# STATE OF MICHIGAN COURT OF CLAIMS

DAVID KRIEGER, et al.,

Plaintiffs.

V

Case Nos. 20-00094-MM; 20-000102-MM; 20-000103-MM; 20-000111-MM; 20-000112-MZ; 20-000116-MM; 20-000118-MM; 20-000121-MM; 20-000151-MM; 20-000156-MM; 20-000230-MM; 20-000232-MZ; 20-000233-MM; 20-000235-MM; 20-000236-MM; 20-000237-MM; 20-000239-MM; 20-000240-MZ; 20-000241-MM; 20-000245-MM; 20-000246-MM; 20-000257-MM; 20-000260-MM; 20-000262-MM; 23-000073-MM; 23-000074-MZ; 23-000076-MM

MICHIGAN DEPARTMENT OF ENVIRONMENT, GREAT LAKES, AND ENERGY, et al.,

Defendants.

Hon. James Robert Redford

## OPINION AND ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY DISPOSITION

On June 20, 2025, defendants Michigan Department of Environment, Great Lakes, and Energy, and Michigan Department of Natural Resources (collectively, "EGLE") moved for summary disposition under MCR 2.116(C)(10). For the reasons explained below, defendants' motion is DENIED.

#### I. BACKGROUND

This consolidated action was filed on behalf of approximately 2,000 persons and entities who experienced significant property damage when the Edenville Dam failed on May 19, 2020. This Court denied EGLE's motion for summary disposition under MCR 2.116(C)(8) and allowed plaintiffs to proceed on their inverse condemnation claim. The Court of Appeals affirmed, describing in a published opinion the underlying facts as follows:

The Edenville Dam was built in 1924 to hold back water from the Tittabawassee and Tobacco Rivers. The dam formed Wixom Lake, crossing portions of Midland County and Gladwin County. Boyce Hydro Power, LLC (Boyce), a private company, purchased the Edenville Dam in 2004. Boyce acquired a license from the Federal Energy Regulatory Commission (FERC) to operate the dam to generate hydroelectric power. Boyce had a long history of noncompliance with regulatory requests from FERC to upgrade the dam. Federal regulators warned Boyce that the dam was not structurally adequate and that its spillway capacity—"the maximum outflow flood which a dam can safely pass"—was inadequate in the event of a "Probable Maximum Flood" (PMF). Fixing the dam, regulators told Boyce, was necessary "to protect life, limb, and property." After years of unaddressed regulatory violations, FERC revoked Boyce's federal license in September 2018.

Upon revocation, the Edenville Dam fell under the oversight of state agencies: EGLE and the Department of Natural Resources (DNR). Plaintiffs alleged that, within nine days of the license revocation, Michigan inspectors conducted a cursory inspection of the dam and determined that it was in fair structural condition. In January 2019, an entity known as the "Four Lakes Task Force" [(FLTF)]—having been delegated authority by Midland and Gladwin Counties—petitioned in circuit court for an order establishing a legal water level for Wixom Lake. The Midland Circuit Court granted the petition in mid-2019, setting the lake level at the levels previously required by FERC. Around this time, the Four Lakes Task Force began the process of acquiring the Edenville Dam from Boyce. According to plaintiffs, civil engineering reports financed by the state of Michigan confirmed that the Edenville Dam lacked adequate spillway capacity and needed significant repairs to meet EGLE safety requirements.

In November 2019, EGLE rejected Boyce's request for a "drawdown"—a lowering of the lake level—purportedly out of concern about harm to aquatic life and other environmental impacts. Boyce lowered the lake level anyway, and EGLE threatened legal action against Boyce over the unapproved drawdown. Then in April 2020, EGLE issued a permit to Boyce to raise the lake water levels and, according to plaintiffs, conditioned the permit on Boyce maintaining high water levels without further drawdowns. . . .

On May 19, 2020, concerns about the Edenville Dam's inadequate spillway came to fruition. Amid heavy rainfall, the dam failed. Floodwaters moved downstream over Sanford Dam, which also failed. Thousands of residents in nearby towns were forced to evacuate to seek safe shelter. The flooding caused extensive damage and destruction to homes and businesses in surrounding communities. [Krieger v Dep't of Environment, Great Lakes, & Energy, 348 Mich App 156, 164-166; 17 NW3d 700 (2023), lv denied 513 Mich 951; 998 NW2d 212 (2023).]

Plaintiffs' sole claim is that of inverse condemnation. "Inverse condemnation is a 'cause of action against a governmental defendant to recover the value of property which has been taken . . . even though no formal exercise of the power of eminent domain has been attempted by the taking agency." *Krieger*, 348 Mich App at 182, quoting *Mays v Governor*, 506 Mich 157, 173; 954 NW2d 139 (2020) (opinion by Bernstein, J.). While "[n]o precise formula" exists for this claim, plaintiffs must prove that defendants "abused [their] legitimate powers in affirmative actions directly aimed at [plaintiffs'] property" and that such actions were a "substantial cause of the decline of [their] property value." *Hinojosa v Dep't of Natural Resources*, 263 Mich App 537, 548-549; 688 NW2d 550 (2004). Following this Court's Order of Bifurcation issued October 4, 2024, the only question in this stage of litigation is whether EGLE is liable under the theory of inverse condemnation. If plaintiffs prevail at this stage, the proceedings will continue to adjudicate damages.

This is EGLE's third motion for summary disposition following the Court of Appeals' September 7, 2023 opinion. The first motion was filed on June 7, 2024, and in it, EGLE sought dismissal of several plaintiffs who allegedly failed to comply with the notice, verification, and other filing requirements of the Court of Claims Act, MCL 600.6401, et seq. (COCA). EGLE's motion was granted in part, denied in part, per opinion and order issued October 23, 2024. The opinion and order includes exhibits categorizing named plaintiffs by apparent deficiencies with respect to their compliance with the COCA and provides the parties the opportunity to respond

with documentation or argument demonstrating each named plaintiff's compliance with the COCA. A final determination as to which of the named plaintiffs have now demonstrated compliance has been held in abeyance, per order dated July 10, 2025, through the liability phase of this proceeding.

EGLE's second motion for summary disposition sought dismissal under MCR 2.116(C)(10) before the close of discovery, on the grounds that plaintiffs' claims lack factual and legal support. This Court denied this motion per order dated May 12, 2025, for the reasons stated on the record. Recognizing that summary disposition under MCR 2.116(C)(10) is generally disfavored before the close of discovery, this Court found that plaintiffs presented sufficient factual support for their inverse condemnation claim that, when viewed in a light most favorable to plaintiffs as the nonmoving party, created genuine questions of material fact preventing a judgment in EGLE's favor as a matter of law. While this Court identified specific items in the record that supported this genuine question of fact, by doing so, it did not limit the scope of this matter. The question for trial remains whether plaintiffs can prove the elements of their inverse condemnation claim by a preponderance of evidence, and EGLE may present whatever admissible evidence they wish to contradict plaintiffs' position.

EGLE's current motion seeks summary disposition under MCR 2.116(C)(10) now that discovery has closed. EGLE claims that the Court of Appeals and this Court "simplified this case" by confirming that negligence is not the applicable standard. Rather, EGLE alleges that "[p]laintiffs must present specific, admissible evidence to support the allegations highlighted by the Court of Appeals: that Defendants operationally controlled the dam, forced Boyce Hydro to return Wixom Lake to its normal level even though they knew doing so would cause the dam to

fail and then lied to the public about it." According to EGLE, "[t]he evidence in this case does not support those outlandish and offensive allegations."

Plaintiffs disagree. They assert neither operational control nor concealment are required elements of their inverse condemnation claim. The parties appear to generally agree the Edenville Dam was owned and operated by a private corporation at the time of its failure. Plaintiffs assert that EGLE worked "hand-in-hand with the Four Lakes Task Force, Boyce, and Spicer Group to direct whether the dam was safe for continued operation, advising, and dictating whether water levels could be raised or lowered, threatening, and initiating enforcement actions to force Boyce to act and, ultimately, authorizing the raising of water levels after determining that the dam does not meet the State's minimum safety requirement of ½ PMF." Plaintiffs claim that EGLE's Dam Safety Unit "directly provided technical assistance and edits to the proposed circuit court lake level order that would raise the Wixom Lake levels." Plaintiffs also point to an April 17, 2019 e-mail, in which EGLE's engineer reported that EGLE "would not object to normal operation of the dam until spillway capacity can be confirmed utilizing best available information and most recent analyses. In the meantime, monitoring during high flows, especially during flow event approaching ½ PMF, is imperative." EGLE was also actively working with the FLTF, Boyce, and the Spicer Group to develop a plan for addressing the known deficiencies.

Plaintiffs allege that EGLE took the affirmative act of authorizing Boyce to raise the water levels knowing that the Edenville Dam did not satisfy the state's minimum safety requirements (i.e., ½ PMF), that it was "not safe, structurally sound or hydrologically adequate for safe

<sup>&</sup>lt;sup>1</sup> "PMF" is the acronym for probable maximum flood.

operations." Plaintiffs assert that EGLE had authority to order the water level in Wixom Lake to be lowered to run-of-the-river level, yet in April 2020, it issued a permit authorizing the raising of the water levels. Plaintiffs point to a September 18, 2018 e-mail from Boyce to EGLE expressing urgency in scheduling the inspection of the dam, as well as a Spicer Group report highlighting the lack of spillway capacity and its classification as a "high hazard" dam. Plaintiffs' retained expert, William D. Sturtevant, P.E., has testified about this as well, both in his deposition and before the Court at an evidentiary hearing on September 16, 2025. Sturtevant stated that FERC's revocation of the license should have raised a red flag for EGLE as to the safety of the dam.

With respect to concealment, plaintiffs assert that this is not a required element of an inverse condemnation claim. They also argue that the record supports there was concealment because EGLE's engineer visually inspected the dam and determined it was in "fair structural condition," when in fact, the dam's gates were not fully operable and it lacked adequate spillway capacity. In making this assertion, plaintiffs point out that it is uncontroverted that the Edenville Dam is a "high hazard potential dam" because of its proximity to residences, roadways, and other developments. MCL 324.31503(11).

During the evidentiary hearing, Sturtevant testified that the lack of adequate spillway capacity was a risk factor that left the Edenville Dam vulnerable to the embankment failure that occurred here. He also testified that it is unusual for FERC to revoke a license and that should have prompted EGLE to use its authority under MCR 324.31519 to order Boyce to lower the dam to run-of-the-river operation until the full spillway capacity was restored.

Plaintiffs argue that instead of invoking its authority under this provision, EGLE denied Boyce's permit for a winter drawdown and in December 2019, issued a notice of enforcement

action against Boyce upon learning that Boyce drew down the winter water level without EGLE's authorization.

Plaintiffs likewise point out that in April 2020, approximately one month before the dam's failure, EGLE approved a permit authorizing the raising of Wixom Lake to its normal, summer levels. Plaintiffs argue that the EGLE staff member who issued the permit authorizing raising Wixom's lake level in April 2020, allegedly, was not informed that an EGLE engineer had already determined that the dam did not pass ½ PMF required by Part 315 of the Natural Resource Environment Protection Act (NREPA). Plaintiffs assert that EGLE had been aware of the inadequate spillway capacity—since at least September 21, 2019, when it issued a report or memorandum concluding that "the dam does not have hydraulic capacity to meet State of Michigan Part 315 Dam Safety hydraulic requirements and the dam cannot be safely operated, during the winter months of 2019/2020, at the normal winter level. The FLTF is presently working to implement a plan that would repair the dam and bring it into compliance with Part 315 with a scheduled completion date by 2024."

Plaintiffs allege that EGLE's affirmative act of issuing a permit to raise the water level of Wixom Lake knowing of its insufficient capacity and the FERC revocation was an affirmative act sufficient for the inverse condemnation claim.

### II. ANALYSIS

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley* v Detroit Bd of Ed, 470 Mich 274, 278; 681 NW2d 342 (2004). When evaluating this motion, this Court considers the pleadings, documentary evidence, and testimony submitted in the light most

favorable to plaintiffs, the party opposing the motion. Quinto v Cross & Peters Co, 451 Mich 358, 362; 547 NW2d 314 (1996). It is not permitted to assess credibility or to determine facts but, rather, the Court's task is to "review the record evidence, and all reasonable inferences therefrom, and decide whether a genuine issue of material fact exists to warrant a trial." Skinner v Square D Co, 445 Mich 153, 161; 516 NW2d 475 (1994). "A genuine issue of material fact exists when the record, giving the benefit of the reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." West v Gen Motors Corp, 469 Mich 177, 182-183; 665 NW2d 468 (2003).

Having reviewed the evidence presented by both parties, including Sturtevant's testimony at the September 16, 2025 evidentiary hearing, this Court finds that the record presents genuine issues of material fact regarding whether the actions that EGLE took with respect to the Edenville Dam upon learning of FERC's decision to revoke its license were a substantial cause of the dam's failure and the corresponding property damage suffered by plaintiffs.

EGLE is correct that plaintiffs must do more than establish that EGLE was negligent or that EGLE's response to the dam's known deficiencies fell below the applicable standard of care. Plaintiffs' claim is one of inverse condemnation, which requires a demonstration (1) that one or both defendants' actions were a substantial cause of the decline in plaintiffs' property value, and (2) that one or both defendants "abused its powers in affirmative acts directly aimed at the property." *Krieger*, 348 Mich App at 182-183. This is far from an easy task given the record presented by both parties. While neither side disputes that the dam's failure was a "substantial cause" of a decline in property values, the parties are diametrically opposed on the question of whether EGLE took affirmative action with respect to the dam that constituted an abuse of power and was a substantial cause of its failure. To establish this claim, plaintiffs must demonstrate that

EGLE took actions above and beyond an alleged malfeasance in licensing or supervision of the dam, or did more than simply fail to act. *Id.* at 184-185.

Plaintiffs' claims rest on a comparison of EGLE's actions in this case with the state-appointed emergency manager's decision to change the water source for the City of Flint. In *Mays*, 506 Mich 175, the Supreme Court allowed the plaintiffs to proceed on an inverse condemnation claim because the state official authorized the city to use a water source that the state "knew . . . could result in harm to property" and "allegedly concealed or misrepresented data and made false statements about the safety of the [water source] in an attempt to downplay the risk of its use and consumption." These facts allowed the *Mays'* plaintiffs' inverse condemnation claim to proceed to trial. *Id.* at 179-180.

Similarly, plaintiffs in this case allege that FERC's revocation of its license was an extraordinary event, signaling to EGLE that this high-hazard-potential dam was vulnerable to failure and presented a significant threat to the health and safety of nearby property owners. Sturtevant testified about this both at his deposition and at the September 16, 2025 evidentiary hearing. In addition, numerous engineering reports and correspondence documented EGLE's awareness that the dam's spillway capacity did not meet statutory requirements and that repairs were needed. While none of the professional engineering reports conducted on the dam declared the dam to be in danger of imminent failure or identified soil liquefication as a plausible threat, Sturtevant testified that some information in these reports, as well as features of the dam's embankments, called into question the structural stability of these embankments and alerted EGLE to the risk of a failure such as occurred on May 19, 2020.

Sturtevant's testimony suggests that instead of using its authority under § 31519 of the NREPA to order the private dam owner to return the water to run-of-the-river level until these repairs were complete, EGLE arguably did the opposite. He states that EGLE denied a permit to draw down the winter lake level, threatened enforcement action against the private owner when the owner lowered the water anyway, and granted a request for a permit to return the lake to its summer levels in April 2020. Taking the record in the light most favorable to the nonmoving party, such allegations are supported and present genuine issues of material fact sufficient to overcome defendants' motion for summary disposition under MCR 2.116(C)(10).

Notably, the Court is guided by the precedent cited herein as well as the standard of review applicable to a motion under MCR 2.116(C)(10)—which is different than that which will be used at trial. Here, the Court must review the record in the light most favorable to plaintiffs, the party opposing the motion. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). The question here is whether plaintiffs presented "evidence establishing the existence of a material factual dispute" for trial. *Quinto*, 451 Mich at 363. At trial, the burden will be on plaintiffs to establish the elements of their inverse condemnation claim by a preponderance of the evidence, and the Court has no premonitions as to which party will prevail.

EGLE emphasizes that EGLE neither owned the dam, controlled its operations, nor had a statutory mandate to dictate operations of the dam on the effective date of FERC's license revocation. Section 31519 of the NREPA authorizes, but does not require EGLE to order the dam owner to limit operations or remove the dam. MCL 324.31519. Section 31516 of the NREPA sets the PMF for this dam, but does not require EGLE to impose a sanction on the owner of the dam until it is reached. MCL 324.31516.

The record evidence suggests that days after FERC's license revocation took effect, EGLE's engineer was on-site at the dam, promptly requested the reports, and other information from FERC's files and, apparently, made clear to the FLTF and the Spicer Group that their plans to assume ownership must include plans to repair the dam and increase its spillway capacity. The record indicates that such plans were in place at or around the time that EGLE issued a permit to return Wixom Lake to its summer level, and millions of dollars in state funds had been allocated to begin these repairs.

The record also raises genuine factual questions as to whether EGLE abused its powers. As explained above, the mere issuance of a permit is not sufficient to constitute an abuse of authority for purposes of an inverse condemnation claim. The permit that EGLE approved authorized Boyce and the FLTF to return Wixom Lake to the level allowed by FERC for decades, without catastrophe. Sturtevant testified that the lake level was not unsafe in and of itself, but it became unsafe because the dam's condition was too poor to contain it. Likewise, defendants assert that no professional engineering report concluded that the Edenville Dam was in imminent danger of failure or that static liquefaction was an immediate threat.

The Court has reviewed and acknowledges this record evidence as well. For purposes of deciding defendants' motion under MCR 2.116(C)(10), the Court finds that the record presents genuine questions of material fact necessitating denial.

#### III. CONCLUSION

For the reasons explained above, Defendants' June 20, 2025 Motion for Summary Disposition is DENIED.

This matter shall proceed to trial to commence Monday, January 12, 2026, at 8:30 a.m., and continue until its conclusion, at the Michigan Court of Appeals courtroom located at 350 Ottawa, NW, Grand Rapids, Michigan. Pretrial deadlines and requirements are delineated in this Court's Amended Notice of Trial and Pretrial Order, issued August 11, 2025.

IT IS ORDERED.

This is not a final order and does not resolve the last pending issue in this case.

Date: October / 2025

Hon. James Robert Redford Judge, Court of Claims

