

**IN THE STATE OF MICHIGAN  
COURT OF CLAIMS**

PLAINTIFFS, PLEASANT BEACH MOBILE HOME RESORT, LLC, CAROL AND DAVE CLARKSON, BRIAN MATTHIAS, PATRICK AND PATRICIA PANGLE, 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, RANDELL AND KIM MIER, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

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

Defendants.

No. 20- - MM

Hon:

CLASS ACTION

**CLASS ACTION COMPLAINT**

Plaintiffs Pleasant Beach Mobile Home Resort, LLC, Carol and Dave Clarkson, Brian Matthias, Patrick and Patricia Pangle, 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 Randell and Kim Mier. individually and on behalf of all others similarly situated, by and through their attorneys, for their Class Action Complaint against Defendants The Michigan Department Of Environment, Great Lakes & Energy and The Michigan Department Of Natural Resources (collectively, "State Defendants"), allege as follows:

**INTRODUCTION**

1. Plaintiffs and the putative class own property near four 100-year-old major dams

on the Tittabawassee River in the State of Michigan. They had no reason to believe that doing so put their lives or property at risk. Rather, any objective person would reasonably expect that the dams' owners and operators, including Boyce Hydro,<sup>1</sup>including the State Defendants, would comply with all existing laws and regulations and the standard of care.

2. Yet, from at least August 6, 1993 until September 24, 2018, the Federal Energy Regulatory Commission ("FERC" or the "Commission") had repeatedly emphasized the potentially unsafe condition of at least one of the four – the Edenville Dam, a 95-year-old high-hazard earthen embankment structure.

3. Specifically, FERC expressed its concerns about the risk of catastrophic erosion from overtopping due to inadequate spillway capacity (i.e., only approximately 50% of the federally mandated Probable Maximum Flood ("PMF") standard, explained *infra*).

4. In general, an auxiliary spillway activates after the existing dam flood gates are open and water flow exceeds the capacity of current flood gate capability. FERC requires this spillway to significantly minimize the risk of the dam washing out during an extreme flood event.

5. FERC further assigned the Edenville Dam a high hazard potential rating, because its failure, or negligent operation, could pose a significant risk to the Village of Sanford, Northwood University, the City of Midland, and other downstream areas, and stated on several occasions:

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,

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<sup>1</sup> "Boyce" or "Boyce Hydro" collectively refers to Boyce Hydro Power, LLC; Boyce Hydro, LLC; Boyce Michigan, LLC; Lee Mueller; Edenville Hydro Property LLC; William D. Boyce Trust 2350; William D. Boyce Trust 3649; and William D. Boyce Trust 3650, which owned and/or operated the Edenville Hydro Project, including the Edenville Dam, from approximately 2007 to present.

Northwood University, City of Midland, Michigan, and other areas downstream.

6. Moreover, the Secord Dam does not have adequate spillway capacity to meet federal regulations.<sup>2</sup>

7. Yet, despite repeated promises to fulfill their obligations as owners and under their licenses to operate the dams, Boyce Hydro knowingly and willfully refused to comply with major aspects of their licenses and FERC's regulatory regime, with the result that public safety was put at risk. Moreover, according to FERC, Boyce Hydro "displayed a history of obfuscation and outright disregard of [their] obligations."

8. As a result, Boyce Hydro's license to operate the Edenville Project was revoked in September 2018 by FERC and oversight was transferred to the State Defendants.

9. The State Defendants knew of the high risks caused by the deterioration of and inadequate spillways at the Edenville Dam.

10. Shortly after the State Defendants became responsible for oversight of the dam, dam safety engineers sent the State Defendants a memorandum, explaining that the State requires all high hazard dams to be capable of "safely passing the ½ PMF. Since the dam was designed and constructed prior to the time of FERC and [State] regulation, the original design did not consider present day design capacity requirements." The memorandum concluded: "At this point in time, based on the documents reviewed, [we] do[] not believe that the Edenville Dam can be operated to meet the [State] dam safety requirement to pass the ½ PMF without certain repairs and improvements."

11. Rather than heed the warnings of years of inspections and warnings from FERC, or

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<sup>2</sup> <http://www.four-lakes-taskforce-mi.com/updates> (last accessed May 22, 2020).

the recent engineering opinions, the State Defendants opposed or delayed interim measures previously approved by FERC to reduce the risk of flooding, including repairs to the Edenville Dam, because of the concern for freshwater mussels and fish.

12. After several days of rain in May 2020, the Secord Dam was breached and the Edenville Dam collapsed. Moreover, as a result of the Edenville Dam collapse, the waters breached the Sanford Dam located downstream. The failures of these dams have caused severe flooding in the Midland, Michigan area, caused the draining of Wixom Lake, and further untold risk and damage to Plaintiffs' and the putative class members' persons and property.

13. The State Defendants' knowing opposition to and or delay of measures to reduce to the risk of flooding at the Edenville Dam as required by the standard of care is a substantial cause of the catastrophic events that have occurred in May 2020. But for the State Defendants' affirmative wrongful conduct, the disaster would have been averted.

14. Plaintiffs and class members sustained personal injury, property damage, economic damage, and other injury as a result of the State Defendants' conduct, as described herein, and set forth in more detail below. Plaintiffs bring this action against the State Defendants, individually and on behalf of the Class, for injunctive relief, and to recover compensatory and punitive damages, and for any other remedies or relief allowed by law.

15. The State Defendants' affirmative actions were specifically directed to Plaintiffs' and the Class's properties and caused damage to and a limitation on the use of Plaintiffs' and the Class's properties, thereby amounting to a de facto taking. The infringement of this Constitutional right is ongoing and likely to continue.

### **JURISDICTION**

16. The Michigan Court of Claims has personal jurisdiction over the State Defendants because they are agencies of the State of Michigan.

17. The Michigan Court of Claims has original jurisdiction over this matter pursuant to MCL § 600.6419, *et seq.* because the claims herein are brought against the State, its departments, and its officers, all acting in their official capacities and within the meaning of MCL § 600.6419(7).

18. Venue is properly in the Court of Claims pursuant to MCL § 600.6419, *et seq.*

19. Plaintiffs certify that the original Complaint is signed and verified by Plaintiffs before an officer authorized to administer oaths pursuant to MCL § 600.6432(1).

20. Pursuant to MCL § 600.6431(1), Plaintiffs designate the following institutions, “departments or officers” of the State “involved in connection” with this claim: Michigan Department of Environment, Great Lakes and Energy and Michigan Department of Natural Resources.

21. Plaintiffs’ and the putative class’s claims accrued on or about May 19, 2020, when the State Defendants’ actions caused the Edenville Dam to fail, resulting in the overflow of the Sanford Dam and actual damage to and destruction to Plaintiffs’ property in the ensuing flood.

22. Plaintiffs’ Complaint is filed within six months of the accrual of Plaintiffs’ claims and satisfies all timeliness requirements of MCL §§ 600.6431, 600.6452.

## **PARTIES**

23. 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. Dave Clarkson is the managing member of Pleasant Beach. Pleasant Beach is on the shores of Wixom Lake, and rents RV lots, vacation cabins and RVs, and boat slips on the lake. First, the breach of the Secord Dam resulted in flooding of Pleasant Beach grounds and cabins. Second, the collapse of the Edenville Dam drained Wixom Lake, and thus rendered Pleasant Beach’s boat slips and position as a beach side park useless. The events have also caused a failure of power, lack of water, and no septic service. Defendants’ actions which resulted in the breach of the Secord Dam

and collapse of the Edenville Dam have impacted and will directly impact Pleasant Beach's business. As a result, Pleasant Beach has suffered and will suffer damages

24. Plaintiffs Carol Clarkson and Dave Clarkson are residents and citizens of Beaverton, Michigan. The breach of the Secord Dam caused flooding of one or more of their personal and rental homes and properties, including 4991 Wixom Dr., Beaverton, MI, 48612. Moreover, the collapse of the Edenville Dam and draining of Wixom Lake has caused and will cause a reduction in property values. As a result of Defendants' actions as described herein, Plaintiffs have suffered and will suffer damages

25. Plaintiff Brian Matthias is a citizen and resident of Hope, Michigan. The breach of the Secord Dam caused flooding of his home, located at 5163 Ostlund Dr., Hope, MI 48628, and damage to his property. As a result of Defendants' actions as described herein, Plaintiff has suffered and will suffer damages.

26. Plaintiffs Patrick and Patricia Pangle are residents and citizens of Beaverton, Michigan. The breach of the Secord Dam caused flooding and damage to their yard and sea wall at their home, located at 3722 South Lake Dr., Beaverton, MI 48626. Moreover, the collapse of the Edenville Dam and draining of Wixom Lake has caused and will cause a reduction in property values. As a result of Defendants' actions as described herein, Plaintiffs have suffered and will suffer damages.

27. Plaintiff Jared Nickel is a citizen and resident of Beaverton, MI. The breach of the Secord Dam caused flooding in his home, located at 5300 Heron Cove, Beaverton, MI 48612 and damage to his property. Moreover, the collapse of the Edenville Dam and draining of Wixom Lake has caused and will cause a reduction in property values, as well as Plaintiff being unable to enjoy the use of the lake, he previously resided next to. As a result of Defendants' actions as

described herein, Plaintiff has suffered and will suffer damages.

28. 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. The breach of the Secord Dam caused flooding at the businesses, located at 5300 Heron Cove, Beaverton, MI 48612 causing damage to Plaintiffs' business equipment, as well as loss of profits. As a result of Defendants' actions as described herein, Plaintiffs have suffered and will suffer damages.

29. Plaintiffs, Julie Van Ameyde and John Smilnak, are citizens and residents of Northville, MI. The breach of the Secord Dam caused flooding in their home, located at 5486 Oakridge Dr, Beaverton, MI 48612, and extensive damage to their property. Moreover, the collapse of the Edvenville Dam and draining of Wixom Lake has caused and will cause a reduction in property values, as well as Plaintiffs being unable to enjoy the use of the lake, they previously resided next to. As a result of Defendants' actions as described herein, Plaintiffs have suffered and will suffer damages.

30. Plaintiffs Randell and Kim Mier are citizens and residents of Hope, Michigan. The breach of the Secord Dam caused flooding of their home, located at 5114 Middle Rd., Hope, MI, 48628, and damage to their property. Moreover, the collapse of the Edvenville Dam and draining of Wixom Lake has caused and will cause a reduction in property values, as well as Plaintiffs being unable to enjoy the use of the lake, they previously resided next to. As a result of Defendants' actions as described herein, Plaintiffs have suffered and will suffer damages.

31. Defendant Michigan Department of Environment, Great Lakes and Energy ("EGLE"), known as the Michigan Department of Environmental Quality ("MDEQ") prior to an April 22, 2019 reorganization, is the state agency that is charged with protecting Michigan's

environment and public health, *inter alia*, by managing water resources.

32. The Water Resource Division (“WR”) of EGLE (“EGLE-WR”) is charged with ensuring Michigan’s water resources remain clean and abundant *inter alia* by monitoring water quality, and the health of aquatic communities, developing policy, and protecting, restoring and conserving Michigan’s inland lakes, streams and wetlands.

33. The Dam Safety Unit of EGLE-WR (“EGLE-WR-DS”) is responsible for ensuring the safety of Michigan’s state-regulated dams. The EGLE-WR-DS program focuses on ensuring that dams are properly constructed, inspected, and maintained, and that the owners have adequately prepared for potential emergencies.

34. On information and belief, the EGLE-WR-DS program has only two full-time staff members, plus one staff supervisor-hydrologist, dedicated to overseeing the regulation and safety of 1,061 dams within the State of Michigan, 89 of which bear a “high” hazard potential rating (as of 2018), and two-thirds of which have reached their typical 50-year design life, with a program budget of approximately only \$400,000.

35. Defendant Michigan Department of Natural Resources is a department of the State of Michigan charged with maintaining the natural resources of the State, including inland lakes and recreation areas.

## **FACTS**

### **A. Background**

#### **1. Hydroelectric dams and spillway capacity**

36. 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 construction for the purpose of producing hydroelectric power, dams are created to control river flow and regulate flooding.



37. Dams are retaining structures or structures that are built to create large standing bodies of water known as reservoirs. These reservoirs can be used for irrigation, electrical generation, or water supply.

38. These dams are built on top of riverbeds and hold back water, raising the water level.

39. A spillway is a structure constructed in a hydroelectric dam to provide a safe path for floodwaters to escape to some downstream area. Generally, the area that the spillway is released to is the river on which the hydroelectric dam was constructed.

40. Spillways are an important functional part 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.

41. 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.

42. Spillways are built to prevent this, as it allows some water to be drawn from the top of the reservoir to make room for the new water.

43. 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.

44. Regardless of the specific type of spillway, they generally consist of a control structure to hold back water, a channel for water to flow through, and a terminal structure.

## **2. The Commission's Dam Safety Guidelines**

45. 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.

46. IDF selection began primarily as a practical concern for protection of a dam and the benefits it provides.

47. However, the early 1900s saw an increase in social awareness and laws designed to protect the public from certain high-risk activities.

48. 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.

49. 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.

50. 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. When translated to runoff from a dam, the estimated flood flow is known as the probable maximum flood (PMF).

51. 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.

52. In April 1977, President Carter issued a memorandum directing the review of federal dam safety activities by an ad hoc panel of recognized experts.

53. In June 1979, the ad hoc interagency committee on dam safety issued its report, which contained the first guidelines for federal agency dam owners.

54. With the passage of the National Dam Safety Program Act of 1996, Public Law 104-303, ICODS and its Subcommittees were reorganized to reflect the law's objectives and requirements, and the official Interagency Committee on Dam Safety (ICODS) was formed.

55. Today, the ICODS members include 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.

56. 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.

57. 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 Inflow Design Floods (IDFs). The IDF is the flood flow above which the incremental increase in water surface elevation downstream due to failure of a dam or other water retaining structure is no longer considered to present an unacceptable additional downstream threat.”<sup>3</sup>

58. The standard practice in the design of dams is to “to use the IDF that is deemed

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<sup>3</sup> FEMA, Federal Guidelines for Dam Safety: Selecting and Accommodating Inflow Design Floods for Dams (April 2004) (“IDF Guidelines”), at 1, available at <https://www.ferc.gov/industries/hydropower/safety/guidelines/fema-94.pdf>.

appropriate for the hazard potential of the dam and reservoir, and to design spillways and outlet works that are capable of safely accommodating the floodflow without risking the loss of the dam or endangering areas downstream from the dam to flows greater than the inflow.”

59. The upper limit of the IDF is the probable maximum flood (PMF). The PMF event 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.”<sup>4</sup>

60. 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. 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.”<sup>5</sup>

61. 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.”

62. Defendants fell into this category. For example, in 2018, Defendant Boyce Hydro argued in a FERC filing that the “odds of a 'probable maximum flood' event occurring in the next 5 to 10 years is 5 to 10 in one million.” Defendants’ willful negligence has resulted in the catastrophic dam breaches and flooding that recently occurred in Michigan.

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<sup>4</sup> IDF Guidelines, at 7.

<sup>5</sup> *Boyce Hydro Power, LLC*, 2018 FERC LEXIS 1323, \*3-4, 164 F.E.R.C. P61,178, 2018 WL 4350809 (F.E.R.C. September 10, 2018).

### 3. The Secord, Edenville, Sanford Dams

63. On the Tittabawassee River in Michigan, there are four projects, each of which includes a dam, a reservoir, and a powerhouse that is integral to the dam.

64. In existence since the 1920s, the four projects' reservoirs occupy about 39 river miles on the Tittabawassee River, with the tailwater of each project being the headwater of the next downstream project.

65. Beginning furthest downstream, the projects are the 3.3-megawatt (MW) Sanford Hydroelectric Project No. 2785, the 4.8-MW Edenville Project No. 10808, the 1.2-MW Smallwood Project No. 10810, and the 1.2-MW Secord Project No. 10809.

66. Historically, the dam operator has drawn down the reservoirs from three to four feet in the late winter to maximize the benefits of winter generation and to minimize spilling during spring snowmelt run-off. The reservoirs are refilled to normal pool elevations before water temperatures reach levels that stimulate northern pike spawning.

67. The Secord Project is located on the Tittabawassee River about 42 miles upstream from the City of Midland, Michigan. The dam is located in Gladwin County approximately 8.5 miles northeast of the City of Gladwin.

68. The Secord Dam consists of a concrete spillway and powerhouse with earthen natural embankments extending from either side of the spillway/powerhouse to natural ground.

69. The top of the earth embankment is at elevation 757.8. The reservoir is approximately 1,100 acres surface area at normal pool elevation of 750.8. The normal tail water is 705. The total length of the dam is about 2100 feet with the concrete spillway and powerhouse comprising about 100 feet in length.

70. An aerial picture of the Secord Dam follows:



71. The Smallwood Reservoir is immediately downstream of the Secord Dam and has significant amount of development along its banks.

72. Due to inadequate spillways, among other issues, flooding at Secord usually occurs in the spring as the result of heavy spring rains or snow cover over ground in a fairly saturated condition. Major floods occurred on June 24, 2017, September 13, 1986, March 21, 1948, and June 3, 1943.<sup>6</sup>

73. The Edenville Project, which is one of the dams that are the subject of this lawsuit, is the second project as one travels upstream. The Edenville Project is located just upstream of the point where the Tobacco River enters the Tittabawassee.

74. The Edenville Project consists of earthen embankments, known as the Edenville dam, totaling about 6,600 feet in length and having a maximum height of 54.5 feet.

75. The Edenville dam spans both the Tittabawassee and Tobacco Rivers creating a 2,600-acre reservoir known as Wixom Lake with a gross storage capacity of about 40,000 acre-

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<sup>6</sup> <https://gladwincounty-mi.gov/dam-information/> (last accessed May 22, 2020).

feet and a 49-mile-long shoreline at full pool.

76. There is a 50-foot-long intake leading to the powerhouse located at the dam on the eastern side of the project. The powerhouse contains two 2.4-megawatt (MW) Francis-type turbine generator units for a total installed capacity of 4.8 MW. The project creates a 0.4-mile-long bypassed reach on the Tobacco River that extends from the dam to the point where the Tobacco River meets the Tittabawassee River.

77. Two reinforced concrete multiple arch spillways are present at the project. The 69-foot-wide and 39-foot-high Tittabawassee spillway (also referred to as the Edenville spillway) is located on the east side (Tittabawassee River side) of the project and contains three Tainter gates and two low-level sluice gates.

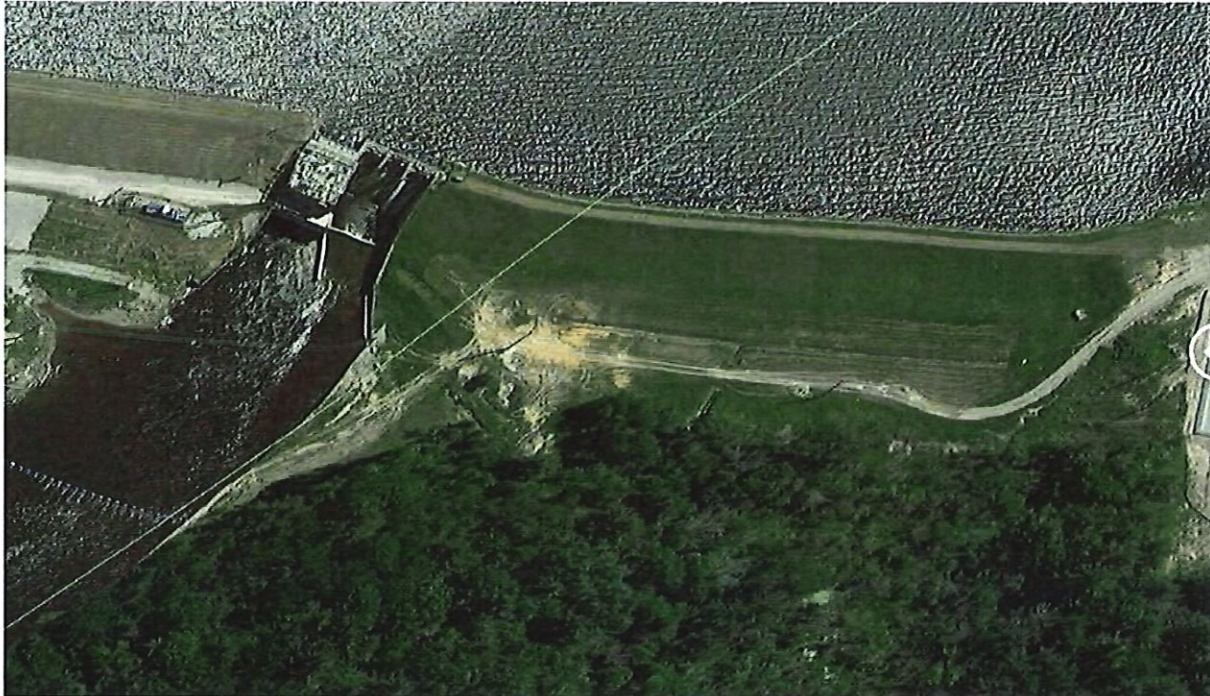
78. The Tobacco spillway is about 72 feet long and 72 feet wide with a crest height of about 40 feet and contains three steel Tainter gates located on the western side (Tobacco River side) of the project. Michigan State Highway 30 bisects both Wixom Lake and the project's dam.<sup>7</sup>

79. Due to inadequate spillways, flooding at Edenville usually occurs in the spring as the result of heavy spring rains or snow cover over ground in a fairly saturated condition. Major floods occurred on June 24, 2017, September 13, 1986, March 21, 1948, March 8, 1946, and June 3, 1943.

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<sup>7</sup> *Boyce Hydro Power, LLC*, 159 F.E.R.C. P62,292, 64669, 2017 FERC LEXIS 735, \*3-4 (F.E.R.C. June 15, 2017).

80. A picture of the Edenville dam in working condition follows.<sup>8</sup>



81. The second dam that is the subject of this lawsuit, the Sanford Dam is the most downstream project, where the river flows 35 miles to its confluence with the Shiawassee, where they form the Saginaw River.

82. Built in 1925, Sanford Dam has a height of 36 feet, and a hydraulic head of 26 feet. The dam has a Michigan Department of Environmental Quality (MDEQ) high hazard rating due to the size of the dam and the development on and below the dam.

83. Sanford Lake is a 1,250-acre impoundment of the Tittabawassee River created by the Sanford Dam.

84. The Village of Sanford lies on the extreme southwest shore of the impoundment, near the impoundment's dam outlet. Sanford Impoundment is bisected by US10 at the southern

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<sup>8</sup> <https://www.cnn.com/2020/05/20/us/michigan-dam-failure-before-after-photos-trnd/index.html> (last accessed May 21, 2020).

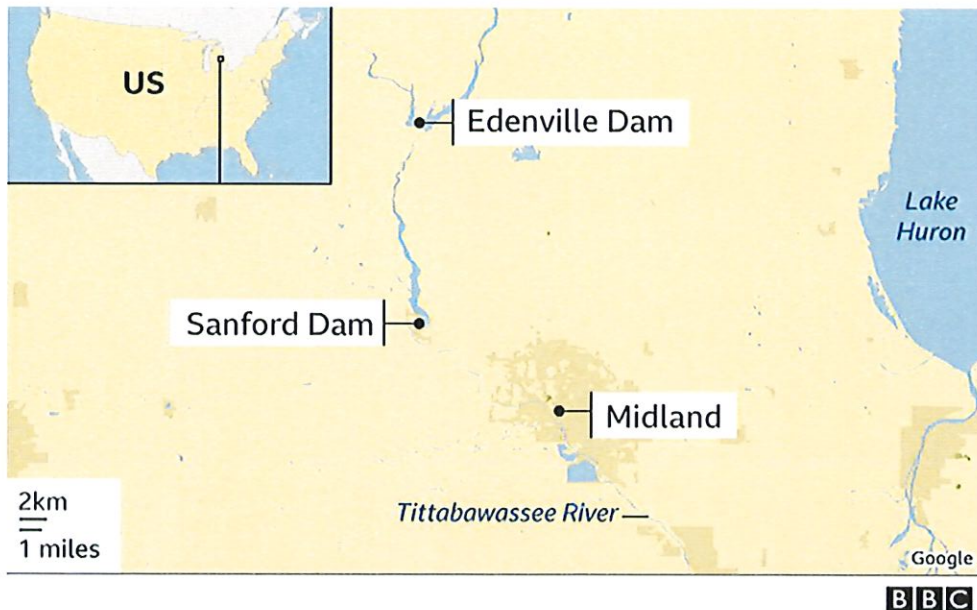


end.

85. A picture of the Sanford Dam in working condition follows:



86. The location of the Edenville and Sanford dams is shown on the following map:



#### 4. Ownership and Licensing of the Dams

87. In 1976, the Commission determined that the Tittabawassee River is a navigable

waterway of the United States and that therefore the four projects are required to be licensed by Section 23(b)(1) of the Federal Power Act (FPA).

88. In 1983, Wolverine Power Corporation (“Wolverine”) filed its license application for the Sanford Project No. 2785, and in 1987 it was issued a license.

89. On July 24, 1989, Wolverine filed license applications for its Edenville Project No. 10808, Smallwood Project No. 10810, and Secord Project No. 10809.

90. On October 16, 1998, the Commission 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.

91. Wolverine transferred the licenses to Synex Michigan, LLC on June 23, 2004. See Wolverine Power Corporation and Synex Michigan, LLC, 107 FERC ¶ 62,266 (2004).

92. Synex Michigan, LLC changed its name to Boyce Hydro Power, LLC, and filed a statement with the Commission on July 12, 2007, to this effect.

**B. FERC repeatedly cited the Owner/Operator Defendants for their failure to address structural deterioration and insufficient spillway capacity at the Edenville Dam.**

**1. From 1993 to June 23, 2004, FERC warned Wolverine that the spillway capacity at the Edenville Dam did not pass the PMF.**

93. Wolverine owned, and since 1926, had operated the four dams and hydroelectric projects at Sanford, Edenville, Smallwood and Secord.<sup>9</sup>

94. In an August 6, 1993 letter from the Commission’s Office of Energy Projects, Division of Dam Safety and Inspections, Chicago Regional Engineer (“Regional Engineer”) to Wolverine, FERC advised that the spillway capacity of the Edenville Project did not meet the

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<sup>9</sup> 51 FERC ¶ 63,012.

Commission's guidelines for passing the PMF.

95. The “PMF event” 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.

96. FERC’s Regional Engineer repeatedly directed Wolverine to address the spillway capacity concerns at the project.

97. On October 16, 1998, FERC issued a 30-year license for the Edenville Project to Wolverine.

98. Beginning in or about 1999, FERC notified Wolverine that it needed to increase capacity of the Edenville Dam’s spillways to prevent a significant flood from overcoming the structure.

99. On January 4, 1999, the Regional Engineer issued a letter to Wolverine, describing the Edenville Project’s need to increase spillway capacity as the Commission’s primary concern.

100. Wolverine failed to immediately address this concern, requesting instead that it be given additional time to study the spillway capacity issue.

101. On June 13, 2002, the Regional Engineer issued a letter requiring Wolverine to file, by July 31, 2002, a detailed plan and schedule for the completion of the spillway upgrades, and ordered Wolverine to complete the modifications to address the inadequate spillway capacity by December 31, 2006.<sup>10</sup>

102. Wolverine failed to do so.

103. Wolverine transferred the license to Synex Michigan, LLC on June 23, 2004.<sup>11</sup>

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<sup>10</sup> *Boyce Hydro Power, LLC*, 2018 FERC LEXIS 1323, \*5, 164 F.E.R.C. P61,178, 2018 WL 4350809 (F.E.R.C. September 10, 2018).

<sup>11</sup> *See Wolverine Power Corporation and Synex Michigan, LLC*, 107 FERC ¶ 62,266 (2004).

**2. From June 23, 2004 to September 10, 2018, Boyce Hydro repeatedly and willfully flaunted FERC's directives to fix the insufficient spillway capacity at the Edenville Dam.**

104. At the time the license was transferred, 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.

105. As detailed in multiple orders, throughout its ownership 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.<sup>12</sup>

106. In a letter issued February 24, 2005, FERC's Regional Engineer noted that a PMF study was overdue even after Boyce received an extension of time to complete the necessary study. Further, FERC noted that Boyce's plan and schedule to complete auxiliary spillway work was also unacceptable.

107. For years, FERC staff worked with Boyce to increase the spillway capacity at the project needed to pass the PMF. From 2005 to 2015, FERC held multiple meetings with and sent multiple letters to Boyce regarding the inadequate spillway capacity.

108. Boyce received several extensions of time to construct auxiliary spillways, in part due to its inability to finance the work. Boyce repeatedly failed to meet its own deadlines, including in 2013, 2014, 2015, and 2016. Neither did Boyce meet FERC's deadlines for plan submissions and progress reports.

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<sup>12</sup> 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 Order).

109. By June 15, 2017, Boyce still had not filed or completed adequate plans for the two auxiliary spillways.

110. Boyce also failed to file a plan to pass the full PMF at the Edenville Project, despite numerous orders to do so.

111. The need for Boyce to address the spillway capacity at the Edenville Project was also highlighted in a Part 12D Independent Consultant Safety Inspection Report, required by FERC's Engineering Guidelines for the Evaluation of Hydropower Projects. The report, filed with FERC by Boyce on March 22, 2016, highlighted that "the licensee should continue to work for review and approval of the existing spillway rehabilitation projects which will allow the dam to safely pass the 100% PMF."

112. By June 2017, FERC issued a Compliance Order, after citing Boyce for violations of its license and the Commission's regulations for years for: "1) failing to increase the spillway capacity of the project; 2) performing unauthorized dam repairs; 3) performing unauthorized earth-moving activities; 4) failing to file an adequate Public Safety Plan; 5) failing to construct approved recreation facilities pursuant to the Commission's 2001 Order approving its Recreation Plan and for restricting public access; 6) failing to acquire all necessary project property rights; and 7) failing to comply with the Commission's 1999 Order approving its Water Quality Monitoring Plan."<sup>13</sup>

113. In the Compliance Order, FERC made clear, however, that its "primary concern is the licensee's longstanding failure to address the project's inadequate spillway capacity. The Edenville dam has a high hazard potential rating, which means a failure of the project's works

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<sup>13</sup> *Boyce Hydro Power, LLC*, 159 F.E.R.C. P62,292, 64669, 2017 FERC LEXIS 735, \*1 (F.E.R.C. June 15, 2017).

would create a threat to human life and/or would cause significant property damage. The project's spillway deficiencies must be remedied.”<sup>14</sup>

114. FERC emphasized that Boyce’s failures caused a “grave” risk for the “potential loss of life and destruction of property and infrastructure”:

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....<sup>15</sup>

115. FERC noted that Boyce was not filing its required monthly progress reports as to a plan for improvements to the auxiliary spillways

116. FERC also documented that Boyce was conducting unapproved and inadequate repairs to the Edenville dam.

117. Finally, in the Compliance Order, FERC found: “Thirteen years after acquiring the license for the project, the licensee has still not increased spillway capacity leaving the project in danger of a PMF event. The licensee has shown a pattern of delay and indifference to the potential

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<sup>14</sup> *Id.* at \*2.

<sup>15</sup> *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).

consequences of this situation. A situation that must be remedied in order to protect life, limb, and property.”<sup>16</sup> FERC also cited Boyce’s “longstanding failure to address the project’s inadequate spillway capacity at this high hazard dam.”<sup>17</sup>

118. On July 14, 2017 and July 27, 2017, Boyce filed two requests for more time to comply with certain requirements in the Compliance Order.<sup>18</sup>

**3. On November 10, 2017, FERC ordered Boyce to cease operations at the Edenville Project.**

119. On November 20, 2017, FERC issued a cease operation order to Boyce for failing to comply with the following provisions of the Compliance Order:

- a. Ordering paragraph (B), which provided in pertinent part: “For the Tobacco Auxiliary Spillway: By July 15, 2017 (extended to September 18, 2017), the licensee was required to file a complete design package with the Commission's Division of Dam Safety and Inspection, Chicago Regional Engineer (Regional Engineer) for a Tobacco auxiliary spillway.
- b. Ordering paragraph (D), which provided in pertinent part: “For the Tittabawassee Auxiliary Spillway: By August 14, 2017 (extended to November 14, 2017), the licensee was required to file with the Regional Engineer, plans, specifications, and a schedule to construct a Tittabawassee auxiliary spillway.”
- c. Ordering paragraph (F), which provided: “By October 13, 2017 (extended

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<sup>16</sup> *Boyce Hydro Power, LLC*, 159 F.E.R.C. P62,292, 64671-64672, 2017 FERC LEXIS 735, \*11-17 (F.E.R.C. June 15, 2017).

<sup>17</sup> *Id.* at \*10-11.

<sup>18</sup> *Boyce Hydro Power, LLC*, 161 F.E.R.C. P62,119, 64244, 2017 FERC LEXIS 1604, \*4 (F.E.R.C. November 20, 2017).

to November 14, 2017), the licensee was required to file with the Regional Engineer, a plan and schedule for additional modifications to the project to meet the full (100%) Probable Maximum Flood.

- d. Ordering paragraph (G), which provided in pertinent part: “By July 30, 2017 (extended to September 30, 2017), the licensee was required to file with the Regional Engineer, complete plans and specifications for permanent repairs to both left and right Tobacco abutment spillway walls, a complete work schedule, detailed drawings, a water management plan, an erosion control plan, a Temporary Construction Emergency Action Plan, and a Quality Control Inspection Program as originally specified in the Regional Engineer's letter to the licensee issued December 8, 2016.<sup>19</sup>

120. FERC also documented additional violations since the Compliance Order, which included: “The September 18, 2017 letter required the licensee to file a plan and schedule to perform a Focused Spillway Assessment pursuant to Article 4 of the license and directives issued by the Regional Engineer on April 28, 2017. This plan and schedule were due October 3, 2017. Neither of the above two plans and schedules have been filed with the Commission.”

121. As before, FERC noted that its “primary concern is the licensee's failure to address the project's inadequate spillway capacity.”

122. FERC thus ordered: “Boyce Hydro Power, LLC (licensee) must cease generation at the Edenville Hydroelectric Project by November 27, 2017. Generation must not resume until

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<sup>19</sup> *Boyce Hydro Power, LLC*, 161 F.E.R.C. P62,119, 64244, 2017 FERC LEXIS 1604, \*5-8 (F.E.R.C. November 20, 2017).



further order by the Commission.”<sup>20</sup>

123. In December 2017, Boyce Hydro provided photographs to FERC of the Edenville Dam, which showed that “the accumulation of large ice formations on the concrete sidewalls of the dam’s spillways” posed a “significant and unacceptable structural hazard” “to the integrity of the dam’s already compromised concrete civil structures.” Boyce Hydro also admitted that the gates on the Edenville Dam were defective.

124. In 2018, Boyce Hydro claimed “that it lacks the funds to actually construct the [Tobacco River Auxiliary] spillway and will need to save money over some unspecified period of time (and resolve outstanding state permitting issues) before it can start construction. Of course, this addresses just one of the two auxiliary spillways it must design and construct and does not include the other modifications that it will need to make to satisfy PMF requirements and/or to satisfy its obligations under the Compliance Order.”<sup>21</sup>

#### **4. FERC revoked Boyce’s license to operate the Edenville Project on September 10, 2018.**

125. On September 10, 2018, the Commission issued an order revoking Boyce’s license for the project. According to the Commission: “Of particular concern has been the project’s inability to pass the Probable Maximum Flood (PMF) due to inadequate spillway capacity.”

126. The revocation of the license became effective on September 25, 2018.

127. Boyce Hydro and the Sanford Lake Preservation Association (Sanford Lake Association) sought rehearing of the Revocation Order, which the Commission denied on January 17, 2019.

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<sup>20</sup> *Id.*

<sup>21</sup> *Boyce Hydro Power, LLC*, 162 F.E.R.C. P61,115, 2018 FERC LEXIS 235 (F.E.R.C. February 15, 2018).

128. 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.<sup>22</sup>

129. 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.’

130. FERC concluded: “An arrangement where Boyce, either itself or through Boyce LLC, retains control over the operations and a portion of the assets of the project is not in the public interest and would not justify reinstatement of the license.”<sup>23</sup>

131. On February 15, 2-018, FERC entered an order recommending Boyce’s license be revoked. FERC stated: “The 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 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.”<sup>24</sup>

**C. Similar to the Edenville Dam, the spillways at the Secord Dam are also not adequate to meet the PMF.**

132. According to the Four Lakes Task Force, the Secord Dam does not meet the FERC

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<sup>22</sup> *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).

<sup>23</sup> *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).

<sup>24</sup> *Boyce Hydro Power, LLC*, 162 F.E.R.C. P61,115, 61555, 2018 FERC LEXIS 235, \*4-5 (F.E.R.C. February 15, 2018)

Dam Safety standards.<sup>25</sup>

133. Secord Dam currently does not have adequate spillway capacity to meet federal regulations or Michigan state guidelines.

134. As of April 2020, the task force had stated that: “If generation of hydro-electric power is to continue at the Secord Dam, additional spillway capacity must be constructed.”

135. In 2020, the Four Lakes Operations Company was coordinating with Boyce Hydro to prepare a submittal to FERC, which reportedly includes a Probable Maximum Flood (PMF) study and a preliminary design of a new auxiliary spillway. The new spillway is initially being considered on the eastern side of the dam.

136. Moreover, if the FERC license is revoked, modifications and improvements to the dam will still be necessary to meet State of Michigan dam safety requirements.

**D. Despite an ample record of the inadequate conditions at the Edenville Dam which posed a grave risk to human life and property, the State Defendants put the protection of wildlife over the protection of human life and property.**

137. The State Defendants were fully aware of Boyce’s years of knowing and willful refusal to comply with its licensing provisions and State of Michigan dam safety requirements, including the fact that both the Edenville Dam and Secord Dam were poorly maintained and had insufficient spillway capacity.

138. While Boyce’s license to operate the dam was revoked on September 10, 2018, Boyce continued to own the Edenville Dam.

139. Starting September 25, 2018 (i.e. after FERC revoked the license for Edenville Dam), the State Defendants assumed regulatory and enforcement jurisdiction over the operation

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<sup>25</sup> <http://www.four-lakes-taskforce-mi.com/updates/secord-dam-preliminary-design-and-engineering-report-submitted-to-ferc> (last accessed May 22, 2020).

of the Edenville Dam in its ongoing prevailing condition, “as it relate[d] to dam safety and environmental matters.”

140. However, during this period, none of the State Defendants took any action to address the deterioration of the Edenville Dam and insufficient spillway capacity.

141. While under FERC licensure, the Edenville Dam had long been considered potentially unsafe to downstream communities because its inadequate spillway capacity had rendered it barely able to satisfy one-half of the FERC 100% PMF standard.

142. Rather than give credence to the years of documented findings that the spillways at the Edenville Dam were not sufficient to withstand the PMF, the State Defendants performed a self-described “ cursory ” inspection in October 2018 and declared the dam and its spillways were in “ fair structural condition. ”<sup>26</sup>

143. In the nineteen months after that inspection and statement, the State Defendants did not demand any repairs to the dam. State Defendants failed to meet their regulatory obligations and, despite knowing that the Edenville Dam was not capable of withstanding flooding in the event of an historic flood, took several official actions designed to force the dam’s operator to increase water levels in Wixom Lake.

144. In or about 2019, an authority called the Four Lakes Task Force was created by resolutions passed in Midland and Gladwin Counties to administer and oversee the maintenance and operations of the four dams and reservoir. The State of Michigan appropriated \$5 million for the purchase.

145. The Task Force, as delegated authority of the Counties, was required to cause an

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<sup>26</sup> [https://www.michigan.gov/documents/egle/egle-EdenvilleDamInspection-10042018\\_691245\\_7.pdf](https://www.michigan.gov/documents/egle/egle-EdenvilleDamInspection-10042018_691245_7.pdf) (last accessed July 24, 2020)

inspection to be made of the dam, for which a normal lake level was set. *See* MCL 324.30722(2).

146. The Task Force dam safety engineers issued a memorandum on September 18, 2019 to Lucas Trumble, P.E., purportedly one of only three personnel responsible for administering and enforcing the dam safety laws and regulations for the State Defendants. The memorandum summarized the gate tests that Boyce Hydro's dam safety engineer had previously performed in the presence of the FLTF's dam engineers at the Edenville Dam on June 14, 2019.

147. The memorandum emphasized that “[t]he original Edenville Hydroelectric project was designed with six radial gates to allow for normal operation and to release floodwaters when lake elevations begin to rise after a rainfall event. The [...] (FERC) requires that all high hazard dams be capable of safely passing 100% of the Probable Maximum Flood (PMF). EGLE requires safely passing the ½ PMF. Since the dam was designed and constructed prior to the time of FERC and EGLE regulation, the original design did not consider present day design capacity requirements.”

148. The memorandum concluded: “At 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 requirement to pass the ½ PMF without certain repairs and improvements.”

149. Moreover, the dam safety engineers of the dam's prospective acquiror allegedly determined that the 95-year-old high hazard embankment dam would fail to meet even the State of Michigan's 50% PMF standard, in light of not only its historically inadequate spillway capacity, but also its old age and the poor condition of its critically important gates and hoisting equipment.

150. The State Defendants did not conduct the required inspection and failed to order the Task Force (and Counties) to perform the necessary repairs.

151. In fact, rather than heed the warnings of years of inspections and warnings from

FERC, or the recent engineering opinions, the State Defendants advocated for the approval of increases to the Wixom Lake water levels, despite the lack of a sufficient inspection and no evidence that the dam could withstand such increased water levels.

152. In May 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 post-September 2018 drawdown levels.

153. MDNR allegedly sent a letter on October 2, 2019 to EGLE-WRD. The letter opposed interim measures previously approved by FERC to reduce the risk of flooding, including drawdowns of the Wixom reservoir, because of the concern for freshwater mussels and fish.

154. On November 20, 2019, Keto Gyekis, the Coordinator of EGLE-WRD's Wetland Identification Program, allegedly submitted comments to MDNR concerning proposed drawdowns of the Wixom reservoir to avoid or reduce the risks of flooding. Gyekis reportedly wrote:

Research has shown that [...] large scale cold-season drawdowns within impoundments are often associated with negative ecological effects. Various biological, chemical, and physical changes within the littoral zone during a large-scale cold-season drawdown can indirectly affect ecological condition within the rest of the impoundment. [...] A drawdown after the cold-season commences can expose [...] hibernating animals to very cold dry air, where they can desiccate irreversibly.

155. Gyekis allegedly further wrote:

Rainbow mussel (*Villosa iris*), is a State-listed Special Concern species that is suspected to inhabit the upper end of the Tobacco River portion of the Wixom Lake where there is normally some lotic current. State/Federal mussel maps indicate that this species also likely inhabits more than a mile segment of the Tobacco River adjacent to the north end of the reservoir. Pertaining to this mussel species, Michigan Natural Features Inventory literature recommends that unnatural hydrological alterations be avoided. A significant winter drawdown could strand and kill individuals of this species and other native mussel species, primarily because they can not relocate (or be relocated) effectively. We do not support implementation of a winter drawdown.

156. On November 25, 2019, State Defendants denied a requested permit for the operator to lower water levels to repair gates in the dam.

157. The State Defendants' focus was thus on the protection of wildlife, rather than on the need for a drawdown of the Wixom reservoir to avoid flooding downstream.

158. The State Defendants' failure to analyze or determine whether the Edenville Dam was potentially unsafe to downstream communities, especially if it were to be operated during harsh winter weather conditions in the absence of a winter Wixom Reservoir drawdown to ROR levels, was egregious in light of years' of evidence from FERC and engineering experts.

**E. During the storms of May 2020, the Edenville Dam was breached, causing a breach at the Sanford Dam, emergency evacuations, and catastrophic damage.**

159. On April 9, 2020, just weeks before the flood, the State Defendants authorized Boyce Hydro to raise water levels in Wixom Lake. It then imposed strict conditions on its permit, intended to ensure that the dam operator kept the water levels high and did not undertake further drawdowns.

160. The timing of the refill of Wixom Lake was particularly dangerous given that late-April and May are historically the high season for heavy rainfall precipitation and water runoff. The State Defendants knew that the Edenville Dam floodways remained in grossly inadequate condition, but nonetheless intentionally caused Wixom Lake levels to increase during the rainy season.

161. As a result of heavy rains, on Monday, May 18, 2020, high flows were reportedly passing through Secord and Smallwood Dams on the Tittabawassee River.

162. The National Weather Service and Gladwin County issued imminent hazard flash flood warnings.

163. In fact, due to inadequate spillways at the Secord Dam, flooding did occur that caused substantial damage to Plaintiffs and the Class.

164. As of 6 a.m. on May 19, 2020, the city of Midland had experienced 4.70 inches of rain in several days of storms. The heavy rainfall was produced by a condition that usually causes Michigan's biggest rains - tropical moisture. Tropical Storm Arthur was churning off the Mid-Atlantic coast, while a belt of moisture traveled from the East Coast westward into Michigan. The storm system already in place over Michigan was able to tap into that tropical moisture and increase rainfall totals.

165. The flooding that breached the Secord upstream combined with the inadequate condition of the Edenville Dam then caused a series of events that caused further damage.

166. At approximately 5:45 p.m. on May 20, 2020, based on stills from videos of the events, it appears that first a small amount of water overtopped the Edenville dam. Then, the crest of the embankments of the dam began to crumble, creating a large bulge and deformation:<sup>27</sup>



167. The embankment then rapidly collapsed in a landslide:

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<sup>27</sup> 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 May 21, 2020).





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



169. Water quickly flooded the surrounding areas.<sup>28</sup>

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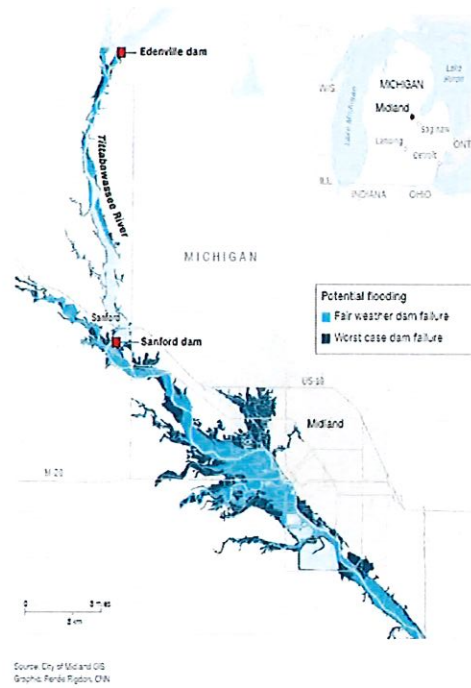
<sup>28</sup> Still taken from <https://www.youtube.com/watch?v=RQh7kIDvNLw> (last accessed May 21, 2020).



170. 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.

171. 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.

172. The following map illustrates the scope of damage projected to occur as a result of dam failures along the Tittabawassee River. The city of Midland urged residents within the shaded areas to evacuate.



173. 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.

174. MCHMP also defines dam failure as “the collapse or failure of an impoundment resulting in downstream flooding.” It states that, “Dam 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.”

175. The flooding forced about 11,000 people to evacuate their homes in the Midland

area, following what the National Weather Service called “catastrophic dam failures” at the Edenville Dam and the Sanford Dam.

176. 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 parts.

177. The floodwaters also mixed with containment ponds at a Dow Chemical Co. plant and could displace sediment from a downstream Superfund site.

178. Thousands of people and entities have suffered significant property damage, and other damages, for which State Defendants should be held responsible.

### **CLASS ALLEGATIONS**

179. Plaintiffs request certification pursuant to MCR 3.501 on behalf of a proposed Class defined as follows: all individuals and entities who suffered injury or property damage from flooding resulting from the collapse of the Edenville Dam in Michigan in May 2020.

180. The number of class members is sufficiently numerous to make class action status the most practical method for Plaintiffs to secure redress for injuries sustained and to obtain class wide equitable injunctive relief.

181. There are questions of law and fact raised by the named Plaintiffs’ claims common to those raised by the Class(es) they seek to represent. Such common questions predominate over question affecting only individual members of the Class(es).

182. The violations of law and resulting harms alleged by the named Plaintiffs are typical of the legal violations and harms suffered by all Class members.

183. Plaintiff Class representatives will fairly and adequately protect the interests of the Plaintiff Class members. Plaintiffs’ counsel are unaware of any conflicts of interest between the Class representatives and absent Class members with respect to the matters at issue in this litigation; the Class representatives will vigorously prosecute the suit on behalf of the Class; and

the Class representatives are represented by experienced counsel. Plaintiffs are represented by attorneys with substantial experience and expertise in complex and class action litigation involving personal and property damage.

184. Plaintiffs' attorneys have identified and thoroughly investigated all claims in this action and have committed sufficient resources to represent the Class.

185. The maintenance of the action as a class action will be superior to other available methods of adjudication and will promote the convenient administration of justice. Moreover, the prosecution of separate actions by individual members of the Class could result in inconsistent or varying adjudications with respect to individual members of the Class and/or one or more of the Defendants.

186. Defendants have acted or failed to act on grounds generally applicable to all Plaintiffs, necessitating declaratory and injunctive relief for the Class.

## **CAUSES OF ACTION**

### **COUNT I**

#### **Mich. Const. 1963, art. 10 § 2 – Unconstitutional Taking of Property**

187. Plaintiffs and the Class incorporate all foregoing and subsequent paragraphs by reference as if fully set forth herein.

188. Article 10, § 2 of the Michigan Constitution requires that “[p]rivate property shall not be taken for public use without just compensation.”

189. After FERC revoked Boyce’s license on September 10, 2018, the State Defendants assumed regulatory and enforcement jurisdiction over the operation of the Edenville Dam in its ongoing prevailing condition, “as it relate[d] to dam safety and environmental matters.”

190. While under FERC licensure, the Edenville Dam had long been considered unsafe to downstream communities because its inadequate spillway capacity had rendered it barely able

to satisfy one-half of the FERC 100% PMF standard.

191. FERC's regulatory filings and concerns were known or should have been known to the State Defendants.

192. Rather than give credence to the years of documented findings that the spillways at the Edenville Dam were not sufficient to withstand the PMF and without a full engineering analysis of the dam, the State Defendants declared the dam and its spillways in "fair structural condition."

193. Moreover, the Four Lakes Task Force dam safety engineers issued a memorandum on September 18, 2019 to the State Defendants, which provided that "The [...] (FERC) requires that all high hazard dams be capable of safely passing 100% of the Probable Maximum Flood (PMF). EGLE requires safely passing the ½ PMF. Since the dam was designed and constructed prior to the time of FERC and EGLE regulation, the original design did not consider present day design capacity requirements."

194. The memorandum concluded: "At 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 requirement to pass the ½ PMF without certain repairs and improvements."

195. Rather than heed the warnings of years of inspections and warnings from FERC, or the recent engineering opinions from FLTF, the State Defendants opposed interim measures previously approved by FERC to reduce the risk of flooding, including drawdowns of the Wixom reservoir, because of the concern for freshwater mussels and fish.

196. The State Defendants' focus was thus on the protection of wildlife, rather than on the need to:

- a. Maintain the Edenville Project in a condition of repair adequate for the purposes of navigation and for the efficient operation of said works in the

- development and transmission of power;
- b. Make all necessary renewals and replacements of the infrastructure of the Edenville Project;
  - c. Establish and maintain adequate depreciation reserves for such purposes;
  - d. Conform to such rules and regulations as the Commission may from time to time prescribe for the protection of life, health, and property;
  - e. Design, fix, or maintain the Edenville Project and Edenville Dam to withstand overtopping of the loading condition that would occur during a flood up to the probable maximum flood (PMF);
  - f. Design, fix, or maintain the Edenville Project and Edenville Dam to withstand overtopping of the loading condition that would occur during a flood up to the point where a failure would no longer constitute a hazard to downstream life and/or property;
  - g. Increase the inadequate spillway capacity of the Edenville Project;
  - h. Mitigate the threat to human life and risk of significant property damage as a result of the inadequate spillway capacity of the Edenville Project.

197. The State Defendants' wrongful conduct includes but is not limited to (1) failing to analyze or determine whether the Edenville Dam was potentially unsafe to downstream communities, especially if it were to be operated during harsh winter weather conditions in the absence of a winter Wixom Reservoir drawdown; (2) purposefully deciding not to require Boyce to fix the IDF and inadequate spillways; (3) wrongfully certifying that the dam was in "fair" condition and suitable for use although it was not; (4) denying permits and other assistance to drawdown water levels to safe levels given the faulty condition of the Edenville Dam; (3)

authorizing and directing the raising of the water level in Wixom Lake as late as April and May 2020, with knowledge that the Edenville Dam could not withstand floods in the event of pressures caused by heavy rain; (4) failing to conduct the required safety inspection and failing to confirm the accuracy of the dam's known defects and inadequacies; and (5) failing to order necessary dam maintenance and repairs.

198. The State Defendants' actions are a substantial cause of the limitation on the use of Plaintiffs' and the Class's property, diminution of property values, loss of access to their property, loss of use and enjoyment, and other economic damages and damages to real and personal property. The State Defendants have failed to compensate Plaintiffs and the Class for the losses resulting from the improper taking of their property.

199. The State Defendants' actions constitute a de facto taking of private property without just compensation because they were unreasonable, unwarranted, reckless, and an abuse of power.

200. The State Defendants' intentional, affirmative acts constituted a purposeful government action directed at the properties of Plaintiffs and the Class, which were overtaken by water when the dam failed and caused catastrophic flooding, and were a wrongful abuse of governmental authority that created an obvious danger to life and property that otherwise would not have existed.

201. At the time the State Defendants took these affirmative actions, they knew and had ample warning of the problems with the Edenville Dam, knew of the dangers posed by the Edenville Dam to Plaintiffs' and the Class's properties, and owed Plaintiffs and the Class a duty to anticipate the failure of the Dam as well as the consequences of such failure and to act accordingly to avoid subjecting Plaintiffs and the Class to property damage and destruction.



202. The damages sustained by Plaintiffs and the Class are a unique and uncommon burden among individuals residing near dams and waterway projects such as these, *i.e.*, are not the natural and unavoidable result of dam operations.

203. The State exercised control over the dam to such an extent that the use of the dam by Boyce Hydro, the Task Force, and the State was a public use for which the State Defendants are responsible.

### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs respectfully request that this Court

- A. Grant their request to proceed as a class action pursuant to MCL 3.501;
- B. Appoint Plaintiffs as the Class Representatives and their counsel as Class Counsel;
- C. Declare the State Defendants' conduct unconstitutional under Art. 10, § 2 of the Michigan Constitution;
- D. Enter judgment against the State Defendants;
- E. Award compensatory, punitive, and statutory damages and any other damages allowed by law, including but not limited to damages for diminution of property values; physical property damage and/or destruction; loss of use and enjoyment of property; loss of access to property; and economic losses;
- F. Award Plaintiffs and the Class injunctive relief to remediate the harm caused by the State Defendants;
- G. Award Plaintiffs costs and attorneys' fees; and

H. Grant any such other and further relief as this Court deems appropriate.

Dated: August 11, 2020

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Fax: 312.264.0100  
jessica@feganscott.com

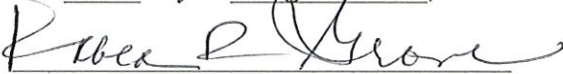
**SIGNATURE AND VERIFICATION OF COMPLAINT BY PLAINTIFF**

Dave Clarkson, individually and as Managing Member of Pleasant Beach Mobile Home Resort LLC, and Carol Clarkson hereby swears under oath that they have read the foregoing Complaint against the Michigan Department of Environment, Great Lakes & Energy and The Michigan Department of Natural Resources, and knows the contents of the Complaint, and states that the claim is true and based on Plaintiffs' own knowledge, except as to the matters which are stated to be on Plaintiffs' information and belief and as to those matters, they believe them to be true.

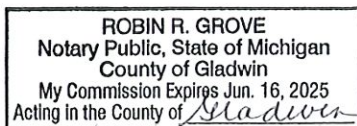


Dave Clarkson, as Managing Member of Pleasant Beach Mobile Home Resort, LLC  
4991 Wixom Drive  
Beaverton, Michigan 48612

Subscribed and sworn to before me  
this 6th day of August, 2020

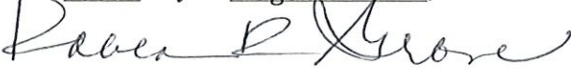


Notary Public Robin R. Grove

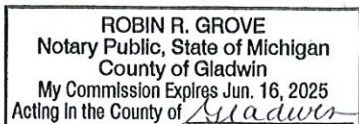


Dave Clarkson  
4991 Wixom Drive  
Beaverton, Michigan 48612

Subscribed and sworn to before me  
this 6th day of August, 2020



Notary Public Robin R. Grove



Carol Clarkson

Carol Clarkson  
4991 Wixom Drive  
Beaverton, Michigan 48612

Subscribed and sworn to before me  
this 6th day of August, 2020

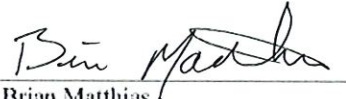
Robin R. Grove

Notary Public Robin R. Grove

ROBIN R. GROVE  
Notary Public, State of Michigan  
County of Gladwin  
My Commission Expires Jun. 16, 2025  
Acting in the County of Gladwin


**SIGNATURE AND VERIFICATION OF COMPLAINT BY PLAINTIFF**

Brian Matthias hereby swears under oath that he has read the foregoing Complaint against the Michigan Department of Environment, Great Lakes & Energy and The Michigan Department of Natural Resources, and knows the contents of the Complaint, and states that the claim is true and based on Plaintiff's own knowledge, except as to the matters which are stated to be on Plaintiff's information and belief and as to those matters, he believes them to be true.



Brian Matthias  
5163 Ostlund Drive  
Hope, Michigan 48628

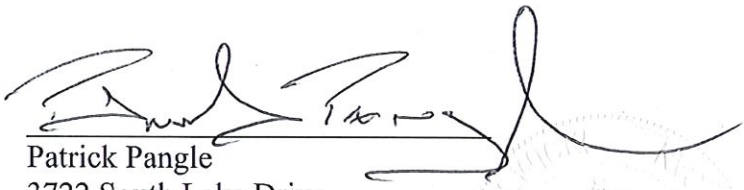
Subscribed and sworn to before me  
this 6<sup>th</sup> day of August, 2020

  
Notary Public Sandra J. Streeter

SANDRA J. STREETER  
NOTARY PUBLIC, STATE OF MI  
COUNTY OF GLADWIN  
MY COMMISSION EXPIRES Oct 1, 2023  
ACTING IN COUNTY OF Gladwin

**SIGNATURE AND VERIFICATION OF COMPLAINT BY PLAINTIFF**

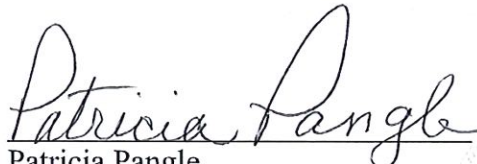
Patrick and Patricia Pangle hereby swear under oath that they have read the foregoing Complaint against the Michigan Department of Environment, Great Lakes & Energy and The Michigan Department of Natural Resources, and knows the contents of the Complaint, and states that the claim is true and based on Plaintiff's own knowledge, except as to the matters which are stated to be on Plaintiff's information and belief and as to those matters, they believe them to be true.

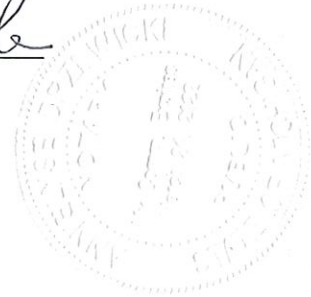
  
Patrick Pangle  
3722 South Lake Drive  
Beaverton, Michigan 48626



Subscribed and sworn to before me  
this 6<sup>th</sup> day of AUGUST, 2020

Ann' Elise D.  
Notary Public

  
Patricia Pangle  
3722 South Lake Drive  
Beaverton, Michigan 48626

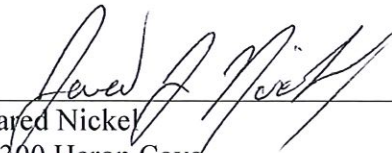


Subscribed and sworn to before me  
this 6<sup>th</sup> day of AUGUST, 2020

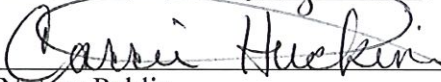
Ann' Elise D.  
Notary Public

**SIGNATURE AND VERIFICATION OF COMPLAINT BY PLAINTIFF**

Jared Nickel hereby swears under oath that he has read the foregoing Complaint against the Michigan Department of Environment, Great Lakes & Energy and The Michigan Department of Natural Resources, and knows the contents of the Complaint, and states that the Complaint is true and based on Plaintiff's own knowledge, except as to the matters which are stated to be on Plaintiff's information and belief and as to those matters, he believes them to be true.

  
\_\_\_\_\_  
Jared Nickel  
5300 Heron Cove  
Beaverton, MI 48612

Subscribed and sworn to before me  
this 6<sup>th</sup> day of August, 2020

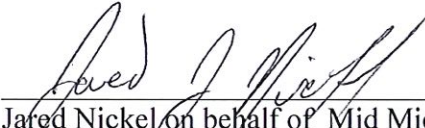
  
\_\_\_\_\_  
Notary Public

**CARRIE HUCKINS**  
**NOTARY PUBLIC - STATE OF MICHIGAN**  
**COUNTY OF GLADWIN**  
My Commission Expires March 29, 2025  
Acting in the County of Gladwin

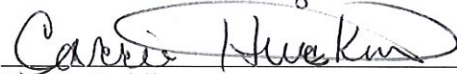


**SIGNATURE AND VERIFICATION OF COMPLAINT BY PLAINTIFF**

Jared Nickel, owner of Mid Michigan Pressure Cleaning, LLC and Mid Michigan Window Cleaning & Powerwashing, LLC d/b/a Mid Michigan Carpet Cleaning, hereby swears under oath that he has read the foregoing Complaint against the Michigan Department of Environment, Great Lakes & Energy and The Michigan Department of Natural Resources, and knows the contents of the Complaint, and states that the Complaint is true and based on Plaintiff's own knowledge, except as to the matters which are stated to be on Plaintiff's information and belief and as to those matters, he believes them to be true.

  
\_\_\_\_\_  
Jared Nickel on behalf of Mid Michigan Pressure Cleaning, LLC and Mid Michigan Window Cleaning & Powerwashing, LLC d/b/a Mid Michigan Carpet Cleaning  
5300 Heron Cove  
Beaverton, MI 48612

Subscribed and sworn to before me  
this 16<sup>th</sup> day of August, 2020

  
\_\_\_\_\_  
Notary Public

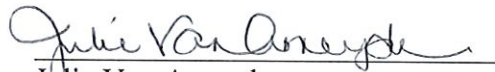
**CARRIE HUCKINS**  
NOTARY PUBLIC - STATE OF MICHIGAN  
COUNTY OF GLADWIN  
My Commission Expires March 29, 2025  
Acting in the County of Gladwin






**SIGNATURE AND VERIFICATION OF COMPLAINT BY PLAINTIFFS**

Julie Van Ameyde and John Smilnak hereby swear under oath that they have read the foregoing Complaint against the Michigan Department of Environment, Great Lakes & Energy and The Michigan Department of Natural Resources, and know the contents of the Complaint, and state that the claim is true and based on Plaintiffs' own knowledge, except as to the matters which are stated to be on Plaintiffs' information and belief and as to those matters, they believe them to be true.

  
Julie Van Ameyde  
48920 Running Trout Lane  
Northville, MI 48168

Subscribed and sworn to before me  
this 6th day of August, 2020

  
Notary Public

  
John Smilnak  
48920 Running Trout Lane  
Northville, MI 48168

Subscribed and sworn to before me  
this 6th day of August, 2020

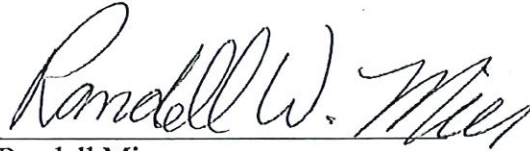
  
Notary Public

DANIEL STYBEL  
NOTARY PUBLIC - STATE OF MICHIGAN  
COUNTY OF WAYNE  
MY COMMISSION EXPIRES DEC 9, 2020  
ACTING IN COUNTY OF Wayne

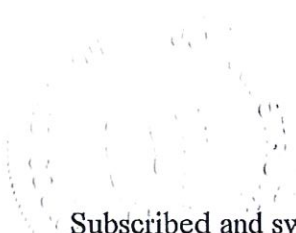


**SIGNATURE AND VERIFICATION OF COMPLAINT BY PLAINTIFFS**

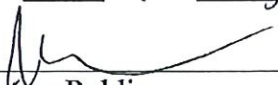
Randell Mier and Kim Mier hereby swear under oath that they have read the foregoing Complaint against the Michigan Department of Environment, Great Lakes & Energy and The Michigan Department of Natural Resources, and know the contents of the Complaint, and state that the claim is true and based on Plaintiffs' own knowledge, except as to the matters which are stated to be on Plaintiffs' information and belief and as to those matters, they believe them to be true.



Randall Mier  
5114 Middle Rd  
Hope, MI 48628




Subscribed and sworn to before me  
this 10 day of August, 2020



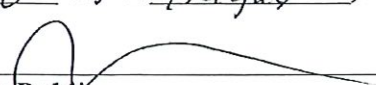
\_\_\_\_\_  
Notary Public



Kim Mier  
5114 Middle Rd  
Hope, MI 48628



Subscribed and sworn to before me  
this 10 day of August, 2020



\_\_\_\_\_  
Notary Public