20, at approximately 35.05 feet—more than 20 feet higher than just three days prior—with water levels remaining at or above record highs for days.
- 15. While the extent of the damages is yet to be fully discovered, it is evident that the failure of the Edenville Dam is among the most extensive and costly disasters in the history of the State of Michigan.
- 16. The preliminary report produced by Defendant EGLE, at the order of the Governor, estimated that because of the Edenville Dam failure more than 11,000 people were evacuated, thousands of structures were damaged by overland flooding, and known property damage is in excess of \$250 Million.
- 17. While the State Defendants have already publicly argued that the Edenville Dam failure was an unavoidable natural disaster, it was anything but. Just like the Four Lakes that precipitated this historic event, this catastrophe was entirely manmade, substantially resulting from conscious, intentional, and affirmative acts by State Defendants to cause water levels on Wixom Lake to be raised to—and maintained at—dangerously high levels under the known circumstances.
- **18.** The failure of the Edenville Dam was long ago forewarned, clearly so by the Federal Energy Regulatory Commission ("FERC" or "Commission") who revoked then private operator Boyce Hydro, LLC's ("Boyce Hydro") permit, expressly because the Dam and its grossly deficient spillways posed an ongoing and unacceptable risk to human life and property.
- 19. State Defendants took sole oversight authority over the Edenville Dam in September 2018 under these emergency circumstances, which they knew about from the beginning.

- **20.** Increased water levels on Wixom Lake posed an immediate, known risk of dam failure in light of the Dam's defective and inadequate condition, specifically the Dam's inability to pass foreseeable floodwaters.
- 21. The devastating consequences of Dam failure were well known by State Defendants.
 - 22. The failure of the Edenville Dam was avoidable.
 - 23. The failure of the Edenville Dam was foreseeable.
- 24. While the longstanding failures of Boyce Hydro to adequately maintain, repair, and improve the Edenville Dam are well-documented, the Edenville Dam ultimately failed on May 19, 2020 because the State Defendants intentionally intervened to cause and maintain dangerously increased water levels on Wixom Lake, despite knowledge of the grossly inadequate and deficient condition of the Dam and its ability to pass foreseeable stormwaters.
- 25. The intentional, concerted campaign by the State Defendants to cause and maintain dramatically increased water levels on Wixom Lake—during the spring rain season nonetheless—constituted an abuse of legitimate state authority under the circumstances.
- **26.** The State Defendants' actions of raising the lake levels were intentional and directly aimed at the properties of Class Plaintiffs, who owned nearby property interests that Defendants knew would be taken, or deprived of use and/or value, in the event of a Dam failure.
- **27.** For more than a year, the State Defendants publicly minimized and obscured the risks posed by the Edenville Dam.
- **28.** Meanwhile, the State took affirmative steps to secure legal bases for effectuating dangerously increased water levels and to threaten legal actions against the private operator for failing to create and maintain those water levels.

- 29. The State's affirmative actions were knowingly taken to the great risk and detriment to lives and property all along the historic Tittabawassee River floodplain, in order to effectuate increased water levels abutting a dangerous dam.
 - **30.** State Defendants, through affirmative acts:
 - 1) Made knowingly false, deceptive, and misleading statements downplaying the condition of the Dam through their initial "cursory" inspection;
 - 2) Financed, supported, and coordinated Midland and Gladwin Counties' acquisition of the Dam, a Part 307 Lake Level order to immediately raise water levels on Wixom Lake to dangerous levels, and a plan from the Counties that pushed necessary repairs many years into the future;
 - 3) Set required preconditions for the Part 307 Lake Level Order;
 - 4) Falsely conveyed to the Court through the Part 307 proceeding that the Edenville Dam presented no unique or significant safety concerns that were relevant to the Court's determination and that the lake level order represented a safe, harmonious status quo;
 - Required raising the water levels through the Part 307 proceeding without having conducted any safety inspection to verify or determine the safety of those levels, as required under Part 307 following a report of conditions that endanger a dam;
 - 6) Provided a handshake assurance to the operators and the Counties prior to the Part 307 proceeding that the State would permit increased water levels, without having first determined the safety of the proposed lake levels;
 - 7) Authorized and signed the Lake Level Order increasing lake levels, with no evidence that such levels were safe and substantial evidence that they were not;
 - 8) Prevented proposed lake level drawdowns in fall 2019 to protect the dam and allow for repairs, with full knowledge that emergency repairs were necessary and that the Dam was in a highly dangerous condition;
 - 9) Failed to communicate urgent information regarding dam safety to the public, the counties, or the Part 307 Court after receiving numerous reports that the Edenville Dam was not capable of passing foreseeable floodwaters and posed a risk to life and property;

- 10) Conducted numerous mussel surveys to build a case against the Dam operators in order to seek an injunction forcing increased lake levels abutting the Dam;
- 11) Made numerous communications threatening pretextual litigation and demanding seven figures in money damages because of lake level drawdowns, despite clear knowledge that the Dam could not meet state safety standards for passing excess floodwaters;
- 12) Initiated civil litigation against the Edenville Dam operators, seeking seven figures in money damages for "unauthorized drawdowns" and an injunction requiring increased water levels;
- 13) Intentionally chose to discard affirmative statutory duties under Part 307 and Part 315 of NREPA, including by refusing to conduct a safety inspection and refusing to issue required emergency orders after definitively learning of conditions that threatened the integrity of the Dam; and
- 14) Misled the public on the safety of the Edenville Dam by the repeated issuance of permits authorizing increased water levels on Wixom Lake, after receiving numerous reports confirming that such levels were unsafe.
- 31. The purported governmental interests advanced by the State Defendants for raising Wixom Lake to dangerous levels are unconscionable and unlawful, weighed against the devastating consequences that the State knew would occur downstream in the event of a foreseeable Dam failure.
- 32. Troublingly, the State Defendants intentionally raised the water levels while violating their well-established statutory duties under Michigan Law for ensuring dam safety and the safe maintenance of legal lake levels.
- 33. Defendants' affirmative actions constituted an unlawful taking without just compensation pursuant to Art. 10, § 2 of the Michigan Constitution.
- **34.** Defendants' unlawful takings are indefinitely ongoing and are likely to continue for many years.

- 35. Plaintiffs bring this action on behalf of themselves and all others similarly situated for inverse condemnation, pursuant to the takings clause of the Michigan Constitution, Art. 10 § 2.
- 36. Plaintiffs and the Class seek an order from this Court requiring Defendants to, among other things, (1) compensate Plaintiffs and the Class for the loss of value caused by the unconstitutional de facto taking of property without just compensation; (2) pay damages to Plaintiffs and the Class for the physical property damages incurred, economic losses incurred, and loss of use and access to and from their properties; (3) pay damages to Plaintiffs and the Class for loss of use and enjoyment of their property; and (4) provide injunctive and declaratory relief as the Court deems appropriate, including paying to fix the mess they made on and around Plaintiffs' property and financing the construction of modern dams that meet FERC standards.

PARTIES

- 37. Plaintiffs Christopher and Laura Forbes are individuals and citizens of the State of Michigan who currently reside at 735 S. Homer Rd., Midland, MI 48640. On May 19, 2020, Plaintiffs Christopher and Laura Forbes resided at 301 N. Cedar Street, Sanford, MI 48567.
- **38.** Plaintiff Robert Woods is an individual and citizen of Midland, Michigan who resides at 3000 Valorie Lane, Midland, MI 48640.
- **39.** Plaintiff Holly Johnson is an individual and citizen of Saginaw, Michigan who resides at 575 Adams Road, Saginaw, MI 48609.
- **40.** Plaintiff Pleasant Beach Mobile Home Resort LLC is a Michigan limited liability company with its principal place of business located at 4991 Wixom Dr., Beaverton, MI 48612.
- **41.** Plaintiffs Carol Clarkson and Dave Clarkson are individuals and citizens of Beaverton, Michigan who reside at 4991 Wixom Dr., Beaverton, MI, 48612.

- **42.** Plaintiff Brian Matthias is an individual and resident of Hope, Michigan who resides at 5163 Ostlund Dr., Hope, MI 48628.
- **43.** Plaintiffs Patrick and Patricia Pangle are individuals and citizens of Beaverton, Michigan who reside at 3722 South Lake Dr., Beaverton, MI 48626.
- **44.** Plaintiffs Ronald and Sandra Streeter are individuals and residents of Hope, Michigan who reside at 5151 Ostlund Dr., Hope, MI, 48628.
- **45.** Plaintiff Jared Nickel is an individual and resident of Beaverton, MI who resides at 5300 Heron Cove, Beaverton, MI 48612.
- **46.** Plaintiffs Mid Michigan Pressure Cleaning, LLC and Mid Michigan Window Cleaning & Powerwashing, LLC d/b/a Mid Michigan Carpet Cleaning are businesses that are owned and operated in Beaverton, MI and located at 5300 Heron Cove, Beaverton, MI 48612.
- **47.** Plaintiffs, Julie Van Ameyde and John Smilnak, are individuals and residents of Northville, MI who own a home located at 5486 Oakridge Dr, Beaverton, MI 48612.
- 48. EGLE is an agency of the State of Michigan charged with protecting Michigan's environment and public health, including by protecting and managing water and hydroelectric power resources. The Water Resources Division of EGLE ("EGLE-WR") is responsible for regulating Michigan's water resources. The Dam Safety Unit ("EGLE-WR-DS") is a subdivision of EGLE-WR that is responsible for regulating dam safety. EGLE-WR and EGLE-WR-DS are included in the term "EGLE."
- **49.** Defendant Michigan Department of Natural Resources ("MDNR") is a department of the State of Michigan charged with maintaining the natural resources of the State of Michigan, including inland lakes and recreation areas.

JURISDICTION AND VENUE

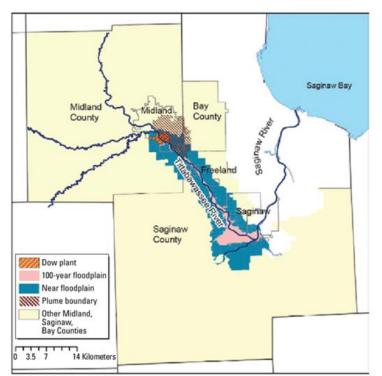
FACTUAL ALLEGATIONS

58. This action arises from human interventions in the natural environment along the historic path of the Tittabawassee River, which created the "Four Lakes."



- **59.** The "Four Lakes" are an interconnected network of manmade inland lakes/reservoirs created by manmade dams constructed at multiple points along the Tittabawassee River. The Four Lakes and the tributaries into which they drain constitute a stormwater management system spanning dozens of miles throughout Mid-Michigan.
- **60.** From north-to-south, the Four Lakes are: (1) Secord Lake; (2) Smallwood Lake; (3) Wixom Lake; and (4) Sanford Lake.

- **61.** The Tittabawassee River watershed drains approximately 2,100 square miles in east central Michigan and is the largest tributary to the Saginaw River, Michigan's largest river basin.⁶
- **62.** This watershed is comprised of three primary subwatersheds: the Tittabawassee, Chippewa, and Pine Rivers. The Pine River is tributary to the Chippewa River, which joins the Tittabawassee River near Midland.
- 63. The Tittabawassee River flows generally to the south and southeast through Gladwin, Midland, and Saginaw Counties.



64. The Tittabawassee River converges with the Shiawassee River and the Saginaw River, which unite and flow north-northeast into Lake Huron.⁷

https://www.researchgate.net/figure/Map-of-Midland-Saginaw-and-Bay-counties-Michigan-showing-the-Dow-Plant-and-the fig1 26250129 (last visited March 18, 2024) (image above).

⁶ https://www.michigan.gov/documents/deq/wrd-monitoring-report-2012-tittabawassee-watershed_606947_7.pdf (last visited March 18, 2024).

65. The water released through each dam flows downstream in a generally southward direction through the modern riverbed of the Tittabawassee River.

Ownership and Operation of the Dams Impounding the Four Lakes

- 66. Each of the Four Lakes is created by a dam, with powerhouses that are integral to the dams' production of hydroelectric power, in addition to passing excess stormwater and controlling and managing water elevations on the Four Lakes.
- **67.** The dams creating the Four Lakes reservoirs were constructed in 1924, primarily to generate hydro-electric power.
- **68.** Construction of the dams impounding the Four Lakes substantially changed the natural flow of water through the Tittabawassee River Watershed, placing a significant portion of water flow maintenance throughout the Watershed into human control.
- **69.** The construction of the dams was conducted by a private owner/operator, Wolverine Power, which was owned by a wealthy local resident named Frank Isaac Wixom.
- **70.** Wolverine Power sold all of its rights, property, and assets relating to the dams to Boyce Hydro, owned by Lee Mueller, in or around 2003, which was previously named Synex Michigan, LLC.
- **71.** Boyce Hydro's operation and maintenance of the dams was continuously subject to oversight, permit, and regulation of the FERC until September 10, 2018.

Plaintiffs provide this map for illustration and context only. It is not provided to accurately depict any floodplain or other purported boundary.

Hydroelectric Dams, Dam Safety Standards, and Spillway Capacity

- **72.** A hydroelectric dam is one of the major components of a hydroelectric facility. A dam is a large, man-made structure built to contain a body of water. In addition to producing hydroelectric power, dams control river flow and regulate and manage storm water flows.
- **73.** Dams are retaining structures or structures that create large standing bodies of water known as reservoirs.
- **74.** Dams are built on top of riverbeds and hold back water, raising the water level by slowing or cutting off the flow of water.
- **75.** A spillway is a structure constructed in a hydroelectric dam to provide a safe path for storm water to escape to a designated downstream area. Generally, the area that the spillway is released to is the river on which the hydroelectric dam was constructed.
- **76.** Spillways are a vital function of a hydroelectric facility. If there is too much water going through the dam, elements like the turbines cannot function properly and can be damaged. Spillways protect these other parts from damage or complications.
- 77. Spillways generally consist of a control structure to hold back water (such as gates, retaining walls, and embankments), a channel for water to flow through, and a terminal structure.
- **78.** Every hydroelectric reservoir has a certain capacity or amount of water it can hold. If the reservoir is already full but floodwaters enter the reservoir, the water level will increase, and this could result in the over-topping of the dam.
- **79.** Water level increases that strain or exceed dam capacity substantially increase the risk of dam failure.

- **80.** Spillways are built to prevent over-topping and dam failure, as they allow water to be drawn from the top of the reservoir to make room for the new inflow of water, typically through open gates.
- **81.** When a reservoir is full, its water level will be equal to the height of the spillway. As soon as any excess water enters the reservoir, water will immediately start flowing out through the spillway, often through gates.

FERC Dam Safety Guidelines

- **82.** Inflow Design Flood ("IDF") is the flood flow above which the incremental increase in water surface elevation due to failure of a dam or other water impounding structure is no longer considered to present an unacceptable threat to downstream life and property.
- **83.** IDF selection began primarily as a practical concern for protection of a dam and the benefits it provides.
- **84.** The early 1900s saw an increase in social awareness and laws designed to protect the public from certain high-risk activities relating to designing, operating, and maintaining dams.
- **85.** The same era witnessed an increase in the number and size of dams built. When the "big dam" era began in the 1930s, safety clearly became a more dominant factor. It was recognized that dams needed to be designed to accommodate water flows that might be greater than the anticipated "normal" flow.
- **86.** Engineers began consulting with hydrometeorologists to determine if upper limits for rates of precipitation could be established on a rational basis by looking at, *inter alia*, the meteorology of storms that produced major floods in various parts of the country, large scale features of storms, measures of atmospheric moisture (such as dewpoint temperatures), and the rainfall depth-area-duration values produced by these storms.

- **87.** It was then possible to increase the storm dewpoint temperature and other factors affecting rainfall to the maximum appropriate values. This increase resulted in estimates of probable maximum precipitation (PMP), and thus introduced the concept of a physical upper limit to precipitation that could aid in designing, operating, and maintaining safe dams.
- **88.** In April 1977, President Carter issued a memorandum directing the review of federal dam safety activities by an ad hoc panel of recognized experts.
- **89.** In June 1979, the ad hoc interagency committee on dam safety issued its report, which contained the first guidelines for federal agency dam owners.
- **90.** With the passage of the National Dam Safety Program Act of 1996, Public Law 104-303, the official Interagency Committee on Dam Safety ("ICODS") and its Subcommittees were reorganized to reflect the law's objectives and requirements, and the ICODS was formed.
- **91.** Today, the ICODS members include the Federal Emergency Management Agency ("*FEMA*"), the U.S. Army Corps of Engineers, the U.S. Department of Energy, U.S. Nuclear Regulatory Commission, U.S. Bureau of Reclamation, U.S. Department of Labor, and the National Weather Service, among others.
- 92. In 1998, the newly-convened Guidelines Development Subcommittee of the ICODS completed work on the update of the following guidelines: Federal Guidelines for Dam Safety: Emergency Action Planning for Dam Owners; Federal Guidelines for Dam Safety: Hazard Potential Classification System for Dams; Federal Guidelines for Dam Safety: Earthquake Analyses and Design of Dams; Federal Guidelines for Dam Safety: Selecting and Accommodating Inflow Design Floods for Dams; and Federal Guidelines for Dam Safety: Glossary of Terms.

- **93.** The purpose of the Federal Guidelines for Dam Safety: Selecting and Accommodating Inflow Design Floods for Dams, according to ICODS "is to provide thorough and consistent procedures for selecting and accommodating [IDFs]."
- **94.** The standard practice in the design of dams is to "to use the IDF that is deemed appropriate for the hazard potential of the dam and reservoir, and to design spillways and outlet works that are capable of safely accommodating the flood flow without risking the loss of the dam or endangering areas downstream from the dam to flows greater than the inflow."
 - **95.** The upper limit of the IDF is the "Probable Maximum Flood" ("PMF").
- **96.** Today, the PMF is generally accepted as the standard for the safety design of dams where the incremental consequences of failure have been determined to be unacceptable.
- **97.** The PMF is the "flood that may be expected from the most severe combination of critical meteorologic and hydrologic conditions that are reasonably possible in the drainage basin under study."
- **98.** In other words, the PMF represents an estimate of the upper limit of storm water run-off that is capable of being produced on the watershed.
- **99.** The Commission's Dam Safety Guidelines require the project works to be designed to safely handle a flood up to the PMF either by withstanding overtopping of the loading condition during such a flood or alleviating the risk such that dam failure would no longer constitute a hazard to downstream life or property.

⁸ https://www.ferc.gov/sites/default/files/2020-04/fema-94.pdf (last visited March 18, 2024).

- **100.** In the alternative, "the capacity of the spillway must be adequate to prevent the reservoir from rising *to an elevation* that would endanger the safety of the project works." 9
- **101.** According to the Commission, "[m]any dam owners have a difficult time believing that their dams could experience a rainfall many times greater than any they have witnessed over their lifetimes. Unfortunately, this attitude leads to a false sense of security because floods much greater than those experienced during any one person's lifetime can and do occur." ¹⁰
- 102. However, while dam owners may have incentives to skirt PMF requirements, the State of Michigan has an affirmative statutory duty to ensure that dams and inland lake water levels are operated and maintained in a safe manner that does not endanger the safety of the project works.
- 103. MCL § 324.30501–31529 ("Part 315") of the Natural Resources and Environmental Protection Act (NREPA) provides that dams and impoundments in the State of Michigan are under the jurisdiction of Defendant EGLE. Part 315 requires EGLE to issue dam safety orders to alleviate the danger by issuing appropriate safety orders when "the department finds that a condition exists which endangers a dam[.]" MCL § 324.31518.
- **104.** Further, MCL § 324.30701–30723 ("Part 307") places statutory duties and requirements on EGLE with regard to maintaining inland lake water levels upon learning that a dam impounding an inland lake is in need of repair or a change of condition that relates to the dam's safety or danger to natural resources.

¹⁰ https://www.ferc.gov/sites/default/files/2020-04/fema-94.pdf (last visited March 18, 2024).

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⁹ https://www.ferc.gov/sites/default/files/2020-04/chap2.pdf (last visited March 18, 2024) (emphasis added).

105. While the federal standard, and the vast majority of other states, would require high hazard dams like those impounding the Four Lakes to withstand a 100% PMF event, Michigan is one of only a few states that employs a relaxed PMF standard. Michigan requires only that high hazard dams "shall be capable of passing the half [50%] probable maximum flood." MCL § 324.31516(d).

Background on the Dams Impounding the Four Lakes Reservoirs

- **106.** On the Tittabawassee River, there are four projects, each of which includes at least one dam structure, at least one spillway, a reservoir, a powerhouse, and embankments to secure the reservoir. Operation and maintenance of each element are integral to the security and stability of the dams and the protection of private properties in and around the Tittabawassee floodplain.
- **107.** The four projects' reservoirs occupy approximately 39 river miles on the Tittabawassee River, with the tailwater of each project being the headwater of the next downstream project.
- **108.** Beginning furthest upstream are (1) the 1.2-megawatt (MW) Secord Project No. 10809; (2) the 1.2-MW Smallwood Project No. 10810; (3) the 4.8-MW Edenville Project No. 10808; and (4) the 3.3-MW Sanford Hydroelectric Project No. 2785.

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¹¹ https://web.archive.org/web/20201031160127/https://www.fema.gov/media-library-data/20130726-1849-25045-9688/04 hydrosafetydam ch 9 11.pdf (last visited March 18, 2024) (stating that only Missouri, Kansas, Colorado, and Michigan permit a relaxed PMF for high hazard dams).

Secord Dam



- **109.** The Secord Dam is located approximately 41 miles upstream of the City of Midland. The dam is located in Gladwin County approximately 8.5 miles northeast of the City of Gladwin.
 - **110.** Secord Lake is approximately 1,100 acres in size.
- **111.** The Secord Dam is oriented in an east-west direction and consists of four major components, including left embankment, powerhouse, concrete spillway, and right embankment.

Smallwood Dam



- 112. Smallwood Lake is immediately downstream of the Secord Dam.
- 113. The Smallwood Dam is located approximately 30 miles northwest of the City of Midland.
 - **114.** Smallwood Lake is approximately 500 acres in size.
- **115.** The Smallwood Dam is oriented in a northeast-southwest direction and consists of four major components, including left embankment, spillway, powerhouse, and right embankment.

The Edenville Dam



- 116. The Edenville Dam is located immediately downstream from the Smallwood Dam and Smallwood Lake.
- 117. The Edenville Dam is a two-section dam located on the Tittabawassee and Tobacco Rivers located near the town of Edenville. 12



- 118. The Edenville Dam is located approximately 18 miles northwest of the City of Midland.
- 119. The Edenville Dam's two sections span the Tittabawassee River and Tobacco Rivers respectively, with the eastward-situated Tittabawassee River Section depicted above and the westward-situated Tobacco River Section depicted below.
- **120.** The Edenville Dam impounds Wixom Lake, which is approximately 2,600 acres in size. Wixom Lake had an approximately 49-mile shoreline.
- **121.** The dam includes the Edenville spillway and powerhouse located on the Tittabawassee River and the separate Tobacco spillway located on the Tobacco River.

¹² The images above and below were captured from Google Earth. The image above depicts the Tittabawassee Spillway, which ultimately failed. The image below depicts the Tobacco Spillway.

- **122.** There is a 50-foot intake leading to the powerhouse located at the Tittabawassee Section of the dam on the eastern side of the project.
- **123.** The powerhouse contains two 2.4-megawatt (MW) Francis-type turbine generator units for a total installed capacity of approximately 4.8 MW.
- **124.** The total length of the earthen embankment securing the Edenville Dam is approximately 6,600 feet with a maximum height of 54.5 feet.
- **125.** The M-30 Highway causeway effectively divides the western Tobacco embankments from the eastern Tittabawassee embankments.
 - **126.** The M-30 bridge opening connects the water impounded from both rivers.
- **127.** The left (eastside) embankment of the Tittabawassee River Section extends from natural ground to the gated spillway and is approximately 625 feet long.
- **128.** The right (westside) embankment of the Tittabawassee River Section extends 2,900 feet from the powerhouse to M-30.
- **129.** The minimum crest elevation of the Tittabawassee River Section embankments is approximately 682.1 feet.
- 130. The left (eastside) embankment of the Tobacco River Section extends 520 feet fromM-30 to the Tobacco spillway.
- **131.** The right (westside) embankment of the Tobacco River Section extends approximately 1,895 feet from the Tobacco spillway and ties into natural ground.
- **132.** The minimum crest elevation of the Tobacco embankment is approximately 682.1 feet.
- 133. There was no seawall protecting the earthen embankments from eroding during periods of excess inflow.

- 134. There are two gated spillway sections, the Tittabawassee and the Tobacco spillways.
- **135.** The Tittabawassee and Tobacco gated spillways have three steel Tainter (radial) gates each.
- **136.** From abutment-to-abutment, the Tittabawassee River Section spillway is 68.6 feet wide.
 - **137.** From abutment-to-abutment, the Tobacco River Section Spillway is 72.2 feet wide.
- 138. The powerhouse for the Edenville Dam is located adjacent to the Tittabawassee spillway and has a concrete substructure and brick superstructure. It is approximately 50.6 feet wide and contains two vertical shaft generating units.
- **139.** The Edenville powerhouse adds approximately 2,000 cubic feet per second (cfs) of capacity to the Dam's spillway capacity.
- **140.** During periods of excess inflow, the Edenville Dam's gates can be opened to discharge excess water and help prevent rising lake levels. However, this capacity is inhibited when the hydroelectric power assets are dormant because additional water cannot flow through the powerhouse when it is non-operational.
- **141.** Despite repeated warnings from the FERC regarding inadequate spillway capacity, the Edenville project lacks an auxiliary spillway to permit the Dam to safely pass a PMF event.
- **142.** The Edenville project also had defective gates and gate hoists, which further limited the Dam's ability to pass excess waters and prevent rising lake levels.

Sanford Dam



- **143.** The Sanford Dam is located near the Village of Sanford on the Tittabawassee River approximately 11 miles upstream of the City of Midland.
 - **144.** Sanford Lake is approximately 1,525 acres in size.
 - **145.** The maximum height of the Sanford Dam is 36 feet.
- **146.** The Sanford Dam consists of four major components, including the left embankment, the powerhouse, the spillway, and the right embankment with fuse plug, which is intended to provide additional spillway capacity during a large flood event. The fuse plug material is designed to erode and wash out to protect the remainder of the dam.
 - **147.** The spillway section is 149 feet long and includes six Tainter gates.

Waterfront Properties on the Four Lakes

- **148.** Over the years, substantial residential development along the Four Lakes has occurred.
- **149.** The properties fronting the lakes include lakefront lots and backlots, which do not directly border the lake but include private easement access to the lakes.

- **150.** Second homes, vacation cottages, and primary residences now line each of the lakes.
- **151.** Narrow, approximately half acre residential lots line the lakes and are heavily developed.
- **152.** Currently, there are 6,555 parcels of private property which front the four lakes and 1,961 parcels of private property that have dedicated easement access to the lakes.
- **153.** Wixom Lake has 2,875 lakefront parcels, with 828 backlot parcels with lakefront easement rights.
- **154.** Sanford Lake has 944 lakefront parcels, with 918 backlot parcels with lakefront easement rights.
- 155. A significant proportion of residential lakefront lots have a dock that was designed to jut from the shore of each lakefront property into the water, where boats and recreational water equipment can be kept and maintained during the summertime.
- 156. The property values of lakefront and backlot lake properties are substantially higher on average than country and downstream properties throughout Midland, Bay, and Saginaw County that do not have lake frontage or access.
- **157.** Property owners paid a premium for their lakefront lots and homes, or their backlot easement access, because of the allure of nice summer days that can be enjoyed by the water or on the boat.
- **158.** The dams impounding the Four Lakes provide the storm water drainage instrumentalities that maintain consistent water levels on the Four Lakes.

Boyce Hydro's FERC License and Water Levels on Wixom Lake

- **159.** In 1976, FERC determined that the Tittabawassee River is a navigable waterway of the United States and that therefore the four dam projects must be licensed by Section 23(b)(1) of the Federal Power Act (FPA).
- **160.** In 1983, Wolverine Power Corporation filed its license application for the Sanford Project No. 2785, and in 1987 it was issued its license.
- **161.** On July 24, 1989, Wolverine filed license applications for its Edenville Project No 10808, Smallwood Project No. 10810, and Secord Project No. 10809.
- **162.** On October 16, 1998, FERC issued a license for the Edenville Project. The license includes terms and conditions concerning dam safety, property rights, water quality, public recreation and safety, and other areas of public concern.
- **163.** On June 23, 2004, Wolverine transferred its licenses to Synex Michigan, LLC. *See Wolverine Power Corporation and Synex Michigan, LLC*, 107 FERC ¶ 62,266 (2004).
- **164.** Synex Michigan, LLC changed its name to Boyce Hydro Power, LLC and filed a statement with FERC on July 12, 2007 to this effect.
- **165.** Since 2004, Boyce Hydro maintained the federal licenses to operate the dams and produce hydroelectric power.
- **166.** Boyce Hydro's operation of the dams included the for-profit production of hydroelectric energy, which it sold to Consumers Energy.
- **167.** The FERC licenses held by Boyce Hydro also regulated the water elevations of the lakes and the timing to achieve normal summer and winter water elevations.

- **168.** Historically, Wolverine Power decreased the water levels by three to four feet in the winter to maximize the benefits of hydroelectric power generation and to minimize spilling and overflow during the spring rains and snowmelt run-off.
- **169.** The Four Lakes were historically refilled to higher summer pool elevations before water temperatures reached levels that would stimulate northern pike spawning, set by the FERC as 39 degrees Fahrenheit.
- 170. The FERC license set "normal pool elevation" for Wixom Lake at 675.8 feet National Geodetic Vertical Datum (NGVD), except during winter drawdown.
 - **171.** The winter drawdown level was 672.8 feet NGVD.
 - **172.** No daily fluctuation in the reservoir was permitted that exceeded 0.7 feet.
- **173.** Winter drawdowns were permitted after December 15, to be completed by January 15, of each year.
- 174. Under normal operating conditions, Boyce Hydro's license required it to refill Wixom Lake to summer levels at or prior to the lake reaching 39 degrees Fahrenheit.

Boyce Hydro's Egregious Neglect Causes FERC to Revoke License Due to the Dangerous Condition of the Edenville Dam—All of Which Was Well-Known by the State

- 175. Since 2004, Boyce Hydro egregiously failed to operate and maintain the dam in a reasonable condition for more than a decade, while profiting from the generation of hydroelectric power.
- **176.** The inadequacy of the Edenville Dam's spillways has long been apparent and is well documented.
- 177. As early as 1993, FERC consistently advised Wolverine, and then Boyce Hydro, that the spillway capacity of the Edenville Project did not meet the Commission's guidelines for passing 100% of the PMF.

- **178.** Since Boyce Hydro assumed ownership and operation of the Edenville Dam in 2004, federal regulators consistently cited the spillway capacity as inadequate and non-compliant.
- 179. At the time the license was transferred in 2004, FERC notified Synex (n/k/a Boyce) that it needed to increase capacity of the Edenville Dam's spillways to prevent a significant flood from overcoming the structure.
- **180.** For at least 15 years, Boyce Hydro consistently failed to increase the Edenville Dam's spillway capacity.
- **181.** As detailed in multiple orders, throughout its ownership and operation of the project Boyce repeatedly failed to comply with its license for the Edenville Project, the Commission's regulations, and Commission orders, or to otherwise fix or maintain the Edenville Dam. ¹³
- 182. In a June 15, 2017 Compliance Order, FERC detailed that Boyce Hydro: (1) failed to increase the capacity of spillways to enable them to pass the [PMF] as required by Regional Engineer directives, license Article 4, and Part 12 of the Commission's regulations; (2) performed unauthorized dam repairs in violation of Regional Engineer directives and Part 12 of the Commission's regulations; (3) performed unauthorized earth-moving activities in violation of Standard Articles 19-21 of the license; (4) failed to file an adequate Public Safety Plain in violation of Regional Engineer directives and Part 12 of the Commission's regulations; (5) unduly restricted public access to project facilities and failed to construct approved recreation facilities in violation of Standard Article 18 and Article 410 of the license and the Commission's Orders Modifying and

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Order).

¹³ See, e.g., Wolverine Power Corporation, 85 FERC ¶ 61,063, at 61,205 (1998); Boyce Hydro Power, LLC, 159 FERC ¶ 62,292 (2017) (2017 Compliance Order); Boyce Hydro Power, LLC, 161 FERC ¶ 62,119 (2017) (Cease Generation Order), reh'g denied, 162 FERC ¶ 61,116 (2018) (Cease Generation Rehearing Order); Boyce Hydro Power, LLC, 162 FERC ¶ 61,115 (2018) (Order Proposing Revocation); Boyce Hydro Power, LLC, 164 FERC ¶ 61,178 (2018) (Revocation)

Approving Recreation Plan; (6) failed to acquire and document all necessary project property rights in violation of Standard Article 5 of the license; and (7) failed to comply with the Commission's 1999 Order approving Boyce Hydro's Water Quality Monitoring Plan in violation of that order and Article 402 of the license.

- **183.** The 2017 Compliance Order stated that Boyce Hydro had demonstrated a pattern of delay and indifference to addressing dam safety requirements.
- **184.** The 2017 Compliance Order also stated that the Edenville Dam's inadequate spillway capacity must be remediated to protect life, limb, and property.
- **185.** FERC emphasized that Boyce's failures caused a "grave" risk for the "potential loss of life and destruction of property and infrastructure." FERC stated that:

Given Edenville dam's high hazard potential rating, the potential loss of life and destruction of property and infrastructure is grave should the project not be maintained and operated appropriately, with consequences that could certainly affect the Village of Sanford, Northwood University, City of Midland, Michigan, and other areas downstream. The Commission's Dam Safety Guidelines require the project works to be designed to either withstand overtopping of the loading condition that would occur during a flood up to the probable maximum flood (PMF), or to the point where a failure would no longer constitute a hazard to downstream life and/or property. In the alternative, the capacity of the spillway must be adequate to prevent the reservoir from rising to an elevation that would endanger the safety of the project works. As summarized in an August 6, 1993 letter from the Regional Engineer to the prior licensee, the spillway capacity of the Edenville Project does not meet the Commission's guidelines for passing the PMF. The Regional Engineer has repeatedly directed the licensee to address the spillway capacity concerns at the project....¹⁴

186. Through a February 15, 2018 Order Proposing Revocation of License, FERC stated that "[t]he Commission's primary concern has been the licensee's longstanding failure to address the project's inadequate spillway capacity, which currently is designed to pass only approximately

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¹⁴ Boyce Hydro Power, LLC, 159 F.E.R.C. P62,292, 64670, 2017 FERC LEXIS 735, *7-9 (F.E.R.C. June 15, 2017).

50 percent of the PMF. Failure of the Edenville dam could result in the loss of human life and the destruction of property and infrastructure." (Emphasis added).

- **187.** Boyce Hydro failed to comply with numerous, specific orders by the FERC, including to develop plans, specifications, and a schedule to construct the Tittabawassee River Auxiliary Spillway, which would ensure that floodwaters could safely pass without threatening nearby life and property.
- **188.** In the face of known and well-documented risk to downstream life and property, Boyce Hydro failed to conduct necessary maintenance and repairs, specifically by increasing spillway capacity, further increasing the risk of dam failure and catastrophic downstream injuries.
- 189. As a result of Boyce Hydro's failure to maintain the dam and make necessary and reasonable repairs, FERC sounded the alarm and issued a September 10, 2018 Order Revoking Boyce Hydro's license to operate the Edenville Dam. Regulatory and enforcement jurisdiction was then to revert to the State.
 - **190.** The revocation of the license became effective on September 25, 2018.
- **191.** Boyce Hydro's licenses to operate dams on the other three lakes—Secord, Smallwood, and Sanford—remained in force.
- **192.** On March 15, 2019, Boyce filed a motion requesting that the Commission reconsider the revocation of the license for the Edenville Project and approve the transfer of the license to Wolverine Hydro, LLC.
- 193. The State of Michigan intervened in support of Boyce's Motion for an Emergency Stay, through letters from the Attorney General of the State of Michigan dated April 24, 2018 and September 24, 2018. The April 24 letter cited Boyce Hydro's "troubled history" as a primary reason for its opposition to revoking the license.

194. As part of its motion for an emergency stay, Boyce produced evidence from its professional engineer stating that there was "significant" deterioration of the concrete spillway rollways and that "[i]f the turbines [in the powerhouse] are permanently disabled, their ability to pass 2,000 cubic feet of water per second (cfs) will not be available, increasing the potential for overtopping of the dam."

195. Denying the motion, FERC stated:

We have previously concluded that 'Boyce Hydro has, for more than a decade, knowingly and willfully refused to comply with major aspects of its license and the Commission's regulatory regime, with the result that public safety has been put at risk and the public has been denied the benefits, particularly project recreation, to which it is entitled' and that '[t]he record demonstrates that there is no reason to believe that Boyce Hydro will come into compliance; rather, the licensee has displayed a history of obfuscation and outright disregard of its obligations.' 15

State Defendants Take Over Jurisdiction of the Edenville Dam in September 2018

- **196.** The FERC revocation of Boyce Hydro's license was a clarion call to Defendants and the public that the Edenville Dam presented a known danger to life and property in and around the Tittabawassee River Flood Plain.
- 197. Without operational hydroelectric power assets, water no longer flowed through the Edenville Dam's powerhouse, which decreased the Dam's spillway capacity by an additional 2,000 cfs. Instead, excess waters travelled exclusively through its other gates and the significantly deteriorated spillway, which created additional risks of further deterioration, overtopping, and dam failure.
- **198.** On September 25, 2018, State Defendants took over regulatory and enforcement jurisdiction of the Edenville Dam under these known, dangerous circumstances.

¹⁵ Boyce Hydro Power, LLC, 167 F.E.R.C. P61,248, 2019 FERC LEXIS 932, 2019 WL 2563038 (F.E.R.C. June 20, 2019).

- **199.** State Defendants knew about the FERC record and the deficient, dangerous, and inadequate condition and spillway capacity of the Edenville Dam from the beginning.
- 200. FERC's Chairman reported to the U.S. House of Representatives Committee on Energy and Commerce that: "Multiple Michigan agencies intervened or commented during the years of [Boyce's] non-compliance or in the license revocation proceeding for the Edenville Project. Their comments were generally focused on recreational and environmental impacts and potential transfer of the license to other parties." The FERC further stated that "Michigan has extensive dam safety regulations, including enforcement mechanisms such as the ability to commence a civil action for appropriate relief for violations."
- **201.** State Defendants were fully aware of Boyce's years of knowing and willful refusal to comply with its licensing provisions, including the fact that the Edenville Dam was in poor condition and had insufficient spillway capacity.
- 202. FERC further corroborates the State's knowledge of the public safety concerns posed by the Dam. The United States House of Representatives Committee on Energy and Commerce, Subcommittee on Energy also asked FERC whether "FERC consult[ed] Michigan regarding the significant public safety concerns stemming from the longstanding non-compliance pattern by Boyce Hydro and the implications for the state?" FERC responded:

Yes. For a number of years, Commission staff worked with Michigan state authorities, who were aware of, and occasionally reported to the Commission, improper activities by Boyce Hydro. Following the issuance of the Commission's Order Proposing Revocation on February 15, 2018, staff contacted the Michigan Department of Environmental Quality [now known as EGLE] to discuss that the result of the Commission's possible revocation of the license would remove the facility from federal jurisdiction.

203. Shortly after taking over jurisdiction, State Defendants also possessed voluminous documentation from FERC describing, in detail, the dangerous condition of the Edenville Dam

and the threat that a dam failure posed to human life and property. These documents included the FERC 12D Safety Inspection Reports, which documented specific fixes that were necessary to eliminate known threats to downstream life and property.

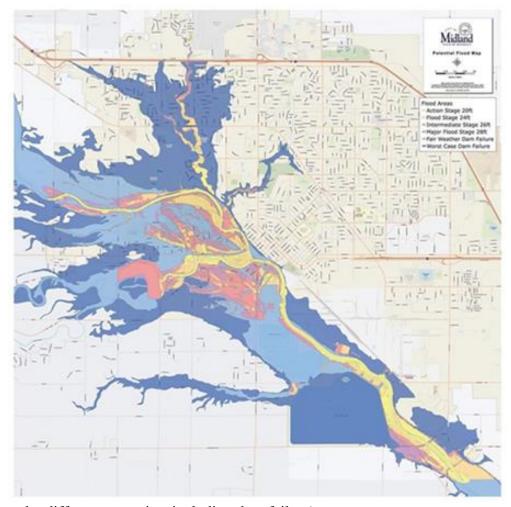
204. The State requested technical data and prior spillway capacity test information from FERC in October 2018. This information was received by EGLE no later than spring of 2019—before State Defendants intervened and supported a Part 307 Petition to re-raise Wixom Lake.

205. The Four Lakes Task Force ("*FLTF*") ¹⁶ further corroborates that the State Defendants had direct knowledge of the damning FERC record documenting the dangerous condition of the Dam. The FLTF stated that "[t]he State received the FERC Safety Reports. Moreover, the knowledge that FLTF's engineers obtained through their diligence was shared with EGLE's Dam Safety Unit."

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¹⁶ The Four Lakes Task Force is a local homeowner's association delegated by Gladwin and Midland Counties in 2018 to secure a lake level order under Michigan Law, and to enter into a purchase agreement with Boyce to purchase the dams, and take over operation and control of the dams in the beginning of 2020.

206. Public flood modeling has long demonstrated the disastrous consequences that an upstream dam failure would cause at the Edenville Project, during both fair and severe weather events (see Potential Flood Map below, in which the colored areas demonstrate areas of potential



flooding under different scenarios, including dam failure).

207. The State of Michigan's emergency declaration and evacuation order on May 19, 2020 demonstrates that State Defendants knew well in advance about the catastrophic impact that dam failure would have on the areas surrounding the Tittabawassee Flood plain and that State Defendants knew about the scope of flooding that would to a substantial certainty result from failure of the Edenville Project.

Boyce Hydro Significantly Decreases Water Levels in Wixom Lake in Response to Losing FERC License

- **208.** In the wake of Boyce's license revocation, the production and sale of hydroelectric power was discontinued, and the operation of the Edenville Dam no longer remained profitable to Boyce.
- **209.** The operator thus no longer had any incentive to continue maintaining the historically "normal" water levels—nor should it have in the face of repeated, dire warnings by FERC, specifically relating to the Dam's inadequate spillway capacity, the deteriorated condition of the Dam, and the potential liability that Boyce would face in the event of dam failure.
- **210.** The Dam already had a diminished spillway capacity of approximately 2,000 cfs. because of the shutdown of the Edenville powerhouse.
- **211.** Beginning on September 20, 2018, Boyce Hydro initiated a significant and lasting lake level drawdown on Wixom Lake, which caused the Wixom reservoir to be lowered by 6-8 feet.
- **212.** Boyce Hydro claimed that the drawdown of Wixom Lake's water levels was initially to perform dam safety-related spillway and gate assessments.
- **213.** The drawdown of Wixom Lake levels was necessary to ensure the safety of life and property, given the high hazard classification of the Edenville Dam and its known, dangerous condition.
- **214.** Immediate repairs to the Edenville Project needed to be conducted, and many of the specific, necessary repairs were detailed in the FERC record.
- **215.** FERC granted Boyce Hydro variances to conduct the drawdowns through orders dated September 14, 2018 and September 19, 2018.

- **216.** The Wixom Lake drawdown initially performed by Boyce Hydro brought water levels down approximately 4.6 feet below the normal pond elevation of 675.8 NGVD, to 671.2 NGVD.
- **217.** Thus, when the State took over regulatory and enforcement jurisdiction on September 25, 2018, lake levels were significantly lower than "historic" summer levels.
- **218.** In 2018, in anticipation of winter freezing, Boyce Hydro further decreased Wixom Lake levels to a "Run-of-River" ("ROR") level controlled by the natural flow of water.
- **219.** The ROR level was approximately 669 NGVD, 6.8 feet below the previously operational lake levels and 3.8 feet below the prior winter drawdown levels set by the FERC license.
- **220.** Under State jurisdiction, Boyce Hydro maintained this safer, depressed water level on the Wixom reservoir from October 2018 through April 8, 2019, except for instances of rainstorm or precipitation-related fluctuations that may have incrementally increased lake levels.

State Defendants Violate Statutory Duties Relating to Dam Safety and Begin Coordinating and Executing a Plan to Raise the Water Levels Abutting the Dam

- 221. Rather than give credence to the years of documented warning signs regarding the unsafe operating conditions of the Edenville Dam, and maintaining the safer, decreased water levels until the necessary dam repairs could be conducted, State Defendants coordinated, supported, executed, and enforced a plan that would raise water levels first and push the necessary dam repairs five years into the future.
- **222.** Despite knowledge of the need for dam repairs to protect human life, limb, and property, the State Defendants took repeated affirmative actions that caused dangerously increased water levels abutting the Edenville Dam.

- **223.** After taking jurisdiction, EGLE conducted its only inspection of the Edenville Dam in October 2018, performed by EGLE-WR-DS agent Jim Pawlowski, and which EGLE itself characterized as "cursory.".
- **224.** EGLE's 2018 inspection was *not* for the purpose of determining whether the dam could satisfy Michigan's dam safety standards. However, the report did not disclose that fact.
- 225. This cursory inspection occurred when water levels were lowered, the powerhouse was non-operational, only two of the three gates were open, and no water was flowing though the spillway.
- **226.** Despite the Dam having only two of the three tainter gates open and without testing their functionality, EGLE reported that "[a]ll spillway gates appear to be operational."
- **227.** Despite noting that the powerhouse was non-operational, the report somehow concluded that "the structure and generating equipment appeared to be in fair condition as well."
- **228.** Mr. Pawlowski noted that "[t]he dam's two concrete spillways showed signs of moderate deterioration (spalling, exposed reinforcing steel, minor cracking and efflorescence), but appeared to be stable and functioning normally."
- **229.** The images attached to the "cursory" inspection report depicted erosion on the embankments, significant spalling, exposed reinforced steel, and a "failing retaining wall downstream of the left abutment."¹⁷
- **230.** During the inspection, due to Boyce Hydro's drawdowns of the water level, Wixom Lake was at a safer level, approximately 4.1 feet below its normal pool elevation. Accordingly, at

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¹⁷ The left (eastern) abutment impounding the Tittabawassee Spillway is the portion of the dam that would later catastrophically erode, causing the dam failure.

the time of the inspection no water was abutting the earthen embankment or passing through the spillway.

- **231.** EGLE inspector Jim Pawlowski characterized the dam as in "fair structural condition[,]" despite the overwhelming weight of the FERC record, and numerous details in his own report that indicated that the dam was in poor condition and required repairs.
- 232. Despite the known deteriorated condition of the dam, EGLE did not conduct any follow up inspection of the Edenville Dam for 17 months thereafter, even though it subsequently confessed that during this time it was concerned that "the dam might not have enough spillway capacity—which allows water to flow out of the Wixom Lake impoundment—to meet state requirements."¹⁸
- **233.** If State Defendants were concerned that "the dam might not have enough spillway capacity ... to meet state requirements[,]" the State's subsequent actions tell a very different story.
- 234. None of the engineering or regulatory opinions at State Defendants' disposal indicated that the Edenville Dam could meet the State's already lax 50% PMF standard. The FERC enforcement documents and subsequent engineering reports and internal communications by and between State Defendants demonstrated conclusively that it could not.
- 235. Yet, in the face of numerous reports that the Edenville Dam was unsafe and needed repair to protect life and property, State Defendants violated their duties by coordinating, supporting, executing, and enforcing an ownership transfer plan that would require dangerously increased water levels abutting the inadequate and defective Dam first, while pushing necessary repairs back until 2024.

¹⁸ <u>https://www.michigan.gov/egle/0,9429,7-135-3313-529696--,00.html</u> (last visited March 18, 2024).

- 236. Under Part 315, Michigan's dam safety law, EGLE "shall order the owner [of a dam] to take actions that the department considers necessary" if "the department finds that a condition exists which endangers a dam[.]" MCL § 324.31518(7). Part 315 makes specific recommendations for appropriate mandatory orders to protect life and safety, including "requirements for run-of-the-river operation." *See* MCL § 324.31519(1).
- 237. Under Part 307, MCL 324.30722(2), "[i]f a report discloses a need for repairs or a change in condition of the dam that relates to the dam's safety or danger to natural resources, the department shall conduct an inspection to confirm the report. If the report is confirmed and the public safety or natural resources are endangered by the risk of failure of the dam, the department may require the county either to repair or to replace the dam." Further, the statute provides guidance for issuing dam safety orders, including "an immediate lowering of the lake level until necessary repair or replacement is complete." MCL 324.30722(2).
 - **238.** The State did not issue any orders under these sections.
- **239.** The State abdicated its duty to conduct a required safety inspection of the Edenville Dam after receiving numerous reports of needed repairs and dangers to the Dam and given its longstanding knowledge of the Dam's egregious and dangerous condition.
- **240.** The State violated its statutory duty to issue orders upon learning about dangerous conditions that threatened the Edenville Dam.

¹⁹ Under MCL 324.30722 (3), "[a] person failing to comply with this section, or falsely representing dam conditions, is guilty of misconduct in office."

The State Finances and Supports a Plan to Increase Wixom Lake to Dangerous Levels First, and Conduct Necessary Safety Inspections and Dam Repairs Later, Affirmatively Misleading the Court

- **241.** In addition to abdicating its dam safety duties, as part of a deal that would transfer ownership of the Dam from Boyce to the FLTF, the State of Michigan Grant provided a \$5 million grant to Midland County for the purpose of obtaining a court order requiring Wixom Lake to be raised.
- **242.** The performance schedule for the State of Michigan Grant began on January 1, 2019 and is set to end on January 31, 2021.
- **243.** \$3 million dollars was provided to aid the Counties/FLTF in obtaining ownership and control over the dams and their lake level assets.
- **244.** The State allocated an additional \$1.5 million of the grant for consultants and outside contractors to pursue a lake level proceeding under Part 307, which the State of Michigan knew would be used by Midland County and their delegated authority the FLTF to seek permanently increased lake levels abutting the Edenville Dam.
- 245. With the money provided by the State of Michigan, the FLTF commissioned a \$400,000 study to have a private engineering firm, Spicer Group, Inc., prepare a "Four Lakes Level Study." The purpose of the Lake Level Study was to support a petition to the Midland County Circuit Court to intervene and require that the lake levels, particularly Wixom Lake, be increased.
- **246.** The FLTF/Midland County, with money from the State, paid more than half-a-million dollars to their legal team "to establish Part 307 legal lake levels.²⁰ In 2019 and the first

²⁰ <u>https://www.four-lakes-taskforce-mi.com/updates/medc-grant-expenditure</u> (last visited March 18, 2024).

quarter of 2020, FLTF Legal worked on negotiations for the Boyce Purchase Agreement as well as negotiations on litigation with the State of Michigan."²¹

- **247.** Of the \$500,000 that was purportedly allocated by the State for dam repairs, only \$391,998.96 of the money was spent to obtain an engineering study on how to approach possible repairs. The necessary repairs were pushed back, despite the line item stating that "[g]ate repairs needed by winter."
- **248.** State Defendants relied exclusively on the homeowners' association and their hand-picked private engineering firm, Spicer Group, to set the proposed lake level increases.
- **249.** Prior to the petition, State Defendants never conducted a dam safety inspection, despite a statutory requirement to do so, or evaluated whether the increased water levels proposed by Midland County were safe.
- **250.** The proposed lake levels were unsafe under the circumstances known by State Defendants.
- **251.** On January 25, 2019, Midland and Gladwin County, through the FLTF and the legal team financed by the State, petitioned the Midland County Circuit Court to establish an enforceable legal lake level.
- **252.** The primary purpose of obtaining the Part 307 Lake Level Order was to protect public recreation, the local economy, and the tourism industry. Dam safety was not considered.
- **253.** At the time the petition was filed, Wixom Lake was lowered to near run-of-river levels of 669 NGVD, more than 6 feet below the summer levels proposed in the petition. The petition omitted that fact, stating only that "[t]his Petition does not seek to revisit the merits or

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²¹ Following the dam failure, the FLTF legal team has been working on formally pursuing condemnation procedures against the Boyce Hydro Properties.

wisdom of the FERC in determining the lake levels of each of the Four Lakes, as the lake levels have been harmoniously maintained for almost 100 years[.]"

- **254.** The State Defendants intervened as interested parties in the Part 307 petition and supported the proposed order to dramatically increase the water levels on Wixom Lake to unsafe levels, despite knowledge of the potential catastrophic harm that would occur as a result.
- **255.** The State Defendants appeared in support of the Part 307 Order following substantial coordination with the FLTF, their legal counsel, and Spicer Group.
- **256.** The Lake Level Study confirmed that Spicer Group worked "in coordination with MDEQ[/EGLE] to review requirements for additional spillway improvements" prior to the Part 307 Hearing.
- **257.** The Lake Level Study further confirmed that, prior to the Part 307 hearing, Spicer Group and EGLE "relied upon engineering inspections, reports, and studies that have been provided by Boyce Hydro."²²
- 258. Prior to the Part 307 hearing, as part of State Defendants' coordination with FLTF/Spicer Group, Daniel Bock, counsel for EGLE, set preconditions to its support for the Lake Level Order. EGLE stated that it would endorse the petition only if proposed lake levels tracked the prior FERC license, and the order stated that "flow would pass through the dams during the spring fill up."
- **259.** The Part 307 Petition minimized, excluded, and/or intentionally obscured the dire warnings from FERC regarding the grossly deficient condition of the Edenville Dam and its

²² Specifically, "Detailed information regarding the four dams and lakes is provided in the FERC Section 12D Safety Inspection Reports comp[il]ed by Dee Perkeypile P.E. on behalf of Boyce Hydro."

spillways. Instead, the petition relied on self-described "historic" and "harmonious" lake levels, without highlighting the alarming warnings from FERC that the Dam was unsafe or the specific repairs that the State knew were needed to allow the dam to safely pass floodwaters.

- **260.** While the Spicer Group report stated that Boyce Hydro's FERC license was revoked, it provided vague and obscure reasons for the revocation, stating only that it was merely "because the dam was determined to be non-compliant with FERC regulations."
- **261.** The report further stated that "[t]he FLTF is not aware of objections or violations from MDEQ [EGLE] or MDNR[,]" which had not by that point conducted any safety inspections. Yet, somehow the FLTF was able to say that EGLE would consent to the increased water levels based on the plan submitted.
 - **262.** The report submitted to the Court was clearly misleading.
- 263. The report stated that "Boyce Hydro and the FLTF have an agreement that water level will be restored for the summer of 2019, with the understanding that the MDEQ will permit this provided that a normal legal lake level is established and repairs to the Edenville Dam are implemented by 2024"—five years into the future (emphasis added).
- 264. The report further stated that "[t]he primary objectives of Midland and Gladwin Counties submitting the petition to the Circuit Court are to maintain levels into the future, ensure all dams *become* and remain compliant with state safety standards, acquire rights to operate and maintain the dams and lake bottoms and establish a local authority that will be responsible to manage the dams." (emphasis added). This demonstrates that none of the parties involved in the Part 307 petition believed that the dam was *currently* capable of meeting state safety standards. Yet, they obscured this fact.

- **265.** The State Defendants signed off on the plan to increase the water levels first, then conduct necessary maintenance and repairs later—based on a total deferral of its dam safety duties—despite knowledge that the dam was very likely non-compliant with Michigan's already lax standard for withstanding 50% PMF.
- **266.** With respect to the horrifyingly deficient condition of the Edenville Dam's spillway capacity—which the FERC had previously stated was *designed* to withstand only 50% PMF and a high hazard and serious and immediate threat to downstream life, limb, and property—the report stated only that "*modest improvements* to spillway capacity at Wixom Lake" will be required. (emphasis added).
- **267.** The Lake Level Study further minimized and obscured the obviously deficient condition of the Edenville Dam, stating that "[i]n general, signs of instability or structural fatigue have not been observed but repairs and maintenance are needed."
- **268.** While the Lake Level Study included the prior FERC licenses as Appendix D, it entirely omitted the many, detailed regulatory violations at the Edenville Dam and failed to attach the many non-compliance letters and orders detailing the extremely dangerous condition of the dam's spillways, including the 12D Safety Reports.
- **269.** The Study failed to even attach the "cursory" 2018 EGLE inspection and failed to disclose that the State of Michigan had not yet evaluated whether the proposed water levels were compliant with State of Michigan safety standards.
- **270.** The Study also incorrectly stated that "the establishment of State of Michigan normal lake levels that match the FERC normal lake levels license's would not introduce detrimental impacts to private property ... [and] detrimental impacts [to] the environment,

including currently established hydrology, drainage, riparian impacts, and natural resources, would not be introduced."

- **271.** In sum, the Part 307 Petition, Lake Level Report, and Hearing conveyed the false impression to the Court that there were no immediate dam safety issues requiring the Court's attention or consideration and that the proposed lake level increase represented a "historic" and "harmonious" status quo.
- 272. Given the alarming events that preceded the Part 307 petition and proceedings, dam safety issues should have been presented to the Court, and State Defendants had no basis for signing off on the proposed water levels without having first conducted any due diligence into whether the Dam could meet Michigan's dam safety requirements.
- **273.** The Part 307 proceedings occurred in a non-adversarial setting, and downstream property owners who were directly threatened by a dam failure were not provided a seat at the table.
- **274.** On May 28, 2019, the State Defendants signed off on an order from the Midland County Circuit Court, which required that the water levels on Wixom Lake be dramatically increased from the post-September 2018 drawdown levels.
- **275.** The preconditions communicated by EGLE to the FLTF/Spicer Group prior to the hearing were incorporated into the final order, as demanded.
 - **276.** Under the new order, the Part 307 lake levels were as follows:

Summer Level (NGVD 29)	Winter Level (NGVD 29)
630.8	627.8
675.8	672.8
704.8	701.8
750.8	747.8
	630.8 675.8 704.8

- **277.** At the time the Part 307 Order was obtained, Wixom Lake levels had been substantially lowered to approximately 669 NGVD in the interest of safety.
- **278.** The State financed, coordinated, and supported the Part 307 Order approving dramatic, required increases to the water levels on Wixom Lake—despite conducting no safety inspection and producing no evidence that the dam could withstand such increased water levels.
- **279.** Through an AG representative, EGLE signed the order approving dramatically increased water levels on Wixom Lake.
- **280.** Through an AG representative, MDNR also appeared and signed the order dramatically increasing the water levels on Wixom Lake.
- **281.** State Defendants' appearances in the Part 307 proceeding, their substantial coordination with FLTF/Spicer prior to the proceeding, and their agreement to permit the proposed lake levels conveyed the false impression that the state agencies charged with ensuring dam safety had actually performed their required duties under Part 307 and Part 315. They had not.
- **282.** As a result, an enforceable State of Michigan Lake Level Order was put in place without consideration for existing dam safety.

The Counties Enter into a Purchase Agreement with Boyce Hydro, Transferring Jurisdiction and Control Over Lake Levels to the Governmental Entities

- **283.** On or around April 24, 2019, Boyce and the FLTF agreed upon a \$9.4 million purchase agreement that would transfer ownership and control over all dam assets, including control of the lake levels, to the Counties.
- **284.** In advance of executing the final Agreement, the State provided \$3 million to the Counties/FLTF to effectuate acquisition of the dams and their lake level assets. \$1.5 million of the State's financing was specifically dedicated as a line item to the "Lake Level Hearing[,]" demonstrating the State's coordinated support for bringing the lake levels up and obtaining governmental ownership and control over the lake level instrumentalities.
- **285.** The Final Purchase Agreement was signed on December 31, 2019 by the Counties and Boyce Hydro.
- **286.** The Purchase Agreement guaranteed that the Counties would exercise oversight and control over the lake levels on Wixom Lake beginning in January 2020.
- **287.** The Purchase Agreement provided that all power assets of the dams relating to the production of hydroelectric power would also be transferred into governmental control.
- **288.** Prior to the Edenville Dam failure, the FLTF had taken over substantial responsibilities in operating the Dam, including applying for permits on behalf of Boyce Hydro, coordinating with State Defendants, and managing water levels and dam repairs.
- **289.** By fall of 2019, the State almost exclusively dealt with the FLTF, not Boyce, regarding all matters related to lake levels, permits, and needed repairs.
- **290.** The executed Purchase Agreement included guarantees that the water levels would be increased by 6 to 8 feet during the spring of 2020.

- **291.** The Purchase Agreement stipulates that the FLTF will "continue, to pay Boyce Forty Thousand dollars (\$40,000.00) each month due on the 5th day of the month, provided Boyce maintains the lake elevations for Wixom Lake in accordance with the lake elevations set forth in the revoked FERC license for the Edenville dam or as agreed to with FLTF[.]"
- **292.** The Purchase Agreement further provides that "[i]n January, 2020, following the First Installment Payment, FLTF agrees to be responsible for operating, maintaining, repairing, and improving the Edenville Dam to meet requirements of the State of Michigan and for purposes of maintaining the lake level in accordance with the Part 307 and circuit court order."
- **293.** Boyce Hydro was bound by the Purchase Agreement and any failure to ensure that lake levels were raised to the summer levels established by the Part 307 order would subject the company to substantial fines and liability.
- **294.** So long as Boyce complied with the terms and conditions of the Purchase Agreement, which specifically required increased water levels as directed by the governmental entities, Boyce would receive a \$9.4 million golden parachute that would free it from continuing responsibility over the failing dam.

State Defendants Take Repeated, Affirmative Actions to Take Control over Lake Levels and Cause Wixom Lake Reservoir to Be Raised to Dangerous Heights, Despite Receiving Numerous Reports that the Edenville Dam Presented an Immediate Danger to Human Life and Property

- **295.** Following substantial coordination with FLTF/Spicer Group to obtain an enforceable order requiring Wixom Lake to be raised, State Defendants received numerous reports that the Edenville Dam was dangerous and that immediate repairs were needed to protect human life and property.
- **296.** After learning about these dire risks, State Defendants took repeated affirmative actions to cause dangerous water levels to be established and maintained.

- **297.** The FLTF, as delegated authority of the Counties, was required to cause an inspection to be made of the dam, for which a normal lake level was set. *See* MCL 324.30722(2).
- **298.** EGLE coordinated with the FLTF and supported the Lake Level Order, and the Counties' efforts to take ownership over the dams, without first conducting an inspection or requiring a safety inspection of the Edenville Dam.
- **299.** Only after obtaining the Lake Level Order from the circuit court did the FLTF begin conducting a formal safety analysis through Spicer Group.
- **300.** Spicer Group's safety inspection work and analysis began in June 2019 and concluded in March 2020.
- **301.** Throughout 2019, EGLE received numerous official reports indicating that the Dam did not meet State of Michigan dam safety standards and posed a direct and dire risk to human life and property. The Inspection Report confirms that all of the information contained therein was contemporaneously shared with "EGLE Dam Safety Engineers and confirmed by the FLTF engineering team."
- **302.** According to the Spicer Inspection Report, a "gate test in June [2019] demonstrated that the current method to operate the gates was not an adequate or safe method." The Inspection Report stated that "[g]ate test reports have previously been provided to EGLE."
- 303. The Spicer Inspection Report further stated that, "[c]urrently, there are deficiencies which need to be corrected. The dam does not provide adequate capacity to pass the ½ Probable Maximum Flood (PMF) event sufficiently to meet EGLE Dam Safety requirements." The Report further stated that "[t]his has been previously identified during review of the rating curves by EGLE Dam Safety Engineers and confirmed by the FLTF engineering team."

- **304.** Definitive knowledge of the specific spillway capacity deficiencies was known by State Defendants at least as early as summer 2019.
- **305.** In or around July 2019, the FLTF submitted a grant application to the MDNR for \$1.6 million in funding "[t]o rehabilitate the Edenville Dam, including spillways, dam embankments and downstream structures for water management and erosion control."
- **306.** The grant application to the MDNR stated that "[t]he FERC hydroelectric license for the Edenville Dam was revoked September, 2018, *primarily due to safety concerns*." (emphasis added).
- **307.** The FLTF wrote to the MDNR that the Edenville Dam "is in most immediate need of rehabilitation ... Critical spillway surfaces are eroded down to the reinforcing rods. Spillway gates cannot be operated for maximum spillway capacity. Spillway training walls need repairs/replacement. *Failure of these structures would jeopardize the integrity of the Edenville Dam*." (emphasis added).
- **308.** The FLTF further stated that the "evidence of deterioration is readily apparent" and "[r]ehabilitation will also ensure safety of downstream communities, including the waterfront properties on Sanford Lake, the Village of Sanford, and the City of Midland."
- **309.** Through a November 13, 2019 email with a Wixom Lake resident, EGLE employee Theresa Seidel confirmed that EGLE had learned about and confirmed the spillway capacity deficiencies, and the need for dam repairs, in June/July 2019, long before Defendants have publicly admitted.
- **310.** Ms. Seidel wrote that "[w]hen the dam was regulated by FERC, it was required to pass the full probabl[e] maximum flood (PMF), which is estimated somewhere around 60,000 [cfs]. According to information provided to us at the time of the license revocation (Fall 2018),

the dam had a maximum spillway capacity of approximately 28,000 cfs. So, it was very clear that the dam did not meet the FERC spillway capacity requirements which ultimately led to the revocation of the license by the FERC and jurisdiction over the dam to revert to the state under Part 315."

- 311. During Spring 2019, EGLE reviewed prior spillway capacity testing conducted by FERC and/or Boyce while the Dam was under FERC regulation and "concluded that the analysis were incomplete/flawed." EGLE stated that "[p]revious evaluations did not adequately assess maximum gate openings, weir vs. orifice flow at the gates, wave run up/set up, or freeboard, all of which would further limit the actual capacity of the spillways."
- 312. Ms. Seidel reported that, after Spicer Group and Boyce's engineer Dee Purkeypile conducted the proper dam safety tests in June/July 2019 and determined that "the capacity of the dam was previously over estimated, and that the true capacity (in its current condition) does not meet the state requirement to safely pass ½ PMF." (emphasis added).
- **313.** Ms. Seidel concluded her email by stating that the Edenville Dam "will require modifications to meet this standard."
- **314.** A September 18, 2019 memorandum from a FLTF-commissioned dam safety engineer to EGLE engineer Luke Trumble concluded that "[a]t this point in time, based on the documents reviewed, the FLTF does not believe that the Edenville Dam can be operated to meet the EGLE dam safety requirements to pass the [50%] PMF without certain repairs and improvements."
- **315.** The September 18 memorandum also identified "unsafe conditions" with respect to the Edenville Dam's gates that the FLTF characterized as "unacceptable."
 - **316.** The FLTF plan submitted to the State to remedy these known deficiencies included:

- 1. Request for a lake level drawdown in winter 2019/2020.
- 2. Install new gate hoist system.
- 3. Update the PMF study to verify ½ PMF design flow rates.
- 4. Develop comprehensive repair plan that provide[s] adequate spill capacity.
- 5. Complete repairs *by 2024*.
- **317.** On September 25, 2019, the FLTF with authorization from Boyce Hydro, jointly applied for a permit to drawdown Wixom Lake by approximately 8 feet—as the FLTF proposed through the September 18 memorandum.
- **318.** The application stated that "FLTF believes this is the safest and most practical method to operate the dam during winter months, until needed repairs can be installed."
- **319.** On October 2, 2019, the MDNR sent a letter to EGLE opposing the interim drawdown of Wixom Lake, purportedly because of fears that a lake level drawdown might harm the freshwater mussel population. The MDNR opposed the drawdown on this basis, despite the fact that the drawdown application proposed a mussel survey and relocation plan to take steps to protect the mussel population.
- **320.** Known dam safety deficiencies that threatened thousands of human lives and properties were subordinated to purported concerns regarding the freshwater mussel population, whether genuine or not.²³
 - **321.** On November 25, 2019, EGLE prohibited the requested lake level drawdown.

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²³ The fact that the FLTF and Boyce proposed a mussel relocation plan, and the State nonetheless rejected the dam safety measures, plausibly suggests that the mussel justification proffered by the State may not have been the genuine reasons for the State's act of prohibiting any lake level drawdowns.

322. Following EGLE's unconscionable decision, which was made in coordination with the MDNR, the FLTF, through counsel, communicated the following warning to EGLE:

The purpose of this letter is to convey the concern for the public health, safety and welfare of the people and property located in proximity to the Edenville Dam and the people that operate it. By denying the application for the drawdown permit for Wixom Lake, the Michigan Department of Environment, Great Lakes, and Energy (EGLE) has elevated the potential risk to the health, safety and welfare of 'Littoral substrate and aquatic vegetation rhizomes/stems', Fish assemblages', and the 'Rainbow mussel' over the risk to health, safety and welfare of human beings and property.

. . .

Our consulting engineers, Essex Partnership and the Spicer Group, Inc. have confirmed what is outlined in the ... FERC '12 D reports' (that were provided to EGLE's Dam Safety Division) that the Edenville Dam is deteriorated and in need of repair, including repairs to the gates, gate hoists, spillways, wingwall and other items.

. . .

We understand there may be certain environmental impacts resulting from the proposed drawdown. However, as stated above, we believe that such impacts, while important are outweighed by the harm to the structural integrity of the dam and its operations, and most importantly to the personnel that operate the dam and the persons and properties in proximity to the dam.

. . .

[I]t is well documented and mutually understood that the Edenville Dam ... requires significant investment to ensure the long-term sustainability and management of the lake and lake levels. ... The FLTF is on a path, which is supported by many stakeholders (including the State of Michigan, which appropriated \$5 million towards this endeavor) to address the challenges associated with the dam improvements needed to fulfil its Part 307 responsibilities. (Emphasis added).

- 323. The State Defendants and their agents included on this email included EGLE Director Liesl Clark, EGLE Dam Safety Engineer Lucas Trumble, EGLE/WLSU Representative Keto Gyekis, the MDNR Fisheries Division Representative Kesiree Thiamkeelakul, and Assistant Attorney General Nathan Gambill.
- **324.** Despite this clarion warning that human life and property were placed at dire risk by maintaining elevated water levels, State Defendants persisted and affirmed their prohibition on any drawdown of Wixom Lake, purportedly to protect freshwater mussels.

- **325.** On January 31, 2020, EGLE's dam safety inspector, Luke Trumble once again reported that the dam did not meet the state's minimum flood capacity requirements. Trumble reported his findings to the Spicer Group.
- **326.** On February 7, 2020, Ron Hansen from Spicer Group asked the State to notify Boyce Hydro and the FLTF of the dam's deficient spillway capacity. Hansen told Trumble: "In the spirit of trying to implement dam safety improvements as quickly as possible, please notify the FLTF and Boyce of the ½ PMF deficiencies at your earliest convenience.
- **327.** State Defendants failed to report any of the confirmed information they had acquired regarding the Edenville Dam's dangerous and defective condition to the Midland County Circuit Court, which previously approved the Part 307 Lake Level Order without such information.
- **328.** Upon learning of conditions that threatened the Edenville Dam, State Defendants refused to issue any orders, as they were required to do under Part 315.
- **329.** Furthermore, the State Defendants threatened and initiated litigation that would require increased water levels.
- **330.** Beginning in January 2020, State Defendants issued numerous communications to Boyce Hydro threatening to file a lawsuit seeking damages for harm allegedly done to the freshwater mussel population because of "unauthorized" drawdowns of Wixom Lake.
- **331.** On January 21, 2020, Nathan Gambill from the AG's Office emailed counsel for Boyce Hydro threatening litigation to recover damages and a court order requiring Boyce Hydro to restore the "millions of freshwater mussels" that the Attorney General's Office alleged were killed as a result of the Wixom Lake drawdown.

- 332. Mr. Gambill wrote that "[t]he State will seek natural resource damages, an order to restore the mussel populations and otherwise repair the environmental harms the drawdowns have caused, *and an injunction against any future unauthorized drawdowns*." (emphasis added).²⁴
- **333.** Mr. Gambill rejected all settlement offers and wrote that "this is essentially a business decision for the State why settle for \$200,000 if it can collect substantially more than that by getting a judgment, even taking the costs of litigation into account."
- **334.** After substantial back-and-forth with the AG's office, the FLTF allegedly offered to settle the State's purported claims for \$900,000, using money obtained through the local assessment district. Funds collected from the special assessment district were originally collected to finance the operation and repair of the Edenville Dam.
- 335. Mr. Gambill allegedly countered once again, stating that, "Boyce really needs to get into seven figures if it wants to get the state's attention."²⁵
- **336.** State Defendants refused to settle their alleged claims for harm to the freshwater mussel population, and the State moved forward with litigation seeking money damages from Boyce Hydro, which the State knew had long claimed an inability to finance the desperately needed dam repairs.
- **337.** On February 6, 2020, a meeting was held between the FLTF and EGLE staff, including Brian Rudolph, Joy Brooks, Luke Trumble, Angela Cleary, Helana Nelson, and Dan DeVaun.

https://www.detroitnews.com/story/news/local/michigan/2020/06/17/emails-state-boyce-haggled-over-mussel-lawsuit-since-january/3207245001/ (last visited March 18, 2024).

²⁵ *Id*.

- **338.** At the time of this meeting, engineering studies had been completed and the spillway capacity of the Edenville Dam had been confirmed as grossly deficient.
- **339.** EGLE engineer Luke Trumble, in coordination with a FLTF consultant, confirmed that "[t]he dam does not meet Part 315 hydraulic requirements."
- 340. EGLE also recognized that, even with the proposed "emergency gate hoist" installations, "the ½ PMF will still not be met."
- **341.** During the February 6 meeting, the repairs that EGLE identified as "emergency" repairs, included to the "wingwall and pier nose" and "gate hoists." EGLE confirmed that the construction of an auxiliary spillway would be necessary to bring the dam into compliance with Part 315 safety regulations.
- **342.** On May 1, 2020—shortly before the catastrophic collapse of the Edenville Dam—the AG's office filed a lawsuit, on behalf of "the People," EGLE, and DNR, demanding in part that the water levels on Wixom Lake be raised in order to protect the lives of mussels and freshwater wildlife.
- **343.** The State Defendants' lawsuit alleged that, "Defendants wrongfully exerted dominion over the freshwater mussels and caused their death, which denies and is inconsistent with the State's rights to them[.]"
- **344.** The basis for the lawsuit was that "[w]ithout authorization, Defendants dramatically lowered the level of Wixom Lake for an extended period in both 2018 and 2019 (Drawdowns), causing the death of thousands if not millions of freshwater mussels[.]"
- **345.** The lawsuit demanded millions of dollars in money damages and injunctive relief "requiring restoration of the Wixom Lake ecosystem ... [and] forbidding any future unauthorized Drawdown of Wixom Lake[.]"

346. State Defendants' affirmative, coercive conduct to effectuate elevated water levels in the face of known dangers is unconscionable and indefensible considering the dangerous condition of the Dam.

In April-May 2020, Defendants Intentionally Caused Increased Wixom Lake Levels, Causing the Direct, Catastrophic Flooding of Tens of Thousands of Downstream Properties

- **347.** On April 9, 2020, just weeks before the flood, EGLE authorized Boyce Hydro/FLTF to raise the water levels on Wixom Lake to dangerous levels, while violating statutory duties relating to dam safety and maintenance of inland lake levels. State Defendants applied strict conditions to the permit to ensure that water levels would increase, remain high, and prohibit future drawdowns.
- **348.** By authorizing increased water levels on Wixom Lake, State Defendants falsely conveyed to the operators and property holders throughout the affected Tittabawassee flood plain that the Dam was in safe, operable condition and that the increased summer lake levels abutting the Dam were safe.
- **349.** However, State Defendants knew that the Dam did not meet state safety standards for adequately impounding and passing floodwaters, the Dam was in a deteriorated condition, and that increased water levels posed a direct threat to the security of the Dam.
- 350. Through a March 9, 2020 letter submitted in conjunction with an application by the FLTF to substantially raise Wixom Lake, Spicer Group engineers wrote to EGLE that numerous repairs were needed to operate the dam safely. Particularly, the engineering report stated that "[t]he current gate hoists on the Edenville Dam are nearly 100 years old and do not meet present day standards. The gate hoists are a primary tool used to control the lake levels and pass flood flows during large runoff events." Spicer Group indicated that the emergency installation of new gate hoists could not begin until October 2020.

- **351.** The gates could not be operated in compliance with Part 315 dam safety standards.
- **352.** The spillway capacity of the Dam was grossly deficient to meet Part 315 dam safety standards.
- **353.** Yet, on or around April 15, 2020, the State authorized Wixom Lake to be raised by approximately 8 inches per day, until it reached the previously established summer level of 675.8 NGVD on or around May 3, 2020.
- 354. The raising of water levels was a state action under the circumstances. The State had repeatedly and unequivocally conveyed to the operators that any attempt to initiate or maintain lake level drawdowns in the interest of dam safety would be met with fines and liability—despite prior requests to lower lake levels to protect the Dam and conduct the necessary repairs, which the State knew had yet to be completed.
- 355. The timing of the spring refill was particularly dangerous given that late-April and May are historically high season for heavy rainfall precipitation and water runoff. The State Defendants knew that the Edenville Dam remained in grossly inadequate and increasingly dangerous condition, but intentionally caused increased Wixom Lake levels during the rainy season anyway.
- **356.** Just two weeks after State Defendants intentionally caused Wixom Lake levels to rise by 6 to 8 feet, and because of the intentionally increased water levels, disaster struck.
- **357.** The Edenville Dam's eastern spillway predictably failed during a rain event on May 19, 2020, when its grossly deficient and inadequate spillway capacity was overcome because of high waters.
- 358. A PMF determination was received prior to the Edenville Dam failure. It was determined, as State Defendants had previously calculated and recognized, that the PMF for the

Edenville Dam was overestimated and that the spillway capacity of the Dam could not meet state standards.

- **359.** The PMF for the Edenville Project was 80,900 cfs.
- **360.** Based on ratings curves conducted by EGLE and others well in advance of the Edenville Dam failure, the spillway capacity of the Edenville Dam was approximately 20,000 cfs, or roughly 25% of the PMF. Thus, the spillway capacity of the Edenville Dam was grossly violative of state and federal PMF standards, and the State knew it.
- 361. An "alternatives analysis" conducted by Ayres Associates in conjunction with the PMF determination demonstrated that the Dam failure event that occurred on May 19 was precisely the type of event which was likely to result from the gross spillway capacity deficiencies that existed. This study considered the "probable failure mode" and projected the following dam failure scenario: "The embankment is overtopped during an extreme flood event. This could result in significant erosion of the downstream slope leading to failure of the embankment and an uncontrolled release of the reservoir."
 - **362.** The spring rain event that occurred was less than a PMF event.
- **363.** Preliminary observations of Wixom Lake prior to the Edenville Dam failure indicated that the water levels were narrowly below the crest of the Dam at the time of its failure.

364. At approximately 5:45 p.m. on May 20, 2020, based on stills from videos of the events, it appears that a small amount of water breached the embankments of the Edenville dam. Then, the crest of the embankments of the dam began to crumble, creating a large bulge and



deformation:²⁶

²⁶ The still images are taken from a video posted at https://www.mlive.com/news/saginaw-bay-city/2020/05/video-shows-michigan-dam-break-as-it-happened-catastrophic-is-the-only-thing-i-can-call-it.html (last accessed March 18, 2024).

365. The embankment then rapidly collapsed in a landslide:



366. The full breach of the Edenville Dam followed within seconds:



367. Water quickly inundated and devastated the surrounding areas:²⁷



368. The power of water flowing after the Edenville Dam broke completely washed away a road bridge roughly a mile downriver and virtually emptied Wixom Lake, a 2,600-acre reservoir created by the dam, by the next morning.

369. One hour later, at approximately 6:50 p.m. on May 20, 2020, the power of the water also caused a breach at Sanford Dam due to inadequate spillways and the collapse of the Edenville Dam.

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²⁷ Still taken from https://www.youtube.com/watch?v=RQh7kIDvNLw (last accessed March 18, 2024).

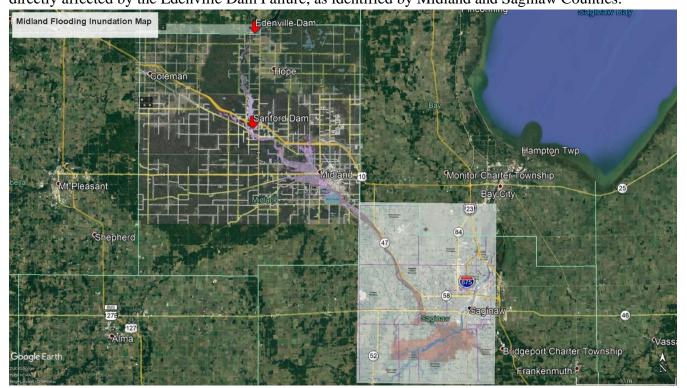
370. The following map illustrates the areas in which the City of Midland urged residents to evacuate. The shaded areas represent the initial evacuation area.



- **371.** According to the Midland County Hazard Mitigation Plan ("MCHMP") from Nov. 2018, the most vulnerable jurisdictions for dam failure are as follows, ranking highest to lowest: Edenville Township, Jerome Township, Village of Sanford, Lincoln Township, Homer Township, City of Midland, Midland Township, and Ingersoll Township.
- **372.** However, the effected flooding area extends well to the south of the City of Saginaw, and miles south of the convergence of the Tittabawassee and Shiawassee Rivers.
- 373. MCHMP defines dam failure as "the collapse or failure of an impoundment resulting in downstream flooding." It states that, "[d]am failures can result in loss of life and extensive property or natural resource damage for miles downstream from the dam. Failure of a dam does not only occur during flood events, which may cause overtopping of a dam. Failure can also result from poor operation, lack of maintenance and repair, and vandalism. Such failures can be catastrophic because they occur unexpectedly, with no time for evacuation."

- **374.** The flooding forced about 11,000 people to evacuate their homes in the Midland area, following what the National Weather Service characterized as the "catastrophic dam failures" at the Edenville Dam and the Sanford Dam.
- **375.** Homes were submerged throughout the affected area, including in the City of Midland where the water was so high that roofs of houses were barely visible in some locations.
- **376.** Based on the investigation of counsel, utilizing official flood inundation maps and the location of known flood victims, there are in excess of 10,000 households in the affected flood area.
- **377.** Many thousands of people and entities have suffered significant property damage, and other damages, for which State Defendants are responsible.

378. The shaded areas in the map below represent the verified flood inundation area directly affected by the Edenville Dam Failure, as identified by Midland and Saginaw Counties:²⁸



- **379.** Defendants knew that there was a substantial and unreasonable risk of dam failure at the Edenville Dam, and they knew that increased water levels directly abutting the Dam substantially increased the risk that such a failure would occur.
- **380.** State Defendants knew that the Edenville Dam was being operated in violation of state dam safety standards, yet took numerous affirmative actions to raise the lake levels anyway—going so far as to file litigation against the operator seeking seven figure damages because of "unauthorized drawdowns."
- **381.** The Tittabawassee River has long carried all excess waters flowing through the dams creating the Four Lakes, and Defendants knew that, in the sudden absence of the dams

²⁸ The content of this map derives from studies conducted by Midland and Saginaw County respectively, which are attached as **Exhibit 1** to this complaint in their original form.

impounding the lakes, many thousands of ascertainable downstream properties within the Tittabawassee Flood Plain would be overtaken by water.

- **382.** Defendants' intentional acts over the course of more than a year to cause increase water levels constituted a purposeful governmental action directly aimed at the properties of Plaintiffs and the Class, which were predictably overtaken by the glut of water when the dam failed during a foreseeable spring rain event that was far less than a PMF event.
- 383. Defendants' acts were a wrongful abuse of governmental authority that violated the State's affirmative duties under Part 307 and Part 315 and created an obvious danger to life and property that did not exist prior to Defendants' exercise of authority over the dam and its water levels.
- 384. These abuses of legitimate governmental authority were exacerbated by misleading statements and conduct, which unmistakably conveyed the false impression to the public and the Court authorizing the Part 307 Lake Level Order that State Defendants had taken the required steps to ensure that the water levels abutting the Dam were safe and that the Dam was compliant with state standards.
- **385.** The calculated act of raising the levels of Wixom Lake, impounded by a knowingly inadequate and defective dam that had been grossly maintained and repaired by Boyce Hydro for more than a decade, caused the catastrophic, but sadly predictable, failure of the Edenville Dam.
- **386.** It will take many years for residents to recover from the intentional and abusive actions of Defendants that caused unspeakable harm to their lives and properties. Plaintiffs have suffered damages, including, but not limited to, significant and universal declines in property values for the indefinite future, the total and/or indefinite losses to use and enjoyment of property,

permanent and/or indefinite losses to personal and real property, and expenses that resulted directly therefrom.

- 387. The failure of the Edenville Dam was a manmade creation, just like the lake it impounded. The failure was foreseeable, avoidable, and the result of intentional conduct by Defendants, which came at the tragic expense of the many communities so devastatingly harmed.
- 388. To add insult to injury, the FLTF intends to fund reconstruction of the dams by imposing special assessments upon property owners in the Four Lakes Special Assessment District—forcing property owners to incur a second level of costs. It expects the cost to exceed \$400 million.²⁹
- Further, after the FLTF's plan to coordinate with the State in order to take ownership and control of the dams and the water levels on Wixom Lake fell through, the FLTF began initiating formal condemnation proceedings to take ownership of the dams, the four lakes, and all the lake level and hydroelectric assets.

CLASS REPRESENTATIVES

- **390.** Plaintiffs restate each and every allegation in this complaint as if fully restated herein.
- 391. Each named Plaintiff below is a proposed Class Representative, acting on behalf of themselves and the many thousands similarly situated individuals and entities who held cognizable property interests within the Class Area and experienced property damages, loss of value, loss of use and enjoyment of property, and other monetary costs because of the Edenville Dam failure on May 19, 2020.

²⁹ See, e.g., https://www.four-lakes-taskforce-mi.com/updates/fact-sheet-positions-and-issues (last accessed March 18, 2024).

392. Only those individuals listed below are acting on behalf of the proposed Class in a representative capacity, as Class Representatives, and the Class Representatives hereby provide notice of this class action to State Defendants on behalf of themselves and all others similarly situated pursuant to MCR 3.501.

Plaintiff Robert Woods

- **393.** Plaintiff Robert Woods is a resident of Midland, Michigan and owns property at 3000 Valorie Lane, Midland, Michigan 48640.
- **394.** Mr. Woods resides in a residential neighborhood located to the north of the Tittabawassee River that is within the Class Area and was inundated with overland floodwaters because of the Edenville Dam failure.
- **395.** Mr. Woods' home is located approximately 17 miles to the southeast of the failed Edenville Dam.
- **396.** On or around the evening of May 19, 2020, Mr. Woods and his wife Linda were subjected to the Governor's emergency evacuation order and evacuated their home, leaving behind prized valuables and property and depriving them of the use and enjoyment of their property.
- **397.** As of May 23, 2020, Plaintiffs remained evacuated and were unable to habitat or use their home.
- **398.** They attempted to return to their home on Wednesday, May 20, but the water was too high into the street to permit access.
- **399.** On Thursday, May 21, they were finally able to get inside their home and discovered substantial property damage, including approximately 5 feet of water in their basement that had obviously invaded through the floor drains, causing damage to their home and numerous items of personal property located therein.

- **400.** Due to the severity of the damage and continuing risk posed by the flood waters, they were unable to remain in their home.
- **401.** The damage to Plaintiff's property was caused by overland flooding resulting from the Edenville Dam failure.
- **402.** As a direct and proximate cause of the Edenville Dam failure, Plaintiff sustained many thousands of dollars in property damages, and monetary costs directly resulting therefrom, in addition to many thousands of dollars of lost property value caused by the flooding of her home and neighborhood.
 - **403.** Plaintiff did not contribute to the damage incurred to his property.

Plaintiff Holly Johnson

- **404.** Plaintiff Holly Johnson is a resident of Saginaw, Michigan at 575 Adams Rd., Saginaw, Michigan 48609, where she resides with her husband Victor.
- **405.** Plaintiff resides in a residential neighborhood located to the west of the Tittabawassee River that was within the Water Intrusion and Evacuation Class Areas and inundated with overland floodwaters because of the Edenville Dam failure.
- **406.** Mrs. Johnson's home is located approximately 35 miles to the southeast of the failed Edenville Dam.
 - **407.** Plaintiff was forced to evacuate her home because of the Edenville Dam failure.
- **408.** Due to the flooding, Plaintiff remained evacuated and unable to habitate her home as of May 22, 2020.
- **409.** When the plaintiff returned to her home, she discovered that her entire finished basement was flooded, and water had reached the subfloor of the main story, with water at an estimated height of 9 feet.

- **410.** She discovered an extensive list of damages, including but not limited to the complete destruction of her H-Vac system, washer, dryer, couch, television, fully furnished living area, and many other real property damages and personal belongings. Her garage also sustained substantial overland flooding.
- **411.** As a direct and proximate cause of the Edenville Dam failure, Plaintiff sustained many thousands of dollars in property damages, and monetary costs directly resulting therefrom, in addition to many thousands of dollars of lost property value caused by the flooding of her home and neighborhood.
 - **412.** Plaintiff did not contribute to the damage incurred to her property.

Plaintiffs Christopher and Laura Forbes

- **413.** Plaintiffs Christopher Forbes and Laura Forbes, as homeowners in Sanford, watched helpless as overland floodwater rapidly overtook their property located at 301 N. Cedar Street, Sanford, MI 48567.
- **414.** Mr. and Mrs. Forbes' Sanford home is located approximately 16 miles from the failed Edenville Dam.
 - **415.** Plaintiffs were forced to evacuate their home because of the Edenville Dam failure.
- **416.** Soon thereafter, the water began entering their home, destroying walls, floors, windows, doors, furniture, office equipment and personal property. The Sanford house is no longer habitable and was demolished on May 30, 2020.
- **417.** As a direct and proximate cause of the Edenville Dam failure, Plaintiffs sustained many thousands of dollars in property damages, and monetary costs directly resulting therefrom, in addition to many thousands of dollars of lost property value caused by the flooding of their

home and neighborhood, including the near total destruction of their home and residential property value.

- **418.** Plaintiffs did not contribute to the damage incurred to their property.
- **419.** The images below depict the result of Defendant's actions and inactions and the nature of the taking:









Plaintiff Pleasant Beach Mobile Home Resort LLC

- **420.** Plaintiff Pleasant Beach Mobile Home Resort LLC ("Pleasant Beach") is a Michigan limited liability company with its principal place of business located at 4991 Wixom Dr., Beaverton, MI 48612. Plaintiff David Clarkson is the managing member of Pleasant Beach.
- **421.** Pleasant Beach is on the shores of Wixom Lake and rents RV lots, vacation cabins, RVs, and boat slips on the lake.
- **422.** On or around the evening of May 19, 2020, the Pleasant Beach grounds and cabins were flooded. Pleasant Beach lost power, water, and septic service for many days. Four of its nine cabins were flooded. Repairs are ongoing.
- **423.** Pleasant Beach was evacuated on or about May 19, 2020, and residents returned on or about May 20, 2020.
- **424.** The collapse of the Edenville Dam drained Wixom Lake, rendering Pleasant Beach's boat slips and position as a beach side park useless. Prior to the flooding, Pleasant Beach had a waiting list for its nine seasonal cabins and frequently reached capacity for its RV lots and boat slips. Pleasant Beach invested in additional lots and slips to accommodate this increase. But now that Wixom Lake is drained, there is little, if any, demand for its facilities.
- **425.** Pleasant Beach's damage was caused by overland flooding and the loss of Wixom Lake, resulting from the Edenville Dam failure. Plaintiff did not contribute to the damage incurred to its property.
- **426.** As a direct and proximate cause of the Edenville Dam failure, Plaintiff sustained many thousands of dollars in property damages and monetary costs directly resulting therefrom, in addition to many thousands of dollars of lost property value caused by the flooding of its property.

Plaintiffs Carol and David Clarkson

- **427.** Plaintiffs Carol and David Clarkson are residents of Beaverton, Michigan and own property located at 4991 Wixom Dr., Beaverton, MI 48612.
- **428.** The Clarksons own and operate Pleasant Beach and live in the owners' cabin on that property.
- **429.** On or around the evening of May 19, 2020, the Pleasant Beach grounds and cabins were flooded. The Clarksons sustained power failure and lost water and septic service. They were forced to evacuate but, because they had nowhere else to go and the hotels were fully booked, they resorted to sleeping in their car. They returned to their home the following day but suffered without water, power, and septic for approximately three days.
- **430.** The Clarksons chose to purchase property, run their business, and live on Wixom Lake so as to enjoy the lake-front atmosphere and amenities, including boating and other recreation. The collapse of the Edenville Dam drained Wixom Lake, rendering their proximity to and access to the lake virtually valueless.
- **431.** The Clarkson's damages were caused by overland flooding and the loss of Wixom Lake, resulting from the Edenville Dam failure. Plaintiffs did not contribute to the damage incurred to their property.
- **432.** As a direct and proximate cause of the Edenville Dam failure, Plaintiffs sustained many thousands of dollars in monetary costs directly resulting therefrom, in addition to many thousands of dollars of lost property value caused by the flooding of their property.

Plaintiff Brian Matthias

433. Plaintiff Brian Matthias is a resident of Hope, Michigan and owns property at 5163 Ostlund Dr., Hope, MI 48628. Mr. Matthias's property is located directly off of Wixom Lake.

- **434.** On or around the evening of May 19, 2020, Mr. Matthias's property was inundated with floodwaters. Water in his home reached three feet in height, destroying everything, including his furnishings, appliances, tools, personal belongings, and riding lawnmower.
- 435. Plaintiff was forced to evacuate his home because of the Edenville Dam failure. Having nowhere else to go, Plaintiff purchased a camper and lived in it for 2.5 months while his home remained uninhabitable. He had to tear out the interior of his home to the floor joists and four feet up the walls. He installed new flooring and subflooring, drywall, air conditioning, heating, paint, carpet, furniture, and cabinetry.
- **436.** Mr. Matthias chose to purchase property and live on Wixom Lake so as to enjoy the lake-front atmosphere and amenities, including boating and other recreation. The collapse of the Edenville Dam drained Wixom Lake, rendering his proximity to and access to the lake virtually valueless.
- **437.** Plaintiff's damage was caused by overland flooding and the loss of Wixom Lake, resulting from the Edenville Dam failure. Plaintiff did not contribute to the damage incurred to his property.
- **438.** As a direct and proximate cause of the Edenville Dam failure, Plaintiff sustained many thousands of dollars in property damages and monetary costs directly resulting therefrom, in addition to many thousands of dollars of lost property value caused by the flooding of his property.

Plaintiffs Patrick and Patricia Pangle

439. Plaintiffs Patrick and Patricia Pangle are residents of Beaverton, Michigan and own property at 3722 South Lake Dr., Beaverton, MI 48612. The Pangles' property is located directly on Wixom Lake.

- **440.** On or around the evening of May 19, 2020, the Pangles' property (located in an evacuation zone) was inundated with floodwaters, damaging the yard, seawall, and the boat hoist.
- **441.** The Pangles chose to purchase property and live on Wixom Lake so as to enjoy the lake-front atmosphere and amenities, including boating and other recreation. This is how they planned to spend their retirement with each other, their children, and their grandchildren. The collapse of the Edenville Dam drained Wixom Lake, rendering their proximity to and access to the lake virtually valueless.
- **442.** Plaintiffs' damage was caused by overland flooding and the loss of Wixom Lake, resulting from the Edenville Dam failure. Plaintiffs did not contribute to the damage incurred to their property.
- **443.** As a direct and proximate cause of the Edenville Dam failure, Plaintiffs sustained many thousands of dollars in property damages and monetary costs directly resulting therefrom, in addition to many thousands of dollars of lost property value caused by the flooding of their property.

Plaintiffs Ronald and Sandra Streeter

- **444.** Plaintiffs Ronald and Sandra Streeter are residents of Hope, Michigan and own property at 5300 Heron Cove, Beaverton, MI 48612. The Streeters' property is located directly on Wixom Lake.
- **445.** On or around the evening of May 19, 2020, the Streeters' property was inundated with floodwaters. Water in their home reached 3.5 feet in height, destroying the floors, walls, cabinets, water heater, furnace, appliances, personal property, and furniture.
- **446.** To begin repairing the house, the Streeters were forced to tear it down to the floor joists and four feet up the walls.

- **447.** Plaintiffs were forced to evacuate their home because of the Edenville Dam failure. Plaintiffs had to relocate next door and stay in a cabin for four months while their home remained uninhabitable.
- **448.** The Streeters chose to purchase property and live on Wixom Lake so as to enjoy the lake-front atmosphere and amenities, including boating and other recreation. The collapse of the Edenville Dam drained Wixom Lake, rendering their proximity to and access to the lake virtually valueless.
- **449.** Plaintiffs' damage was caused by overland flooding and the loss of Wixom Lake, resulting from the Edenville Dam failure. Plaintiffs did not contribute to the damage incurred to their property.
- **450.** As a direct and proximate cause of the Edenville Dam failure, Plaintiffs sustained many thousands of dollars in property damages and monetary costs directly resulting therefrom, in addition to many thousands of dollars of lost property value caused by the flooding of their property.

Plaintiff Jared Nickel, Mid Michigan Pressure Cleaning, LLC and Mid Michigan Window Cleaning & Powerwashing, LLC, d/b/a Mid Michigan Carpet Cleaning

- **451.** Plaintiff Jared Nickel is a resident of Beaverton, Michigan, residing at 5300 Heron Cove, Beaverton, MI 48612.
- **452.** Plaintiff Nickel also owns and operates Mid Michigan Pressure Cleaning, LLC and Mid Michigan Window Cleaning & Powerwashing, LLC d/b/a Mid Michigan Carpet Cleaning out of the property located at 5300 Heron Cove, Beaverton, MI 48612.
- **453.** Plaintiffs' home is located in a residential neighborhood located on a natural cove, which drains into the Tittabawassee River approximately ³/₄ mile to the south of the residence, that was within the Class Area and inundated with overland floodwaters as result of the inadequate

management of the flow of the water by Defendants with the concurrent failure of the Edenville Dam.

- **454.** Plaintiffs' home is located approximately four miles to the northeast of the failed Edenville Dam; however, due to the road closure, travel time is increased to 13.1 miles to drive to their home.
- **455.** Plaintiffs were fortunately not forced to evacuate their home because of the Edenville Dam failure.
- **456.** Plaintiffs home was flooded, including garage, pole barn, and enclosed trailer full of collectibles.
- **457.** The flood waters also caused damage to Mr. Nickel's business equipment, including heavy machinery.
- **458.** Mr. Nickel also suffered an interruption in operating his business as a result of the devastation to his property, business equipment, and overall destruction of the surrounding areas.
- **459.** As of this filing, Plaintiffs have been working on cutting out the wet insulation, walls, and flooring, and, in addition, the contents of their home and garage were ruined, with the collectibles located in the enclosed trailer being completely destroyed.
- **460.** As a direct and proximate cause of the Edenville Dam failure, Plaintiffs sustained many thousands of dollars in property damages, and monetary costs directly resulting therefrom, in addition to many thousands of dollars of lost property value caused by the flooding of their home and neighborhood.
 - **461.** Plaintiffs did not contribute to the damage incurred to their property.

Plaintiffs Julie Van Ameyde and John Smilnak

- **462.** Plaintiffs Julie Van Ameyde and John Smilnak are husband and wife and are currently residents of Northville, Michigan, at 48920 Running Trout Lane, Northville, MI 48168.
- **463.** Plaintiffs have a second home, which is a lake home, located at 5486 Oakridge Drive, Beaverton, MI 48612, where they resided 7 to ten months out of the year.
- **464.** Plaintiffs' second home is located in a residential neighborhood located off the Tittabawassee River, just slightly west of Wixom Lake that was within the Class Area and inundated with overland floodwaters because of the Edenville Dam failure.
- **465.** Plaintiffs' home is located approximately 4.6 miles to the northwest of the failed Edenville Dam.
 - **466.** Plaintiffs were forced to evacuate their home because of the Edenville Dam failure.
- **467.** Due to the flooding, Plaintiffs remained evacuated and unable to inhabit their home as of May 22, 2020.
- **468.** Plaintiffs returned to their home and discovered that their entire home was flooded to the ceiling, with water at an estimated height of 6-8 feet.
- **469.** As of this filing, Plaintiffs have discovered that their reconstruction will cost approximately \$106,210.00, to-date, and that, in addition, all contents of their home and garage were completely destroyed.
- **470.** As a direct and proximate cause of the Edenville Dam failure, Plaintiffs sustained many thousands of dollars in property damages, and monetary costs directly resulting therefrom, in addition to many thousands of dollars of lost property value caused by the flooding of their home and neighborhood.
 - **471.** Plaintiffs did not contribute to the damage incurred to their property.

Plaintiff Randall and Kim Mier

- **472.** Plaintiffs are husband and wife and are currently residents of Hope, Michigan, at 5114 Middle Rd., Hope, MI 49628.
 - **473.** Plaintiffs live on Wixom Lake with 500 feet of lake frontage and sandy beach area.
 - **474.** Plaintiffs are year-round lake residents.
- **475.** Plaintiffs' home is located in a residential neighborhood located on the Tittabawassee River, north of Wixom Lake, that was within the Class Area and inundated with overland floodwaters because of the Edenville Dam failure.
- **476.** Plaintiffs' home is located approximately 6.7 miles to the northwest of the failed Edenville Dam.
- **477.** Plaintiffs were fortunately not forced to evacuate their home because of the Edenville Dam failure.
- **478.** Plaintiffs' block crawl space was full to the top, which storage space contained all of their stored personal items.
 - **479.** All of the Styrofoam and insulation was wet and destroyed.
- **480.** As of this filing, Plaintiffs have spent an inordinate amount of time drying and cleaning the crawl space, replacing Styrofoam and insulation on their own.
 - **481.** Plaintiffs lost their outdoor furniture, including four wooden chairs and a tiki bar.
- **482.** Ironically, the Plaintiffs purchased a new pontoon boat 11 days prior to the Edenville Dam failure.
- **483.** There was no damage to the Plaintiffs' boat itself; however, the boat hoist has been destroyed.

- **484.** As a direct and proximate cause of the Edenville Dam failure, Plaintiffs sustained many thousands of dollars in property damages, and monetary costs directly resulting therefrom, in addition to many thousands of dollars of lost property value caused by the flooding of their home and neighborhood.
 - **485.** Plaintiffs did not contribute to the damage incurred to their property.

CLASS ALLEGATIONS

486. Plaintiffs bring this action individually and on behalf of all persons as the Court may determine to be appropriate for class certification, pursuant to MCR 3.501. Plaintiffs seek to represent the following Classes of persons preliminarily defined as:

All individuals or entities who (1) owned or rented real property interests within one (1) mile of the outer boundary of the flooding inundation zone determined by Midland and Saginaw Counties (as set forth in **Exhibit 1**) as of May 19-May 22, 2020; and/or (2) all individuals or entities who owned or rented real property interests, including but not limited to backlots and lakefront easements, on or around Wixom Lake, Sanford Lake, or their connected tributaries prior to May 19, 2020.

Expressly excluded from this Class are:

- a) all persons or entities who have individually been named as plaintiffs in any other litigation against the State of Michigan, relating to this matter, in Michigan Court of Claims that are not being pursued on a class basis under MCR 3.501, specifically including Case Nos 20-000094-MM, 20-000102-MM, 20-000111, 20-000112, 20-000118, 20-000121-MM, 20-000140, 20-000151, 20-000230, 20-000232, 20-000233, 20-000237, 20-000241, 20-000235, 20-000239, 20-000240, 20-000257, 20-000260, 20-000262, 23-000074, and 23-000076;
- b) all persons who are employees, directors, officers, or agents of either the EGLE-WR-DS Division or a division of the MDNR that was directly involved in the decision to authorize and enforce increased water levels abutting the Edenville Dam;
- c) governmental entities;
- d) the Court, the Court's immediate family, and Court staff.

The definitional boundaries stated above are subject to modification as discovery will further disclose and clarify the location of all class members and the affected flood area. Plaintiffs reserve the right to propose one or more sub-classes if discovery reveals that such subclasses are appropriate.

- **487.** The reason for not joining all potential class members as Plaintiffs is that, upon information and belief, there are in excess of 10,000 potential plaintiffs, thereby making it impractical to bring them each before the Court individually.
- **488.** There are many persons who have been similarly affected, and the question to be determined is one of common and general interest to many persons constituting the class to which Plaintiffs belong, and is so numerous as to make it impracticable to bring them all before the Court, for which reason Plaintiffs initiate this litigation for all persons similarly situated pursuant to Michigan Court Rule 3.501.
- **489.** Issues and questions of law and fact common to the members of the Class predominate over questions affecting individual members and the claims of Plaintiffs, are typical of the claims of the Class.
- **490.** The maintenance of this litigation as a Class Action will be superior to other methods of adjudication in promoting the convenient administration of justice.
- **491.** Defendants have acted or failed to act on grounds generally applicable to all Plaintiffs, necessitating declaratory and injunctive relief for the Class.
- **492.** Plaintiffs and the experienced above-captioned counsel will fairly and adequately assert and protect the interests of the Class.
- **493.** Dubin Law, PLLC and Liddle Sheets Coulson, PC (Dubin and Liddle) have successfully practiced environmental class litigation under Michigan Law on behalf of flood

victims for almost 30 years, with a combined experience of more than 50 years among its five outstanding attorneys. Dubin and Liddle have successfully litigated complex class actions on behalf of more than 50,000 flooding victims throughout the Midwest over the course of decades. Dubin and Liddle are among the very few law firms in the United States that maintain consistent, successful legal practices protecting the rights of flooding victims whose property has been damaged by overland flooding and sewage backup events. The lawyers at Dubin and Liddle have been involved in virtually every major flooding case in the State of Michigan over the past 20 years. Dubin's and Liddle's attorneys have the experience and technical knowledge about the public and private infrastructure that contributes to flooding events, and the firms are unmatched in their knowledge and expertise regarding proof of damages in flooding cases. Dubin and Liddle have litigated and successfully obtained highly beneficial results for hundreds of thousands of Michigan residents in many dozens of complex class cases. The firms have the outstanding staff and resources necessary to get the job done on a class basis. Dubin's and Liddle's practices are exclusively class litigation, and the lawyers of each firm have almost exclusively litigated property damage cases for over 20 years. Dubin and Liddle are the best-positioned firms in the country to take on this important, complex class case on behalf of the devastated residents of Mid-Michigan.

494. Founded in 2019, but built upon more than five decades of collective class action experience, Fegan Scott LLC ("FeganScott") is a nationwide class action law firm dedicated to helping victims of negligence, fraud, abuse, constitutional violations, and discrimination. Its founding partner and Managing Member, Beth Fegan, is a graduate of Michigan State University and has more than two decades of experience in complex class action litigation. FeganScott attorneys have litigated numerous environmental and constitutional torts around the country, involving groundwater contamination, drinking water contamination, and air pollution, and are

well-situated to leverage their significant experience and excellent staff and resources to prosecute this important, time-sensitive case on behalf of Mid-Michigan's residents.

495. Sommers Schwartz has decades of complex litigation and trial experience, and its lawyers have been appointed to leadership positions in federal and state court class actions throughout the country. Jason Thompson has a wide breadth of experience in class leadership. He has been appointed as class counsel and to MDL leadership positions in cases involving antitrust, overtime pay, insurance coverage, environmental pollution, and consumer protection and has litigated several successful appeals on class action issues in the Sixth Circuit. Jason Thompson has sued environmental polluters such as United States Steel Corporation and ATOFINA Chemicals, and has published legal articles on environmental issues, including a Michigan State Bar Journal article on environmental damages and a law review article on leaking underground storage tanks.

COUNT I

Mich. Const. 1963, art. 10 § 2 – Inverse Condemnation

- **496.** Plaintiffs restate all allegations in the complaint as if fully stated herein.
- **497.** Under Art. 10, § 2 of the Michigan Constitution, "[p]rivate property shall not be taken for public use without just compensation."
- **498.** State Defendants took calculated, intentional, and affirmative actions to cause increased water levels on the Wixom Lake reservoir to knowingly dangerous levels abutting the Edenville Dam, which it knew was grossly deficient and inadequate to withstand predictable and foreseeable floodwaters at the inland lake levels supported and required by State Defendants.
 - **499.** State Defendants, through affirmative acts:
 - 1) Made knowingly false, deceptive, and misleading statements downplaying the condition of the Dam through their initial "cursory" inspection;
 - 2) Financed, supported, and coordinated Midland and Gladwin Counties'

- acquisition of the Dam, a Part 307 Lake Level order to immediately raise water levels on Wixom Lake to dangerous levels, and a plan from the Counties that pushed necessary repairs many years into the future;
- 3) Set required preconditions for the Part 307 Lake Level Order;
- 4) Falsely conveyed to the Court through the Part 307 proceeding that the Edenville Dam presented no unique or significant safety concerns that were relevant to the Court's determination and that the lake level order represented a safe, harmonious status quo;
- 5) Required raising the water levels through the Part 307 proceeding without having conducted any safety inspection to verify or determine the safety of those levels, as required under Part 307 following a report of conditions that endanger a dam;
- Provided a handshake assurance to the operators and the Counties prior to the Part 307 proceeding that the State would permit increased water levels, without having first determined the safety of the proposed lake levels;
- 7) Authorized and signed the Lake Level Order increasing lake levels, with no evidence that such levels were safe and substantial evidence that they were not;
- 8) Prevented proposed lake level drawdowns in fall 2019 to protect the dam and allow for repairs, with full knowledge that emergency repairs were necessary and that the Dam was in a highly dangerous condition;
- 9) Failed to communicate urgent information regarding dam safety to the public, the counties, or the Part 307 Court after receiving numerous reports that the Edenville Dam was not capable of passing foreseeable floodwaters and posed a risk to life and property;
- 10) Conducted numerous mussel surveys to build a case against the Dam operators in order to seek an injunction forcing increased lake levels abutting the Dam;
- 11) Made numerous communications threatening pretextual litigation and demanding seven figures in money damages because of lake level drawdowns, despite clear knowledge that the Dam could not meet state safety standards for passing excess floodwaters;
- 12) Initiated civil litigation against the Edenville Dam operators, seeking seven figures in money damages for "unauthorized drawdowns" and an injunction requiring increased water levels;

- 13) Intentionally chose to discard affirmative statutory duties under Part 307 and Part 315 of NREPA, including by refusing to conduct a safety inspection and refusing to issue required emergency orders after definitively learning of conditions that threatened the integrity of the Dam; and
- 14) Misled the public on the safety of the Edenville Dam by the repeated issuance of permits authorizing increased water levels on Wixom Lake, after receiving numerous reports confirming that such levels were unsafe.
- **500.** The State Defendants' affirmative actions were directed at the properties of Plaintiffs and the Class, and such Defendants knew Plaintiffs and the Class were certain to have their property taken, damaged, and/or values diminished in the event of a dam failure.
- **501.** The State Defendants' intentional acts in causing increased water levels on Wixom Lake were for the purpose and benefit of the public, including but not limited to, public recreation, the transfer of dam operation and ownership to a public entity, and/or the preservation of purported natural resources.
- **502.** Defendants' acts pursuant to such purported public interests were knowingly taken at the great risk and detriment of Plaintiffs and the Class, whose properties were, and were certain to be, in the event of a dam failure at the Edenville Project.
 - **503.** Defendants' intentional acts were an abuse of legitimate governmental authority.
- but not limited to: (1) causing water levels to be increased to dangerous levels abutting a knowingly defective and inadequate dam; (2) violating affirmative statutory duties to issue required orders under Part 307 and Part 315 of the NREPA after receiving numerous reports that the Edenville Dam was unsafe and required maintenance, repairs, and improvements were needed; (3) making misleading assertions and/or material omissions before, during, and after the Part 307 proceedings setting the Wixom Lake levels; (4) abdicating mandatory statutory responsibilities and instead

deferring to the FLTF and Spicer Group with respect to dam safety and plans to conduct necessary maintenance and repairs on the knowingly dangerous dam; (5) wrongfully denying the operators' requests to drawdown Wixom Lake levels in the interest of dam safety and maintenance after receiving specific reports that the operators were concerned about risks to downstream life and property; (6) authorizing lake levels to be increased in Spring 2020, despite definitively confirming that the Edenville Dam could not adequately pass foreseeable floodwaters and that increased water levels threatened the integrity of the dam; (7) threatening to impose millions of dollars of liability on the operators if they refused to increase lake levels; (8) taking constructive control of water levels on Wixom Lake while violating statutory duties to issue appropriate orders under Part 307 and 315 to protect dam safety; (9) refusing to seek a revised Part 307 Lake Level Order from the Midland County Circuit Court, or even inform the Court regarding urgent developments, after definitively confirming the Edenville Dam's dangerous condition and inadequate spillway capacity; and (10) additional abusive conduct to be determined through discovery.

- **505.** Defendants' abusive and affirmative actions substantially caused the Edenville Dam to fail and constituted a de facto governmental taking without just compensation, in violation of the Michigan Constitution.
- **506.** Plaintiffs and the Class experienced diminution in the value of their property as a result of the Edenville Dam failure.
- **507.** Plaintiffs and the Class experienced loss of use and enjoyment of their property as a result of the Edenville Dam failure.
- **508.** Plaintiffs and the Class have experienced a loss of access to their property as a result of the Edenville Dam failure.

- **509.** Plaintiffs and the Class have experienced physical real property losses, destruction, and other damages and real and personal property as a result of the Edenville Dam failure, including reduction in property value.
- **510.** Plaintiffs and the Class have experienced economic losses and damages associated with remediating the damages suffered as a result of the Edenville Dam failure.
- **511.** Defendants have failed to compensate Plaintiffs and the Class for the losses that resulted from the improper taking of their property.
- **512.** Plaintiffs and the Class have suffered special damages that are different in kind than the harm suffered by similarly situated residents living in an around a flood plain protected by dams.
- **513.** Defendants' intentional actions were a substantial cause of the aforementioned damages suffered by Plaintiffs and the Class.

RELIEF REQUESTED

WHEREFORE, Plaintiffs request that the Court:

- A. Certify the proposed Class, appoint Plaintiffs as Class Representatives, and appoint the above-captioned legal counsel as Class Counsel;
- B. Declare Defendants' conduct unconstitutional under Art. 10, § 2 of the Michigan Constitution;
- C. Declare Defendants liable to Plaintiffs in an amount well in excess of \$1,000.00 for damages, including but not limited to:
 - i. Diminution of property values;
 - ii. Physical property damage and/or destruction;
 - iii. Loss of use and enjoyment of property;

- iv. Loss of access to property;
- v. Economic losses resulting from the physical damages to real and personal property;
- vi. Other damages that may be available under law and/or determined through discovery.
- D. Order Defendants liable for injunctive relief, including, but not limited to, paying to fix the damages on and around Plaintiffs' property and financing the construction of modern dams that meet FERC standards for withstanding a PMF;
- E. Order Defendants liable to the Plaintiffs for an award of punitive damages;
- F. Award Plaintiffs all costs and attorney fees which resulted from the initiation and prosecution of this litigation;
- G. Award Plaintiffs such other relief as this Court deems just and equitable under the circumstances.

Respectfully submitted,

Case No. 20-000103-MM

/s/ Jason Thompson (w/consent)
Jason J. Thompson (P47184)
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Date: March 22, 2024

CONSOLIDATED AMENDED COMPLAINT EXHIBIT 1

