

STATE OF MICHIGAN
IN THE COURT OF CLAIMS

PAMELA FAGAN, NICOLE KRAMER,
and SANFORD HARDWARE 1, LLC
individually and on behalf of
those similarly situated,

Plaintiffs,

v.

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

Defendants.

Case No.: 20-000111 -MM

Hon.: Murray

CLASS ACTION COMPLAINT

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COURT OF CLAIMS

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A civil action between these parties or other parties arising out of the transaction or occurrence alleged in the complaint has been previously filed in the United States District Court for the Eastern District of Michigan, Midland County Circuit Court, Saginaw County Circuit Court, and this Court. In this Court it was given case number 20-000094-MM and was assigned to Judge Cynthia Stephens. The action remains pending.

/s/ E. Powell Miller
E. Powell Miller

CLASS ACTION COMPLAINT

Plaintiffs Pamela Fagan, Nicole Kramer, and Sanford Hardware 1, LLC (“Plaintiffs”) on behalf of themselves and of all others similarly situated, by and through their undersigned counsel, bring this action against Defendants Michigan Department of Environment, Great Lakes & Energy (formerly known as the Michigan Department of Environmental Quality) and the Michigan Department of Natural Resources (collectively “Defendants”). Plaintiffs’ allegations herein are based upon personal knowledge as to their own acts, upon investigation of their counsel, and upon information and belief as to all other matters.

PARTIES

Plaintiff Pamela Fagan

1. Plaintiff Pamela Fagan is a resident of Sanford, Michigan in Midland County.
2. Plaintiff Fagan owns her residence, which backs up to Sanford Lake. As a result of the floods, her home and personal possessions, including but not limited to furniture, flooring, carpet, a refrigerator and a boat lift, have been severely damaged and/or outright destroyed.
3. Due to the damage to her home, property and personal possessions and the last-minute order to evacuate, Plaintiff Fagan’s entire lower level of her home has been destroyed, including her home, property and personal possessions.

Plaintiff Nicole Kramer

4. Plaintiff Nicole Kramer is a resident of Sanford, Michigan in Midland County. Plaintiff Kramer is property owner that lives approximately one block away from the Sanford Dam and downstream from Lake Sanford.

5. At approximately 5:30 am on May 19th, Plaintiff Kramer and her family were forced to evacuate due to the catastrophic flooding of the Edenville and Sanford Dams. Plaintiff Kramer was unable to return to her home until May 23rd, and at this time she and her family were again forced to evacuate by first responders.

6. As a result of the flooding, Plaintiff Kramer's real and personal property has been significantly damaged and/or outright destroyed.

7. In particular, Plaintiff Kramer's basement has been flooded and Plaintiff is now required to repair and/or replace the furnace, hot water heater, air conditioning, and electrical wiring in her home.

Plaintiff Sanford Hardware 1, LLC

8. Plaintiff Sanford Hardware 1, LLC ("Sanford Hardware") is a domestic limited liability company which registered address is at 2351 N. 8 Mile, Sanford, MI 48657. Sanford Hardware's principal place of business is at 346 Saginaw Rd., Sanford, MI 48657, approximately 1 mile from Sanford Dam, Sanford Lake, and the Tittabawassee River

9. As a result of the catastrophic flooding and Dam failure, Plaintiff Sanford Hardware incurred substantial damage to its real and business property and sustained interruption to its business, loss of profits and other such damages as shall be determined.

Defendants

10. Defendant Michigan Department of Environment, Great Lakes & Energy (“EGLE”) is a legal entity formed and/or existing under the laws of the State of Michigan and a department of the State of Michigan. EGLE is the successor agency to the Michigan Department of Environmental Quality (“MDEQ”)¹

11. Defendant Michigan Department of Natural Resources (“DNR”) is a legal entity formed and/or existing under the laws of the State of Michigan and a department of the State of Michigan.

JURISDICTION AND VENUE

12. This Court has jurisdiction over Defendants as State departments pursuant to MCL 600.6419. This Court has jurisdiction over the EGLE and DNR as each constitute a “department, commission, board, institution, arm, or agency of this State.”

13. This Court has subject matter jurisdiction over this lawsuit pursuant to MCL 600.6404 and 600.6419 because the claims asserted herein are made against the State and its departments as defined in MCL 600.6419(7).

14. Venue is proper in this Court pursuant to MCL 600.6419.

GENERAL ALLEGATIONS

A. The History of the Edenville Dam.

15. The Edenville Dam (“Dam” or “Edenville Dam”) was built in 1924 with the purpose of providing hydroelectric power and is located on the border of Midland and Gladwin Counties in Michigan.²

¹ <https://www.mlive.com/news/2019/04/michigan-launches-new-name-for-expanded-environment-department.html>

² <https://gladwincounty-mi.gov/Dam-information/>

16. The Edenville Dam “consists of earthen embankments . . . totaling about 6,600 feet in length and having a maximum height of 54.5 feet. The 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-feet and a 49-mile-long shoreline at full pool.”³

17. Three other dams were also built in 1924 “for the purpose of waterpower development and to generate electricity”; Sanford Dam, which is downstream from the Edenville Dam; and Smallwood and Secord Dams, which are upstream from the Edenville Dam.

18. The Sanford Dam (“Sanford Dam”), which stands three stories tall, is on the Tittabawassee River near the town of Sanford, Michigan and about 34 miles upstream of the City of Midland.

19. The Secord Dam (“Secord Dam”) is on the Tittabawassee River in Gladwin County, Michigan and is approximately 8.5 miles northeast of the City of Gladwin. The Secord Dam is approximately 42 miles upstream from the City of Midland, Michigan. The failures of Edenville Dam and Sanford Dam caused damage to Secord Dam and resulted in the flooding of Secord Lake and the surrounding areas.

20. The Smallwood Dam (“Smallwood Dam”) is on the Tittabawassee River in Gladwin County and is approximately 8 miles southeast of the City of Gladwin. The Smallwood Dam is approximately 34 miles upstream of the City of Midland, Michigan. The failures of Edenville Dam and Sanford Dam caused damage to Smallwood Dam and resulted in the flooding of Smallwood Lake and the surrounding areas.

³ 162 FERC ¶ 61,116, 2018 WL 2221301, Fed. Energy Reg. Comm'n Rep. P 61116 (February 15, 2018)

21. The construction of these four dams modified the Tittabawassee River and created Sanford, Wixom, Smallwood and Secord Lakes. Further, “[T]hese four impoundments form a continuous chain of lakes 35 miles in length and flood approximately 6,000 surface areas.”⁴

22. Edenville Dam was formerly licensed as a hydroelectric dam generating electricity, and was, until recently, subject to regulation by the Federal Energy Regulatory Commission (“FERC”).⁵ The Edenville Dam, and its former related production of hydroelectricity, are referred to as the “Edenville Project.”

23. The Edenville Project “was originally licensed to Wolverine Power Corporation on October 16, 1998. The license was transferred from Wolverine Power Corporation to Synex Michigan, LLC on June 23, 2004. Subsequent to Boyce’s purchase, Synex Michigan, LLC changed its name to Boyce Hydro Power, LLC (licensee) and filed a statement with the Commission on July 12, 2007 to this effect.”⁶

24. Even though the Edenville Dam is no longer licensed to produce electricity, it is critically important to maintain the water levels of Wixom Lake and the water levels of the river and all bodies of water downstream from the Dam.

25. A consortium of individuals, trusts, and Limited Liability Companies—all operating under the Boyce umbrella—acted in concert and jointly owned, operated and managed the Edenville and Sanford Dams. These actors and entities include Boyce Hydro Power LLC;

⁴ https://www.michigan.gov/documents/dnr/SR52_text_540515_7.pdf

⁵ <https://www.ferc.gov/legal/staff-reports/2017/hydropower-primer.pdf> (“The FPA, codified in 16 U.S.C. §§ 791 to 823d, was enacted in 1935 and grants the Commission jurisdiction over nonfederal hydropower projects throughout the United States, as well as the power to regulate the transmission and wholesale sale of electricity in interstate commerce.”); https://www.michigan.gov/dnr/0,4570,7-350-79136_79236_80249-80301--,00.html; <https://sanfordlakeassociation.org/sanford-Dam>

⁶ 159 FERC ¶ 62,292, 2017 WL 3283765, Fed. Energy Reg. Comm'n Rep. P 62292 (June 15, 2017).

Boyce Hydro LLC; Boyce Michigan LLC; Lee W. Mueller; Michele G. Mueller; Michael d'Avenas; Stephen B. Hultberg; William D. Boyce Trust 2350 u/a/d 10/1908; William D. Boyce Trust 3649 u/a/d 06/1929; William D. Boyce Trust 3650 u/a/d 06/1929; Boyce Trust Hydro Property 2350 LLC; Boyce Trust Hydro Property 3649 LLC; and Boyce Trust Hydro Property 3650 LLC (collectively the "Boyce Entities" or "Boyce").

26. Downstream from the Tittabawassee River is the Sanford Dam, also owned and operated by the Boyce Entities. Boyce obtained the Sanford Dam and its related license at the same time as the Edenville Dam.

27. Sanford Lake is a man-made reservoir which was formed by the damming of the Tittabawassee River with the creation of the Sanford Dam. The main body of the lake stretches for about 6 miles.⁷

28. Boyce obtained the Sanford Dam and its related FERC license, which is still valid, at the same time as the Edenville Dam in approximately March 2006.⁸

B. Federal Regulations and Safety Standards.

29. The FERC has clear standards and rules to ensure that hydroelectric dams are safe and do not pose a threat to the public.⁹ As summarized in a recent FERC Order related to the Edenville Dam:

The Commission's Dam Safety Guidelines require that, if the failure of project works would present a threat to human life or would cause significant property damage, the project works must be designed to either withstand overtopping or the loading condition that would occur during a flood up to the probable maximum flood, 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

⁷ <https://sanfordlakeassociation.org/the-lake>

⁸ See *Lee W. Mueller, et. al. v. R.L. Milsner, Inc., et. al.*, Case No. 07-3012-CZ, Gladwin County Circuit Court (Feb. 23, 2007).

⁹ See <https://www.ferc.gov/industries/hydropower/safety/guidelines/eng-guide/chap2.pdf>

endanger the safety of the project works. Given that failure of the Edenville Dam could pose a significant risk to the Village of Sanford, Northwood University, the City of Midland, and other downstream areas, the dam must meet this design standard.¹⁰

30. The FERC's safety rules also come from its oft-cited Engineering Guidelines for the Evaluation of Hydropower Projects.¹¹

31. Chapter two of the FERC Engineering Guidelines required Boyce to ensure that the Edenville Dam was capable handling 100% of the probable maximum flood ("PMF").¹²

32. The PMF is defined as: "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."¹³

33. The FERC used this peak 100% standard for the Edenville Dam because the FERC necessarily, and rightfully, determined that a "failure of the project works would present a threat to human life or would cause significant property damage."¹⁴

34. In addition, Boyce's License at Article 4 gave the FERC broad authority to issue both general and specific rules and regulations, "from time to time," related to the Edenville Project so as to ensure there was no risk to "the protection of life, health, or property."¹⁵

¹⁰ 162 FERC ¶ 61,007, 2018 WL 2221191, Fed. Energy Reg. Comm'n Rep. P 61007 (January 5, 2018).

¹¹ Each individual chapter is available online at the link below:

<https://www.ferc.gov/industries/hydropower/safety/guidelines/eng-guide.asp>

¹² <https://www.ferc.gov/industries/hydropower/safety/guidelines/eng-guide/chap2.pdf> (at 2-3).

¹³ *Id.*

¹⁴ See 159 FERC ¶ 62,292, 2017 WL 3283765, Fed. Energy Reg. Comm'n Rep. P 62292 (June 15, 2017).

¹⁵ *Id.* at (A)(1)(5).

35. Since Boyce obtained the Edenville Dam's license in 2006, the FERC spent the next 15 years issuing notices, orders, opinions, and warnings to Boyce that the Edenville Dam was unsafe.

36. The Edenville Dam has consistently failed to meet these very important rules and guidelines, and that did not change when Boyce acquired the Edenville Dam and took over the license in 2006. In fact, matters got worse since Boyce took over in 2006.

37. FERC "[s]taff informed Boyce that its primary concern was the licensee's longstanding failure to address the project's inadequate spillway capacity, and required Boyce to construct two auxiliary spillways as risk reduction measures, and to file a plan and schedule for additional modification needed to safely pass the project's full probable maximum flood. The order noted Boyce's extensive violations and warned that the failure to comply with the order could result in an order to cease generation and subject the licensee to enforcement and civil penalties."¹⁶

38. A FERC Compliance Order summarized Boyce's behavior:

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 consequences of this situation. A situation that must be remedied in order to protect life, limb, and property.¹⁷

¹⁶ 162 FERC ¶ 61,007, 2018 WL 2221191, Fed. Energy Reg. Comm'n Rep. P 61007 (January 5, 2018).

¹⁷ 159 FERC ¶ 62,292, 2017 WL 3283765, Fed. Energy Reg. Comm'n Rep. P 62292 (June 15, 2017).

39. For years, the FERC advised Boyce that the Edenville Dam did not meet adequate design standards and could only drain about half¹⁸ of the expected “probable maximum flood”—the amount of water expected in the most severe storm that is reasonably possible in the region.¹⁹

40. This was a critical safety issue, and the FERC consistently implored Boyce, since acquiring the Dam’s license in 2006, to increase the spillway capacity.

41. Yet, that never happened. Instead, the FERC was faced with delay tactics, non-compliance, false promises, complaints, and any other illegitimate reasons in Boyce’s arsenal of excuses.

42. Eventually, federal regulators ordered Boyce to build two spillways to accommodate potential flooding, and Boyce agreed.²⁰ But Boyce never did the work.²¹

43. It is clear that the FERC believed that the Edenville Dam poised a substantial risk to Plaintiffs. The breach of the Edenville Dam showed that the FERC’s concerns were well founded. Defendants were well aware of the substantial risks posed by Edenville Dam under Boyce’s ownership. And, as detailed below, Defendants’ affirmative acts led directly to the breach, the flooding, and Plaintiffs’ damages.

C. FERC Revokes Boyce’s License, Making Defendant EGLE Responsible for the Edenville Dam.

¹⁸ “The Edenville Dam's spillway capacity was only about 50 percent of the probable maximum flood, the commission said.” <https://www.nytimes.com/aponline/2020/05/20/us/ap-us-midwest-flooding-failing-dam.html>.

¹⁹ “the project spillways are not adequate to pass the probable maximum flood, thereby creating a grave danger to the public.” 162 FERC ¶ 61,007, 2018 WL 2221191, Fed. Energy Reg. Comm'n Rep. P 61007 (January 5, 2018).

²⁰ See generally 159 FERC ¶ 62,292, 2017 WL 3283765, Fed. Energy Reg. Comm'n Rep. P 62292 (June 15, 2017).

²¹ *Id.*

44. More than a decade of non-compliance came to a peak on June 15, 2017 when the FERC issued a more than 50 page Compliance Order describing, in excruciating detail, Boyce's failure to comply with the FERC's orders and directives, its failure to acknowledge the grave public safety concern, and its decade long string of excuses.

45. Although the FERC's concerns were many, the key concern was public safety. The Compliance Order provides, in part:

the Commission's 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 would create a threat to human life and/or would cause significant property damage. The project's spillway deficiencies must be remedied.

46. The Compliance Order made clear that Boyce had to make changes and had to increase the Dam's spillway capacity to avoid the risk of catastrophe.

47. Boyce failed to come into compliance with the FERC's requirements.²²

48. Boyce's failure to comply with the two safety-related directives in the Compliance Letter resulted in the FERC's staff issuing an order on November 20, 2017 requiring Boyce to cease generating energy at the Edenville Project. The FERC referred the matter to the Office of Enforcement for further action.²³

49. The FERC issued a proposal on February 15, 2018 to revoke Boyce's license which permitted it to generate hydroelectricity at the Edenville Dam.²⁴

²² 162 FERC ¶ 61,116, 2018 WL 2221301, Fed. Energy Reg. Comm'n Rep. P 61116 (February 15, 2018).

²³ 161 FERC ¶ 62,119, 2017 WL 7797220, Fed. Energy Reg. Comm'n Rep. P 62119 (November 20, 2017).

²⁴ 162 FERC ¶ 61,116, 2018 WL 2221301, Fed. Energy Reg. Comm'n Rep. P 61116 (February 15, 2018).

50. Roughly six month later, on September 10, 2018, Boyce’s license as to the Edenville Dam was formally revoked by the FERC.²⁵

D. The Switch to State Regulation, the EGLE, and the State Rules.

51. After revoking Boyce’s license, the FERC transferred oversight of the Edenville Dam to the relevant State regulatory agencies.²⁶

52. The Revocation Order stated: “Following revocation of the license, the Commission's jurisdiction will end, and authority over the site will pass to Michigan DEQ for dam safety regulatory purposes.”²⁷

53. Specifically, Defendant EGLE took oversight of the Edenville Dam.²⁸ See MCL 324.31506, Natural Resources and Environmental Protection Act, Part 315, Dam Safety.

54. The EGLE has its own Dam Safety Program and enforcement mechanisms.²⁹

55. And, like the FERC, a Michigan statute provides guidelines for minimum spillway capacities. See MCL 324.31516.

56. Because the Edenville Dam is categorized as a “high hazard potential dam,”³⁰ Michigan law requires that the spillway capacity “shall be capable of passing the half probable maximum flood.” MCL 324.31516(1)(d).

²⁵ 164 FERC ¶ 61,178, 2018 WL 6326709, Fed. Energy Reg. Comm'n Rep. P 61178 (September 10, 2018).

²⁶ *Id.* FERC did not “transfer” regulatory authority per se, but since Boyce no longer had a license there was no reason, under their regulations, to continue to regulate.

²⁷ *Id.*

²⁸ <https://www.michigan.gov/egle/0,9429,7-135-3313-529696--,00.html>

²⁹ https://www.michigan.gov/egle/0,9429,7-135-3313_3684_3723-9515--,00.html

³⁰ See FLTF April 2019 Lake Level Study Report by Spicer Group; http://www.four-lakes-taskforce-mi.com/uploads/1/2/3/1/123199575/four_lake_level_study_final_full_report_20190426.pdf.

57. “‘Half probable maximum flood’ means the largest flood that may reasonably occur over a watershed, and is derived from the combination of hydrologic runoff parameters and the half probable maximum storm.” MCL 324.215(7).

58. Further, the Michigan statute provides for the submission of inspection reports and provides EGLE with enforcement authority to order repairs to dams and issue other compliance orders. Failure to abide by these orders can result in civil litigation and penalties. MCL 324.31518(7); MCL 324.31524 and 31525.

59. The Michigan statute further authorizes the EGLE to promulgate rules related to dam safety in the State. MCL 324.31528; *see* Michigan Administrative Code Rules 281.1301 to 1313.

E. Defendant EGLE Performs a “Cursory Inspection” of the Edenville Dam in October 2018.

60. EGLE is an agency that is apparently too small for its mission. Despite having 1,061 dams under its jurisdiction—more than ten times the number of Michigan dams regulated by the federal government, but not even half of the dams found throughout this State—the entire Dam Safety Unit of the Water Resources Division of EGLE (the “Dam Unit”) has three employees, one of whom is a supervisor. One of those employees, Luke Trumble, P.E., is responsible for the dams in nearly every major population center in Michigan, including those in and south the counties of Muskegon, Kent, Montcalm, Gratiot, Shiawassee, Genesee, Lapeer, and St. Clair. The other employee has responsibility for the entire Upper Peninsula, as well as the Lower Peninsula in all counties north of that line.³¹ According to Trumble, “The Program’s main goal is to prevent failures.”³²

³¹ https://www.michigan.gov/documents/deq/wrd-damsstaff_402870_7.pdf

³² <https://www.freep.com/story/news/local/michigan/2020/05/24/dam-safety-unit-2-staff-supervisor-1000-dams/5247566002/>

61. The Dam Unit is not just small; it is also poorly funded. In 2018, the budget of the entire Dam Unit was \$397,215. That is equivalent to \$374 per dam, barely half the average of \$695 per dam for states across the country.³³

62. The Michigan Section of the American Society of Civil Engineers (“ASCE”) estimated that in 2018, about two-thirds of Michigan’s 2,600 dams exceeded “their typical 50-year design life,” a percentage that would increase to “about 80 percent” by 2023. “271 dams [are] over 100 years old.” The ASCE specifically pointed to “[e]xpanded funding ... to provide additional staffing for the Michigan [DEQ] Dam Safety Unit” as necessary “to make more progress to address dams in need of repair or removal.”³⁴

63. This Dam Unit’s capacity—two inspectors and a supervisor covering 1,061 dams with \$397,215—makes it impossible for dams, even those with a high-hazard designation like the Edenville Dam, which the FERC had already determined to be unsafe and to pose a major threat to life, limb, and property, to be properly inspected.

64. In Michigan, dam owners are responsible for their own inspections. This measure saves money; but EGLE does not strictly enforce it. In 2018, Michigan reported to the US Army Corps of Engineers that the Dam Unit received only 82% of scheduled inspection reports for high-hazard dams—a 13% drop from 2017.³⁵

³³ <https://www.freep.com/story/news/local/michigan/2020/05/24/dam-safety-unit-2-staff-supervisor-1000-dams/5247566002/>

³⁴ https://www.infrastructurereportcard.org/wp-content/uploads/2016/10/FullReport-MI_2018-FINAL-1.pdf

³⁵ <https://www.freep.com/story/news/local/michigan/2020/05/24/dam-safety-unit-2-staff-supervisor-1000-dams/5247566002/>

65. Trumble has said that EGLE leaves him alone to review “200 to 300 consultant’s reports a year,” as well as 20 to 40 inspections of dams he performs himself.³⁶

66. On October 4, 2018, Trumble, together with Jim Pawloski, P.E., on behalf of the Dam Unit, inspected the Edenville Dam. Pawloski issued a report on that inspection on October 8, 2018 (the “EGLE Report”). The EGLE Report, which mentions the FERC order revoking Boyce’s license to generate hydroelectricity, and which the Dam Unit was therefore aware of, admits that the inspection performed was merely “cursory.”³⁷

67. Perhaps because the inspection was only cursory, the Dam Unit did not report on the deficient spillway capacity that caused the FERC to revoke Boyce’s federal license for Edenville Dam less than a month earlier. Instead, “the dam was observed to be in fair structural condition,” and it was adjudged that “there were no observed deficiencies that would be expected to cause immediate failure of the dam.”³⁸

68. Thus, the EGLE Report is most notable for what it does not say. There is not a single word in the one-page written portion of the Report about the capacity of the Edenville Dam’s spillways.³⁹ The FERC revoked the Dam’s license to generate hydroelectric energy because of the inadequate spillways, and the order stating as much is cited in the EGLE Report’s first sentence. But Pawloski and Trumble apparently failed to even consider the possibility that they may be

³⁶ <https://www.freep.com/story/news/local/michigan/2020/05/24/dam-safety-unit-2-staff-supervisor-1000-dams/5247566002/>

³⁷ https://www.michigan.gov/documents/egle/egle-EdenvilleDamInspection-10042018_691245_7.pdf

³⁸ https://www.michigan.gov/documents/egle/egle-EdenvilleDamInspection-10042018_691245_7.pdf

³⁹ The Report also contains dozens of annotated pictures. Nothing in the annotations discusses spillway capacity either.

inadequate. Upon information and belief, the sufficiency of the spillways' capacity was not inspected or considered by the Dam Unit on October 4.⁴⁰

69. This failure to consider the capacity of the spillway would have violated the rules EGLE has promulgated regarding the Inspection Reports it requires dam owners like Boyce to submit to the Dam Unit every 3 years. Under Rule 281.1310(2)(f), "an inspection report shall include," *inter alia*:

A hydrologic and hydraulic section that includes an evaluation of spillway adequacy, including a description of pertinent available information, such as any of the following:

- (i) Hydrologic design data provided by the department.
- (ii) Drainage area.
- (iii) Floods of record.
- (iv) Previous evaluations.

70. None of the information which Rule 281.1310(2)(f) requires to be included in an Inspection Report was included in the EGLE Report. Thus, the EGLE Report failed to meet the standard to which the State's rules requires of others.

71. In a statement issued in May 2020, *after* the Edenville Dam broke and more than a year after the EGLE Report was issued, EGLE said that it "had concerns that the dam might not have enough spillway capacity ... to meet state requirements, and therefore ordered a comprehensive structural assessment of the dam to help determine if it met state spillway, and other, safety requirement," but that the study it sought "had not been received by EGLE prior to the dam failure." The EGLE statement did not say when the study was commissioned or when it would be completed.⁴¹

⁴⁰ *Id.*

⁴¹ <https://www.michigan.gov/egle/0,9429,7-135-3313-529696--,00.html>

72. Regardless, the EGLE Report found only one apparent deficiency at the Edenville Dam: that “the water level in the impoundment (Wixom Lake) was surveyed and observed to be approximately 4.1 feet below its normal pool elevation.”⁴²

F. Defendant EGLE Ignores Warning Signs at the Edenville Dam.

73. After EGLE took over regulation of the Edenville Dam, a plan was put in place for a local task force, the Four Lakes Task Force (“FLTF”), to purchase and take over the Edenville, Sanford, Smallwood, and Secord Dam operations by January 2022.⁴³

74. Around the end of December 2019 and early January 2020, upon information and belief, the FLTF signed a purchase agreement with Boyce to acquire the four dams, but the titles for the dams have not yet been transferred and that is not expected to occur until 2022.⁴⁴

75. Upon purchase, an entity known as the Four Lakes Operation (“FLO”) would own FERC licenses for the Sanford, Smallwood and Secord Dams that expire in 2028.⁴⁵

76. Around October of 2018, and again around November of 2019, Boyce lowered the water level in Wixom Lake without permission from EGLE.⁴⁶ This lowering is known as a “drawdown.”

77. Boyce lowered the water levels in an effort to save money during the winter months and failed to make the necessary and requisite repairs to increase the safety of the Dam and to bring the Dam in to compliance with State standards.

⁴² *Id.*

⁴³ <http://www.four-lakes-taskforce-mi.com/about.html>;
<https://chemicalcitypaper.com/2020/01/02/four-lakes-task-force-signs-purchase-agreement-for-wixom-and-sanford-lakes/>

⁴⁴ FLTF PowerPoint Re Purchase Agreement; <http://www.four-lakes-taskforce-mi.com/frequently-asked-questions.html>

⁴⁵ *Id.*

⁴⁶ https://www.michigan.gov/documents/egle/egle-BoyceHydroDamChronology_691440_7.pdf

78. Meanwhile, Defendant EGLE spent months considering whether the Dam’s spillway capacity met the State’s requirements.⁴⁷

79. Defendant EGLE sought records on spillway capacity from the FLTF’s consultants in February 2019—five months after the Dam Unit took regulatory control—and from Boyce’s consultants in March 2019.⁴⁸

80. A preliminary finding that the Wixom Lake spillways were deficient even under the less-stringent Michigan law standards was made shortly after the Defendant EGLE started collecting information from FLTF consultants, apparently through work done in coordination with the Dam Unit. A “Four Lakes Lake Level Study” prepared by Spicer and dated April 2019, states:

The FLTF met and coordinated with the MDEQ Dam Safety staff and understand that many of the repairs and improvements outlined in the Part 12D safety inspection reports for FERC would also be required for State of Michigan, should the MDEQ inherit regulatory oversight of the dams. The preliminary conclusion is, it should be anticipated that modest improvements to spillway capacity at Wixom Lake and Secord Lake will be required and that repairs at all four dams will be required.⁴⁹

81. This early finding showed that the spillway capacity was a lingering danger to people and property, whether under both the Federal and State regulations. But this did not spur any urgency by Defendant EGLE to improve spillway capacity.

82. EGLE would reach a similar—and more detailed—conclusion on spillway capacity the following winter. Trumble stated in a January 31, 2020 email that the Edenville Dam did not meet the Michigan spillway capacity requirement. Mr. Trumble, according to internal emails

⁴⁷ <https://www.detroitnews.com/story/news/local/michigan/2020/05/22/state-found-edenville-dam-failed-safety-standards-four-months-before-flood/5241158002/>

⁴⁸ <https://www.detroitnews.com/story/news/local/michigan/2020/05/22/state-found-edenville-dam-failed-safety-standards-four-months-before-flood/5241158002/>

⁴⁹ http://www.four-lakes-taskforce-mi.com/uploads/1/2/3/1/123199575/four_lake_level_study_final_full_report_20190426.pdf (emphasis added)

quoted by the Detroit News, stated: “Assuming this stands, the **dam would be about 4,000-5,000 [cubic feet per second] short of passing [the State standard]** with no freeboard at the low point in the earthen embankments.”⁵⁰ Freeboard, according to the Detroit News, is the distance between the water’s surface and the top of a dam’s containment wall.

83. Trumble also said: “Factor in waver run up/set up, **and the deficiency increases significantly,**” continuing, “**No big surprise there,** but I wanted to have the calcs to support that assumption before EGLE makes a final determination.”⁵¹

84. The EGLE itself describes the “late January 2020” findings of its staff as a “preliminary conclusion that the dam likely did not meet the state spillway flow requirement.” It implies that it was only in question because Boyce and its consultant—who, as shown above, had spent years obfuscating to federal authorities about the sufficiency of its spillway capacity—suggested that the dam met the State standards. But by January 2020, EGLE, which had reviewed decades of FERC’s data and records, and thus would have been well aware of both the Dam’s insufficiencies and how little credibility Boyce’s self-assessment could be given.⁵²

85. EGLE states that an “independent consultant’s report” was “scheduled to be submitted in March [presumably of 2020],” and that it “would have likely confirmed EGLE’s preliminary determination.” But EGLE does not say if the report was ever submitted.⁵³

⁵⁰ <https://www.detroitnews.com/story/news/local/michigan/2020/05/22/state-found-edenville-dam-failed-safety-standards-four-months-before-flood/5241158002/> (citing internal emails obtained by the Detroit news) (alterations from the Detroit News) (emphasis added)

⁵¹ <https://www.detroitnews.com/story/news/local/michigan/2020/05/22/state-found-edenville-dam-failed-safety-standards-four-months-before-flood/5241158002/> (citing internal emails obtained by the Detroit news) (emphasis added)

⁵² https://www.michigan.gov/documents/egle/egle-EdenvilleDamFailureFAQ_691979_7.pdf

⁵³ https://www.michigan.gov/documents/egle/egle-EdenvilleDamFailureFAQ_691979_7.pdf

86. Thus, the Dam Unit was aware no later than January 31, 2020, and likely by April 2019, that the Edenville Dam had dangerous deficiencies when the water was still, even without consideration of the impact of a not-yet-completed analysis of the impact of waves on Wixom Lake.⁵⁴

87. After the January 31, 2020 email, Trumble told the Spicer Group, the FLTF's chief engineering consultants, to advise the FLTF and Boyce of the deficiency.⁵⁵

88. Nevertheless, while Spicer's study was pending, and despite Trumble's conclusion on January 31, 2020 that the Edenville Dam's spillways remained deficient, even under the less-stringent State standards (let alone the federal standards), no citation was issued. Defendant EGLE allowed the dam to operate without citation and took no apparent action to improve spillway capacity. Instead, Defendant EGLE would exacerbate the issue by ordering the water levels increased.

89. This was despite the fact that, according to EGLE Public Information Officer Nick Assendelft, Michigan regulators "had strong concerns that the dam did not have enough spillway capacity," and had "expressed those concerns," even as they failed to move beyond "continued conversations" about the required repairs.⁵⁶

G. Defendants Affirmatively Seek to Increase the Water Level of Wixom Lake to More Dangerous Levels

⁵⁴ <https://www.detroitnews.com/story/news/local/michigan/2020/05/22/state-found-edenville-dam-failed-safety-standards-four-months-before-flood/5241158002/> (citing internal emails obtained by the Detroit news)

⁵⁵ <https://www.detroitnews.com/story/news/local/michigan/2020/05/22/state-found-edenville-dam-failed-safety-standards-four-months-before-flood/5241158002/>

⁵⁶ <https://www.bridgemi.com/michigan-environment-watch/feds-revoked-dams-license-over-safety-issues-then-michigan-deemed-it-safe>

90. Defendants were not merely derelict regulators who failed in their duty. Defendant undertook affirmative actions to increase the water level of Wixom Lake while Defendants were fully aware of the Dam’s safety defects and insufficient spillway capacity.

a. Defendants Sue to Protect Freshwater Mussels, not Michiganders.

91. Defendants EGLE and DNR, along with the State of Michigan, sued the Boyce Entities in early May of 2020 as a result of Boyce’s drawdowns of Wixom Lake levels in October 2018 and November 2019.⁵⁷ That lawsuit, which sought to increase Wixom Lake levels, was filed to protect fresh-water mussels living in the lake, and not the people and property who would be hurt if the Edenville Dam failed..

92. The lawsuit principally alleged that, “Without authorization, [Boyce] dramatically lowered the level of Wixom Lake for an extended period in both 2018 and 2019 (Drawdowns),” which, it is alleged, killed freshwater mussels.⁵⁸

93. Nowhere in the Mussel Complaint did Defendants note or even allude to the potential hazard to human life that would accompany keeping the water level of Wixom Lake at the higher levels Defendants desired. Nor did Defendants grapple with the fact that, if the Edenville Dam were to breach or fail, Wixom Lake would drain far below the level of the two drawdowns contested and would surely kill as many, if not more of the freshwater mussels it was seeking to protect.

94. Crucially, the Mussel Lawsuit did not merely seek damages or other monetary remedies for the dead mussels. Nor did it only seek relief that would seek to restore the freshwater mussels and their habitat. Instead, despite knowledge of the deficiencies of the Dam and the risk

⁵⁷ *Michigan, et al. v. Mueller, et al.*, No. 20-255-CE (Ingham Cnty. Cir. Ct. Apr. 30, 2020) (“Mussel Complaint”).

⁵⁸ Mussel Compl. ¶ 1.

posed from high water levels, Defendants sought an “order ... forbidding any future unauthorized Drawdown of Wixom Lake.”

95. Defendants filed the Mussel Lawsuit as to keep the water level of Wixom Lake artificially high, with knowledge of the Dam’s deficiencies and the risk posed from high water levels.

96. Before the revocation of Boyce’s license, at least one regulator, the FERC, had determined that the Defendants’ desire to raise the water levels to protect mussels was insufficient to overcome the risk it posed to human lives and property.⁵⁹ Nothing in the Mussel Lawsuit or elsewhere indicated that those circumstances had changed—neither that the risk to human life or property was lower, nor that the risk to the freshwater mussels was higher.

b. Defendant EGLE Issue Permit Requiring Higher Water Levels on Wixom Lake.

97. According to the EGLE, on May 16, 2019, permit WRP016343 v.1 was issued to Boyce to require higher levels of water filling for the dam during summer months. As shown above, when permit WRP016343 v.1 was issued, the Dam Unit had received the April 2019 report that found that “it should be anticipated that modest improvements to spillway capacity at Wixom Lake ... will be required.”⁶⁰

98. EGLE’s issuance of permit WRP016343 v.1 constituted an affirmative act by Defendants.

99. Those higher summer-month water levels were required, with only small deviations permitted in either direction.

⁵⁹ <https://www.detroitnews.com/story/news/local/michigan/2020/05/22/state-found-edenville-dam-failed-safety-standards-four-months-before-flood/5241158002/>

⁶⁰ http://www.four-lakes-taskforce-mi.com/uploads/1/2/3/1/123199575/four_lake_level_study_final_full_report_20190426.pdf

100. The water levels set by permit WRP0163434 v.1 went on to be ordered by the Midland County Circuit Court.

101. As a result of Defendant EGLE's affirmative acts in initiating the Mussel Lawsuit and issuing permit WRP016343 v.1, the water level in Wixom Lake was raised without increasing the spillway capacity or repairing other safety defects of the Dam. And the public remained, likely unknown to them, at grave risk of injury.

H. The Inevitable Occurred – the Edenville Dam Collapsed.

102. Unfortunately, the FERC's decade-long-warning that the Edenville Dam "would create a threat to human life and/or would cause significant property damage" if not fixed proved true on May 19, 2020.

103. On May 19, 2020, flooding on the Tittabawassee River further increased the water levels in Wixom Lake and the eastern side of the Edenville Dam collapsed and breached, triggering immediate evacuations in the towns of Edenville and Sanford, and the City of Midland and forced the evacuation and displacement of over 10,000 residents.

104. The devastation caused by the Edenville Dam's breach was catastrophic:⁶¹

⁶¹ <https://www.freep.com/story/news/local/michigan/2020/05/24/Dam-safety-unit-2-staff-supervisor-1000-Dams/5247566002/>; <https://www.cnn.com/2020/05/20/us/michigan-Dam-failure-before-after-photos-trnd/index.html>; <https://www.washingtonpost.com/weather/2020/05/22/michigan-Dams-failure-before-after/>.



Aerial photo of flooding in downtown Midland, Mich., Wednesday, May 20, 2020.⁶²



⁶² <https://www.freep.com/story/news/local/michigan/2020/05/24/Dam-safety-unit-2-staff-supervisor-1000-Dams/5247566002/>

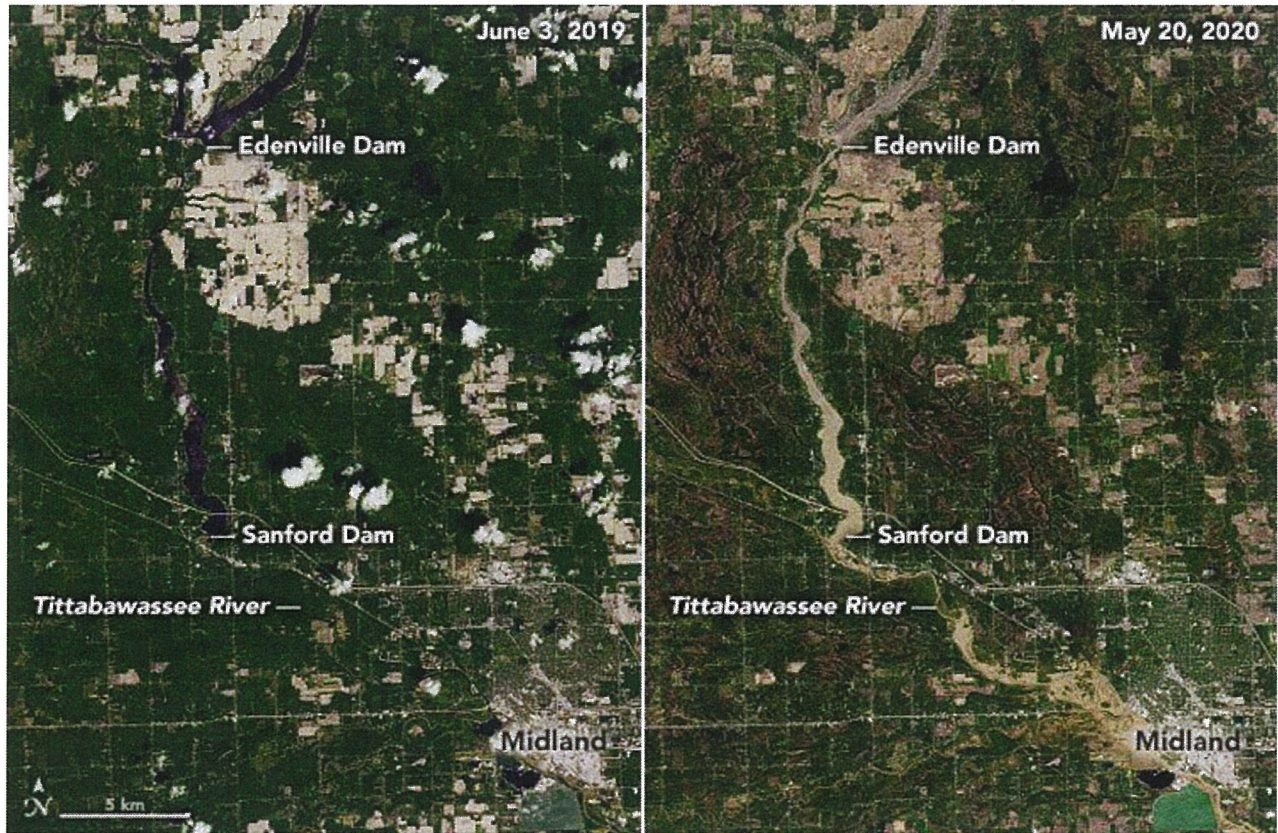
*Aerial photo of breaching Sanford Dam, Sanford, MI, Wednesday, May 20, 2020.*⁶³



*An aerial image taken by a drone shows the Edenville Dam breach on Wednesday, May 20, 2020.*⁶⁴

⁶³ *Id.*

⁶⁴ <https://www.cnn.com/2020/05/20/us/michigan-Dam-failure-before-after-photos-trnd/index.html>



NASA imagery shows waterways before and after the Edenville Dam collapse, and the Sanford Dam was overtopped Tuesday, May 19, 2020.⁶⁵

105. Immediately prior to the collapse of the Edenville Dam, Wixom Lake flooded, causing property damage to resident on Wixom Lake.⁶⁶ The eventual collapse of the Edenville Dam released the 21.5 million gallons of water comprising Wixom Lake, virtually emptying Wixom Lake in an hour and left those homeowners with a sand pit filled with dead fish and boats sitting on hoists with no water beneath them, greatly diminishing property values of former lakefront property.⁶⁷

⁶⁵ <https://www.washingtonpost.com/weather/2020/05/22/michigan-Dams-failure-before-after>

⁶⁶ <https://www.clickondetroit.com/news/local/2020/05/20/looked-like-niagra-falls-dam-that-created-wixom-lake-gives-way-flooding-mid-michigan-communities/>

⁶⁷ <https://www.fox2detroit.com/news/at-21-5-billion-gallons-wixom-lake-is-twice-as-big-as-oakland-countys-largest-lake-it-emptied-in-one-hour>



*Washed out boating docks on Wixom Lake due to the failure of the Edenville Dam on Wednesday, May 20, 2020.*⁶⁸

⁶⁸ <https://www.mlive.com/public-interest/2020/05/residents-on-michigans-vanished-wixom-lake-prep-for-first-holiday-without-it.html> (image 32/57); (image 46/57).



Two boats sit atop what remains of the Edenville Dam, washed up after severe flooding on Wednesday, May 20, 2020.⁶⁹

106. The collapse of the Edenville Dam emptied Wixom Lake, sending the devastating force of floodwaters into Sanford Lake—the reservoir created by the Sanford Dam—which also nearly emptied into the surrounding communities.⁷⁰ The roaring water forced out of Wixom Lake as a result of the Edenville Dam collapse caused devastating and catastrophic damage to real and personal property located downstream of Wixom Lake.

107. The result was catastrophic demolition and/or damage to thousands of residences and personal property and the utter and complete devastation of the town of Sanford.

⁶⁹ Courtesy of Mlive: <https://www.mlive.com/public-interest/2020/05/residents-on-michigans-vanished-wixom-lake-prep-for-first-holiday-without-it.html>

⁷⁰ <https://www.mlive.com/weather/2020/05/sanford-lake-now-a-puddle-after-dam-breach-from-flooding.html>

108. As a result of the torrential floodwaters rushing downstream from Wixom Lake, the Sanford Dam, roughly ten miles downstream of the Edenville Dam and six miles upstream of City of Midland, breached and overflowed, causing severe and extensive flooding into the downstream communities and eventually into the City of Midland.⁷¹



The flooding in Midland came after the failure of two dams in the area, completely covering certain roads and vegetation.⁷²

⁷¹ <https://www.mlive.com/news/saginaw-bay-city/2020/05/troubled-dam-breaks-sends-floodwaters-hurling-toward-midland.html>

⁷² <https://www.nytimes.com/2020/05/20/us/michigan-dams.html>

109. The Tittabawassee River, which the Edenville and Sanford Dams help maintain, crested at 35 feet in Midland, Michigan, its highest level on record.⁷³

110. As a result of the catastrophic damage, the Governor of Michigan issued a State of Emergency and more than 10,000 people were evacuated from the region⁷⁴ with just minutes to spare.

111. Many of the evacuees had nowhere to go but shelters, a disastrous place to be housed during the COVID-19 pandemic, creating an increased risk of grave physical harm and/or mental anguish. Some evacuees, seeking to avoid exposure to COVID-19, have been sleeping in their cars.⁷⁵

112. Thousands of homes and business were completely destroyed, personal property and valuables were lost, sewage systems overflowed, water supplies and residential wells were rendered undrinkable and the regions surrounding the Edenville and Sanford dams were left in utter disrepair.

113. The floodwaters also reached containment ponds at Dow Chemical. Plaintiffs and Class Members are subject to the substantial risk of imminent harm from the continuing increased risk of exposure to chemicals and/contamination from the containment ponds. To date, environmental testing has not occurred.⁷⁶

⁷³ <https://www.detroitnews.com/story/news/local/michigan/2020/05/20/tittabawassee-river-midland-flooding/5226734002/>

⁷⁴ https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-529649--,00.html

⁷⁵ <https://www.freep.com/story/news/local/michigan/2020/05/22/michigan-flooding-shelters/5242629002/>

⁷⁶ <https://www.detroitnews.com/story/news/local/michigan/2020/05/21/mid-michigan-floodwater-contamination-not-tested-yet/5239070002/>

114. The Defendants' affirmative actions directed towards keeping the Wixom Lake water level high, all with knowledge of the Dam's deficiencies and lack of requisite spillway, resulted in catastrophic flooding that constituted a taking by Defendants

CLASS ALLEGATIONS

115. Plaintiffs incorporate the preceding paragraphs by reference as if fully set forth at length herein.

116. Plaintiffs bring this action individually and as a class action pursuant to MCR 3.501 behalf of themselves and the following proposed class ("Class" or "Class Members") of similarly situated persons for both legal and equitable remedies:

All persons and entities that owned or leased residential or commercial property or a business which suffered economic losses, including property damage, due to the failure or imminent threat of failure of the Edenville and Sanford Dams in May 2020.

117. Plaintiffs reserve the right to modify or amend the definition of the proposed Class.

118. Excluded from the Class are: (a) Defendants and any entity or division in which Defendants have a controlling interest, and their legal representatives, officers, directors, assigns, and successors; (b) the Judge to whom this case is assigned and the Judge's staff; (c) the attorneys representing any parties to this Class Action;; and (e) the cities, towns, counties, townships, municipalities, and government entities of Gladwin, Midland or Saginaw Counties.

A. Numerosity

119. Pursuant to MCR 3.501(A)(1)(a), the Class is so numerous that joinder is impracticable. The Defendants' affirmative acts resulted in the displacement of over 10,000 residents and damage to the real and personal property of tens of thousands of residents within Gladwin, Midland and/or Saginaw Counties.

B. Typicality

120. Pursuant to MCR 3.501(A)(1)(c), Plaintiffs' claims are typical of the claims of the members of the Class, Plaintiffs and all Class Members have been adversely affected by Defendants' unlawful conduct.

C. Adequacy

121. Pursuant to MCR 3.501(A)(1)(d), Plaintiffs will fairly and adequately represent the Class.

122. Plaintiffs' interests are coincident with and not antagonistic to those of the other members of the Class.

123. Plaintiffs have retained counsel with substantial experience litigating class action lawsuits such as this one.

124. Plaintiffs and their counsel are committed to vigorously prosecuting this action on behalf of the Class and have the resources with which to do so.

D. Commonality and Predominance

125. Pursuant to MCR 3.501(A)(1)(b), common questions of law and fact exist as to all members of the Class which will drive the resolution of the claims raised. This is particularly true given the nature of the claims, which focuses on the conduct of Defendants, not of any particular Class Member, and which was generally applicable to all the members of the Class, thereby making appropriate relief with respect to the Class as a whole.

126. Plaintiffs' claims and the claims of all Class Members are based on the same legal and remedial theories arising from the wrongful conduct, acts and omissions of the Defendants in the ownership, maintenance and operations of the Dams and the resulting flood waters.

127. All members of the Class have been similarly affected by Defendants' conduct, which conduct has injured Class Members by causing damage to Plaintiffs' and Class Members' real and personal property; diminished value to Plaintiffs' and Class Members' real property; loss of income from Plaintiffs' and Class Members' real property; lost wages; loss of use and enjoyment of Plaintiffs' and Class Members' real and personal property; additional expenses related to annoyance and inconvenience; and, in light of the Plaintiffs and Class Members necessary displacement during the COVID-19 pandemic, an increased risk of grave physical harm and/or mental anguish damage.

128. Common legal and factual questions include, but are not limited to:

- a. Whether Defendants' Mussel Lawsuit, which sought to prohibit lowering the water level in Wixom Lake during the winter of 2019-2020, was an affirmative act which directly caused Plaintiffs' damages;
- b. Whether Defendants' issuance of a permit which allowed the water levels in Wixom Lake to be raised for the summer of 2020 was an affirmative act which directly caused Plaintiffs' damages;
- c. Whether Defendants' affirmative permission to Boyce to continue operating the Edenville Dam as if it were in full working order, despite actual knowledge of a substantial and material risk that the Edenville Dam would breach or would otherwise result in devastating flooding, was an affirmative act which directly caused Plaintiffs' damages;
- d. Whether Defendants knew or should have known that the operation of the Dams in the manner alleged herein was reasonably likely to cause the Edenville Dam to collapse and the flooding waters to breach the Sanford Dam;

- e. Whether Defendants' actions caused Plaintiffs and the other Class Members to incur real and personal property damage, diminution of value of property, forced evacuation, loss of the use and enjoyment of property and common areas within the community and other injury or damage;
- f. Whether the destruction of Plaintiffs' and the other Class Members property constituted a taking without just compensation; and
- g. Whether Plaintiffs and the other Class Members have suffered damages as a result of Defendants' actions.

129. These common questions of law and fact predominate over any question affecting only individual Class Members. Defendants have acted on grounds generally applicable to the entire Class, and the answers to these common questions will advance resolution of the litigation as to all Class Members.

E. Superiority

130. Pursuant to MCR 3.501(A)(1)(e), this class action is superior to all other available methods for the fair and efficient adjudication of this controversy. Such treatment will permit a large number of similarly situated persons to prosecute their common claims in a single forum simultaneously, efficiently, and without the unnecessary duplication of evidence, effort, or expense that numerous individual actions would engender.

- a. Absent a class action, Class Members would likely find the cost of litigating to be prohibitively high and, therefore, would have no effective remedy at law, and the expense and burden of individual litigation would render it impossible for members of the Class to individually redress the wrongs to them.

- b. Individualized litigation would create the risk of inconsistent or varying adjudications arising from the same set of facts. Individualized litigation would also increase the delay and expense to all parties and the court system from the issues raised by this action. By contrast, the class action device provides the benefits of adjudication of these issues in a single proceeding, economies of scale, and comprehensive supervision by a single Michigan court.
- c. Plaintiffs know of no difficulty to be encountered in the management of this action as a class action and many examples of similar cases certified as class actions are readily available.
- d. If required, Plaintiffs will propose one or more subclass(es), as the record becomes more developed.
- e. The class action is superior as final equitable or declaratory relief may be appropriate with respect to the Class.

COUNT I – INVERSE CONDEMNATION/TAKING

131. Plaintiffs repeat and incorporate the above allegations as if fully set forth herein.

132. Article 10, § 2 of the Michigan Constitution requires that “Private property shall not be taken for public use without just compensation.”

133. “An inverse condemnation suit is one instituted by a landowner whose property has been taken for public use without the commencement of condemnation proceedings.” *Blue Harvest, Inc v Dep’t of Transp*, 288 Mich App 267, 277–78 (2010) (quoting *Electro-Tech, Inc v H F Campbell Co*, 433 Mich 57, 88–89 (1989)). An inverse condemnation may occur, for example, where the government causes a decline in value or destruction of private property.

134. By affirmatively acting in such a way as to directly and substantially cause damage to the property of Plaintiffs and the Class Members, including, but not limited to, damage caused by the flooding after the failure of the Edenville and Sanford Dams, by the unplanned draining of Wixom Lake, and by the outgrowths thereof, Defendants affected a taking of that property.

135. Plaintiffs' and the Class Members' property was taken or destroyed without the use of any direct condemnation processes.

136. Defendants have not provided and will not provide Plaintiffs or the Class Members with any process or opportunity to reclaim the damage they suffered to their property as a result of the flooding.

137. Defendants affirmative actions regarding the Edenville Dam and Wixom Lake were a substantial cause of the decline of Plaintiffs' property's value.

138. Defendants abused their legitimate powers in affirmative acts directly aimed at the Plaintiffs' and the Class Members' property. Defendants' affirmative actions exacerbated (1) the likelihood that the Edenville Dam would break and that downstream dams would fail as a result; and (2) the extent of the damage if the Edenville Dam did break. Defendants undertook at least the following three affirmative acts which were aimed at the Plaintiffs' and the Class Members' property:

139. **First**, Defendants EGLE and DNR affirmatively acted by filing the Mussel Lawsuit, which sought to force Boyce to keep the water level in Wixom Lake higher than was safe and which did not account for the potential risks to human lives or property.

140. **Second**, Defendant EGLE affirmatively acted by issuing a permit to Boyce allowing the increase the level of water in Wixom Lake during the warmer months of 2020.

141. **Third**, Defendant EGLE acted affirmatively to permit Boyce to continue operating the Edenville Dam as if it were in full working order, despite actual knowledge of a substantial and material risk that the Wixom Lake spillways did not meet statutory requirements for spillway capacity and that the Edenville Dam would breach or would otherwise result in the catastrophic flooding in May 2020.

142. Defendants' first and second affirmative acts directly and substantially caused more water to be held behind the Edenville Dam in Wixom Lake before the rain of May 2020. Had the water level in Wixom Lake been kept at lower, safer levels, then:

- a. the Edenville Dam would have been under less pressure and would not have breached or failed; and
- b. if the Edenville Dam nevertheless breached on May 2020, there would have been less water in Wixom Lake to cause flooding downstream.

143. Defendant EGLE's third set of affirmative acts directly and substantially caused the breach itself. Had Defendants not so acted, the Edenville Dam would not have been damaged and would have withstood the high water levels after the rain of May 2020.

144. Defendants' affirmative acts constituted an abuse of their legitimate powers.

145. As a direct and proximate result of the foregoing, the Plaintiffs and Class Members have been displaced, suffered, and will continue to suffer injury and harm including, but not necessarily limited to, damage to Plaintiffs' and Class Members' real and personal property; diminished value to Plaintiffs' and Class Members' real property; loss of income from Plaintiffs' and Class Members' real property; lost wages; loss of use and enjoyment of Plaintiffs' and Class Members' real and personal property; additional expenses related to annoyance and

inconvenience; and, in light of the Plaintiffs and Class Members necessary displacement during the COVID-19 pandemic, an increased risk of grave physical harm and/or mental anguish.

146. Defendants have not paid just compensation.

147. Defendants will not now pay just compensation.

148. Defendants do not intend to pay just compensation in the future.

149. An inverse condemnation with damages has occurred.

150. Plaintiff and the Class have been injured and have suffered damages.

151. Accordingly, Plaintiffs and Class Members seek damages from Defendants, in an amount to be determined at trial, directly resulting from the injuries to their persons and properties, in a sufficient amount to compensate them for the injuries and losses sustained and to restore Plaintiffs and Class Members to their original position, including but not limited to the difference between the current value of their properties and such value if the harm had not been done, the cost of repair or restoration, remediation and abatement, and actual, consequential, and nominal damages, flowing from the negligence which are the natural and proximate result of Defendants' conduct.

RELIEF REQUESTED

As a result of the aforementioned acts and omissions of Defendants, Plaintiffs seek relief on behalf of themselves and the Class, including, but not limited to:

- a. Monetary damages:
 - i. sufficient to remediate Plaintiffs' and Class Members' properties from the damage caused by Defendants' conduct;
 - ii. to compensate Plaintiffs and Class Members for the diminution in the value of their properties caused by Defendants' conduct;
 - iii. to compensate Plaintiffs and Class Members for the loss of use and enjoyment of their properties caused by Defendants' conduct;

- iv. to compensate Plaintiffs and Class Members for the cost to obtain housing and/or shelter, clothing, and other goods due to the damage and/or destruction of Plaintiffs' and Class Members' properties and possessions; and
 - v. for such other monetary damages that are required to fully compensate Plaintiffs and Class Members for the loss of value, use, and enjoyment of their properties and possessions caused by Defendants' conduct.
- b. Injunctive relief on behalf of themselves and the Class, including but not limited to, an order requiring Defendants to fully remediate Plaintiffs' and Class Members' properties so that Plaintiffs' and Class members' properties are free from the presence of flood waters and potentially harmful bacteria and chemicals, and to provide Plaintiffs and Class Members with alternative, comparable housing during the remediation period;
- c. Any and all equitable relief that the Court deems proper and just;
- d. An order certifying the proposed Class, designating Plaintiffs as the named representatives of the respective Class Members, and appointing Plaintiffs' counsel as Class Counsel;
- e. An award to Plaintiffs and Class members of compensatory, exemplary, and consequential damages, including interest in an amount to be proven at trial;
- f. An award of attorneys' fees and costs;
- g. An award of pre-judgment and post-judgment interest as provided by law; and
- h. Such other and further relief as the Court deems just and proper.

Dated: June 3, 2020

Respectfully submitted,

/s/ E. Powell Miller

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Counsel for Plaintiffs and the Proposed Class

**SIGNATURE AND VERIFICATION OF COMPLAINT BY
PLAINTIFF SANFORD HARDWARE 1, LLC**

Pursuant to MCL 600.6431(1), Plaintiff Sanford Hardware 1, LLC hereby signs and verifies this complaint before an officer authorized to administer oaths:

Signed: Dennis Sian

Sanford Hardware 1, LLC Dennis Sian

By its: President

Title

CERTIFICATE OF ACKNOWLEDGEMENT OF NOTARY PUBLIC

State of: Michigan

County of: Midland Count

The foregoing instrument was acknowledged before me this 3rd day of June by 2020.

Signature of Notary Public: [Signature]
Oakland County Notary Public

My Appointment Expires: 10-25-2020