STATE OF MICHIGAN

COURT OF CLAIMS

DAVID KRIEGER, et al.,

Plaintiffs,

v

MICHIGAN DEPARTMENT OF ENVIRONMENT, GREAT LAKES & ENERGY, and MICHIGAN DEPARTMENT OF NATURAL RESOURCES[1]

Defendant.
_____/

OPINION AND ORDER

Case Nos. 20-000094-MM; 20-000102-MM; 20-000103-MM; 20-000111-MM; 20-000112-MM; 20-000116-MM; 20-000118-MM; 20-000121-MM; 20-000140-MM; 20-000151-MZ; 20-000156-MM; 20-000230-MZ; 20-000232-MZ; 20-000233-MM; 20-000235-MM; 20-000236-MM; 20-000237-MM; 20-000239-MM; 20-000240-MM; 20-000241-MM; 20-000245-MM; 20-000246-MM; 20-000257-MM; 20-000260-MM; and 20-000262-MM

Hon. Cynthia Diane Stephens

[1] Every complaint in these consolidated matters named the Department of Environment, Great Lakes, and Energy as a party defendant, while only some of them named the Department of Natural Resources as a defendant. Taking its cue from the parties, this opinion and order will use the term "defendant" to refer only to the Department of Environment, Great Lakes, and Energy, unless otherwise noted.

Pending before the Court in these consolidated cases are defendant's motions for partial[2] summary disposition which have purportedly been filed under MCR 2.116(C)(7). The Court held a hearing on the motions in November 2020, and the parties have submitted briefing in the consolidated cases, making this matter ripe for review. For the reasons that follow, the motion for summary disposition is GRANTED in part with respect to the trespass claims asserted by some plaintiffs because defendant enjoys immunity from those claims. However, summary disposition is DENIED with respect to plaintiffs' inverse-condemnation claims because defendant is not immune from those claims and because plaintiffs have adequately pled inverse condemnation. All other claims that have been pled—see footnote 4 of this opinion and order—but not addressed in the summary disposition briefing remain pending at this time.

I. BACKGROUND

Plaintiffs in these consolidated cases are property owners who owned property near two dams that failed in the spring of 2020. According to the allegations contained in the complaint, one of the dams, the Edenville Dam, held back water from two rivers and formed a body of water referred to as Wixom Lake. On or about May 19, 2020, the Edenville Dam failed after a rainstorm that began on May 18, 2020. The failure of the dam led to damaging floodwaters that eventually flowed over an impoundment at a second dam, the Sanford Dam, which was approximately 10 miles downstream. The Sanford Dam subsequently failed as well. Plaintiffs allege that the

[2] The Court describes the motions for summary disposition as "partial" because they do not address all of the claims made by the various plaintiffs in these consolidated actions, such as those described in footnote 4 of this opinion and order.

flooding and dam failures caused a wide range of property damage at plaintiffs' respective properties.

Plaintiffs allege that defendant engaged in affirmative acts of "mismanagement" and "concealment" in the operation of the dam, resulting in damage to plaintiffs' properties. In particular, they note concerns regarding the Edenville Dam's spillway capacity that were purportedly known by defendant before the flooding occurred. In 2018, federal regulatory authorities revoked the license of the Edenville Dam operator, Boyce Hydro, to sell power generated by the dam, based on concerns that the dam's spillway could not pass enough water to avert failure during certain flooding events. According to plaintiffs, the Federal Energy Regulatory Commission (FERC) had asked Boyce Hydro to build additional spillways to mitigate the risk, but to no avail.[3] The revocation became effective September 2018.

After federal regulators revoked Boyce's license, defendant Department of Environment, Great Lakes, and Energy (EGLE) became responsible for regulation and oversight at the Edenville Dam in accordance with part 315 of the Natural Resources and Environmental Protection Act, MCL 324.31501 *et seq*. In October 2018, approximately two weeks of being tasked with oversight duties for the Edenville Dam, defendant's inspectors declared the dam to be in "fair" condition and permitted its continued operation. Plaintiffs allege that defendant failed to demand any repairs be made to the dam between the time when its oversight began and the date of the flooding at issue. They also allege that, by way of the FERC revocation and other available information, that

[3] Plaintiffs and defendant assert a number of shortcomings by Boyce with respect to the operation and maintenance of the Edenville Dam. The Court does not recite all of the same, but simply notes that there appears to be agreement in the allegations regarding Boyce's failure to remediate what were apparently known safety and spillway capacity hazards.

the dam lacked adequate spillway capacity and that defendant knew that the spillways were inadequate.

In 2019, an entity known as the "Four Lakes Task Force" petitioned Midland and Gladwin Circuit Courts to establish a legal lake level for Wixom Lake. The Task Force brought the proceedings pursuant to Part 307 of the Natural Resources and Environmental Protection Act, MCL 324.307 *et seq.* Counsel for defendant attended the proceedings regarding lake levels. In June 2019, the Midland Circuit Court granted the petition to establish a legal lake level for Wixom Lake. The levels set by the court's order were, per the parties' representations, consistent with where they had been for several decades. At or around this same time, the Task Force, buoyed in part by a $5 million grant from the state, began the process of acquiring the Edenville Dam from Boyce. According to plaintiffs, reports prepared in conjunction with the Task Force's efforts to purchase the Edenville Dam reiterated that the dam was in need of repairs. A report prepared by an engineering group in September of 2019, and which was available to defendant, opined that the Edenville Dam's spillway capacity did not satisfy state law and was in need of repair.

In late 2019, Boyce conducted a seasonal "drawdown" or lowering of the water level on Wixom Lake. According to defendant, because Wixom Lake was an "inland lake" under Part 301 of the Natural Resources and Environmental Protection Act (NREPA), a permit was necessary in order to draw down water levels below those that had already been set. See MCL 324.30101(i); MCL 324.30102. Boyce submitted a request to defendant for approval of the drawdown. On or about November 25, 2019, defendant rejected the drawdown but, as noted above, Boyce conducted the drawdown anyway, without approval. Thereafter, defendant threatened legal action and subsequently sued Boyce for drawing down the water levels without approval. Defendant cited purported damage to natural resources and aquatic life as the reasons for the permit denial. At or

around this same time, the Task Force submitted a statement of support for the drawdown, concluding that the drawdown was necessary for repairs. The Task Force asserted that defendant denied the drawdown and demanded higher water levels due to concerns about the effect of a drawdown on aquatic life. Plaintiffs have asserted that defendant acknowledged that the Edenville Dam was in need of repairs at this time, particularly with respect to the dam's spillways. According to plaintiffs' allegations, defendant prioritized aquatic life over repairs and over the property of those who owned property around the affected lakes.

In approximately March 2020, defendant authorized Boyce to raise water levels in Wixom Lake despite, according to plaintiffs, knowing—and concealing—that the spillway capacity of the Edenville Dam was inadequate. Boyce raised the water levels in the spring of 2020 to the same level where they had previously been for the spring/summer months for the past several decades. Later, defendant filed suit against Boyce and sought an order preventing Boyce from lowering water levels at Wixom Lake. The action was taken in an effort, according to plaintiffs, to ensure that Boyce would keep the water levels high and not undertake additional drawdowns. The flooding event noted above occurred shortly thereafter.

II. PLAINTIFFS' COMPLAINTS

The complaints filed in these actions all allege inverse condemnation against defendant. The inverse-condemnation claim notes regulatory failures, such as an alleged failure by defendant to mandate repairs to the Edenville Dam. In addition to failing to mandate repairs, the complaint alleges that defendant, despite knowing that the Edenville Dam was not capable of withstanding flooding, took several actions that were, according to allegations such as the one found in ¶ 66 of the complaint filed in Docket No. 20-000094-MM, "designed to force the dam's operator to increase water levels in Wixom Lake." For instance, plaintiffs allege that, on or about November

25, 2019, defendant denied a permit for Boyce to lower water levels to repair dam gates in order to minimize ice damage during the winter months. Nevertheless, Boyce conducted "drawdowns"—lowering the water level—in November 2019, purportedly due to concerns about the safety of the downstream community. According to plaintiffs' complaints, defendant threatened legal action against Boyce for these drawdowns and asserted that Boyce's actions were illegal. Then, on or about April 9, 2020, which was before the flooding at issue, defendant authorized Boyce to raise water levels in Wixom Lake. In addition, plaintiffs allege that defendant imposed conditions on Boyce's permit; these conditions were intended to ensure that Boyce kept water levels high and did not undertake any additional drawdowns.

In addition to the inverse-condemnation some—but not all—of the plaintiffs in this matter assert trespass claims against defendant for the same flooding and water damage that makes up the inverse-condemnation claim.[4]

III. ANALYSIS

A. STANDARD OF REVIEW

Defendant ostensibly brings this motion under MCR 2.116(C)(7), on the basis of governmental immunity. Immunity is a characteristic of government, and a party suing a governmental entity must plead in avoidance of immunity. *Mack v Detroit*, 467 Mich 186, 203;

[4] Plaintiffs in Docket No. 20-000118-MM originally pled a gross negligence claim as well; however, they dismissed that claim by stipulation on or about November 12, 2020. In addition, some plaintiffs have voluntarily dismissed their trespass claims, such as those in Docket Nos. 20-000121-MM and 20-000140-MM. Other plaintiffs, such as those in Docket No. 20-000239-MM; Docket No. 20-000241-MM; Docket No. 20-000257-MM; Docket No. 20-000260-MM; and Docket No. 20-000262-MM, alleged a claim under MCL 691.1417, which imposes liability on a governmental entity for a "sewage disposal system event." Defendant has not addressed the sewage-disposal-system-event claims. Where defendant has not moved for summary disposition on those claims, the Court will not evaluate them at this time.

649 NW2d 47 (2002). Some of the plaintiffs in these consolidated actions have alleged trespass claims against defendant. See, e.g., Complaint in Docket Nos. 20-000112-MZ; Docket Nos. 20-000118-MM; 20-000151-MM. Defendant is entitled to immunity on these claims. *Pohutski v Allen Park*, 465 Mich 675, 689-690; 641 NW2d 219 (2002); *Wiggins v City of Burton*, 291 Mich App 532, 573; 805 NW2d 517 (2011). Furthermore, the omnibus response briefing has not addressed these trespass claims in response to defendant's assertion of immunity, which is indicative of abandonment of the claims by those plaintiffs who alleged these claims.

With respect to the inverse-condemnation claims, however—which are the primary focus of the parties' pleadings and briefing—the application of immunity and the resolution of defendant's motion is not as clear. Defendant acknowledges, as it must, that an inverse condemnation claim is a constitutional claim to which immunity does not apply. *Buckeye Union Fire Ins Co v State*, 383 Mich 630, 641; 178 NW2d 476 (1970). As explained by our Supreme Court, because "the obligation to pay just compensation arises under the constitution and not in tort, the immunity doctrine does not insulate the government from liability" in an inverse-condemnation claim. *Electro-Tech, Inc v HF Campbell Co*, 433 Mich 57, 91 n 38; 445 NW2d 61 (1989). And despite defendant's assertions that plaintiffs have brought a tort claim, caselaw is clear that "[i]nverse condemnation is a constitutional claim that does not truly sound in tort." *Elia Cos, LLC v Univ of Mich Regents*, __ Mich App __, __; __ NW2d __ (2021) (Docket No. 351064), slip op at p. 7, citing *Tamulion v Mich State Waterways Comm*, 50 Mich App 60, 66-67; 212 NW2d 828 (1973). This is because the right to recover just compensation for a governmental taking is implied in this state's constitution, such that "[t]o permit the State to assert the defense of governmental immunity in such circumstances would be utterly to vitiate the constitutional provision providing for just compensation for the taking of private property for public use, for it

would mean that the owner of property alleged to have been taken without compensation would be left without judicial recourse." *Thom v State Highway Comm'r*, 376 Mich 608, 628; 138 NW2d 322 (1965). In short, immunity does not apply to the inverse-condemnation claims asserted by plaintiffs, and defendant's motion and claim of immunity under subrule (C)(7) are without merit. See *id*. See also *Mays v Governor*, 506 Mich 157, 190; __ NW2d __ (2020) (opinion by BERNSTEIN, J.) (explaining that "immunity is not available in a state-court action in which it is alleged that the state has violated a right conferred by the Michigan Constitution."); *Hinojosa v Dep't of Natural Resources*, 263 Mich App 537, 546-547; 688 NW2d 550 (2004) ("Governmental immunity is not available in a state court action where it is alleged that the state has violated a right conferred by the Michigan Constitution.").

Defendant acknowledges the lack of immunity available for constitutional claims, but then contends that immunity nevertheless remains available to it because plaintiffs are unable to plead inverse condemnation claims. Defendant examines the allegations in plaintiffs' complaints in support of its position. Defendant also supports its argument with hundreds of pages of documentary evidence—as do plaintiffs in response, for that matter. Still, the crux of defendant's argument is that plaintiffs have not adequately pled an inverse-condemnation claim. Defendant is correct that, when the Court is reviewing a motion for summary disposition under MCR 2.116(C)(7), it is obligated to examine the documentary evidence submitted by the parties. See *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999), citing MCR 2.116(G)(5). And when "determining whether a plaintiff's claim is barred because of immunity granted by law, the reviewing court will accept the allegations stated in the plaintiff's complaint as true unless contradicted by documentary evidence." *Kincaid v Cardwell*, 300 Mich App 513, 522; 834 NW2d 122 (2010).

Here, however, the Court again notes that immunity is simply not available when it is alleged that the state violated a right conferred by the Michigan Constitution. See, e.g., *Mays*, 506 Mich at 190; *LM v State*, 307 Mich App 685, 695; 862 NW2d 246 (2014) (citation and quotation marks omitted) (explaining that, to allow a claim of immunity where the plaintiff "*alleges* that defendant has violated its own constitution" would undermine the rights intended to be protected by the constitution) (emphasis added). Plaintiffs have alleged that defendant's actions amounted to inverse condemnation and an uncompensated taking in violation of art 10, § 2. The alleged constitutional violation takes this matter outside the realm of governmental immunity. As a result, defendant's assertions about the inadequacy of plaintiffs' pleadings sound more in the nature of an argument that plaintiffs failed to state a claim which relief can be granted under MCR 2.116(C)(8). See *Dalley v Dykema Gossett PLLC*, 287 Mich App 296, 304; 788 NW2d 679 (2010) (describing subrule (C)(8) and the Court's responsibilities when reviewing such a motion). In other words, immunity does not apply, such that any evaluation of the adequacy of plaintiffs' pleading should be done under MCR 2.116(C)(8). The Court has an obligation to evaluate defendant's motion under the correct subrule(s), even when defendant has cited a different subrule. *Blair v Checker Cab Co*, 219 Mich App 667, 670-671; 558 NW2d 439 (1996). And here, given the nature of the arguments raised, the Court will evaluate defendants' arguments under MCR 2.116(C)(8), based on defendant's argument that plaintiffs failed to state a claim. Under such a review, examination of documentary evidence is not permitted. See *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 163-164; 934 NW2d 665 (2019).

B. INVERSE CONDEMNATION

Plaintiffs have asserted an unconstitutional taking under Const 1963, art 10, § 2. Specifically, they have alleged inverse condemnation, because no eminent domain proceedings

occurred. See *Blue Harvest, Inc v Dep't of Transp*, 288 Mich App 267, 277; 792 NW2d 798 (2010). "While there is no exact formula to establish a de facto taking, there must be some action by the government specifically directed toward the plaintiff's property that has the effect of limiting the use of the property." *Id*. (citation and quotation marks omitted). "Inverse condemnation can occur without a physical taking of the property; a diminution in the value of the property or a partial destruction can constitute a 'taking.' " *Merkur Steel Supply Inc v Detroit*, 261 Mich App 116, 125; 680 NW2d 485 (2004). "Thus, for purposes of a de facto taking, all of the [government's] actions in the aggregate, as opposed to just one incident, must be analyzed to determine the extent of the taking." *Id*.

In order to state a claim for inverse condemnation, plaintiffs must establish: "(1) that the government's actions were a substantial cause of the decline of the property's value and (2) that the government abused its powers in affirmative actions directly aimed at the property." *Blue Harvest*, 288 Mich App at 277. A plaintiff must also allege "a unique or special injury, that is, an injury that is different in kind, not simply in degree, from the harm suffered by all persons similarly situated." *Spiek v Mich Dep't of Transp*, 456 Mich 331, 348; 572 NW2d 201 (1998). In addition, plaintiffs must "prove a causal connection between the government's actions and the alleged damages." *Blue Harvest*, 288 Mich App at 277 (citation and quotation marks omitted).

One of the primary arguments defendant advances is that plaintiffs in these consolidated matters have failed to allege affirmative actions directed at plaintiffs' properties. Defendants argue that all plaintiffs have done is allege that, as a result of a 2018 visual inspection, defendant either granted or denied permit applications for water drawdown levels on Wixom Lake. They argue that neither the inspection nor any permitting decisions can amount to an affirmative action that can serve as the basis for an inverse condemnation claim. They also argue that Boyce would have

raised Wixom Lake to its summer levels by May 19, 2020, even if defendant had granted the drawdown permit application in November, such that the denial of the drawdown application had nothing to do with the water levels at Wixom Lake at the time the dam failed. They also argue that the authorization of Boyce's request to raise lake levels in the spring of 2020 was irrelevant to the water level at the time of flooding because it was merely a return to the lake's normal, summer levels. Finally, they argue that water levels had already been set by the Part 307 Order, such that the adjustment of water levels in accordance with the order—such as raising them in the spring—cannot be an affirmative act by defendant aimed at plaintiffs' property.

Defendant cites cases such as *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 295; 769 NW2d 234 (2009), for the proposition that the state's licensing decisions cannot constitute an action by the state that will support claim of inverse condemnation. Nor can "the state's alleged misfeasance in licensing and supervising the operation" constitute affirmative actions directed at a plaintiff's property. *Id*. Likewise, merely approving construction plans of a neighboring landowner does not amount to an affirmative action directed at a plaintiff's property. *Id*. In addition, failing to abate a nuisance does not amount to an affirmative action toward a plaintiff's property. *Hinojosa v Dep't of Natural Resources*, 263 Mich App 537, 538; 688 NW2d 550 (2004).

The Court concludes that the allegations in this case are of a different character than those in the cases cited by defendant and that plaintiffs have alleged affirmative acts taken by defendant that were directed at their properties. In particular, they allege that defendant knew about the need for repairs at the Edenville Dam, particularly the need for repairs to the spillways. The complaints also allege that, despite knowing about the risks of flooding to the surrounding area and the inadequate spillways, defendant nevertheless took actions that were designed to force Boyce to

increase water levels in Wixom Lake.[5] For instance, ¶¶ 56-57 of the complaint in Docket No. 20-000112-MZ allege that defendant threatened Boyce with enforcement action if Boyce lowered lake levels and that defendant pressured Boyce to raise water levels and to keep them high. This pressure culminated, allege plaintiffs, in a lawsuit filed in early May 2020, before the flooding occurred, regarding lake levels and damaged purportedly caused when Boyce lowered the lake levels in late 2019.[6] Thus, plaintiffs have alleged that defendant mandated and was responsible for high lake levels at Wixom Lake in the spring of 2020, prior to the May 2020 flooding event. The high lake levels were tied to defendant's alleged focus on aquatic wildlife over and at the expense of the surrounding properties. The various complaints also allege that defendant was aware of and even concealed the dangers posed by the safety failures at the Edenville Dam. Stated otherwise, plaintiffs allege that defendant was aware of the danger, disregarded it, and took affirmative actions that exacerbated the risk of flooding and ultimately led to the flooding of plaintiffs' properties. These allegations set forth affirmative actions directed at plaintiffs' properties.

[5] See, e.g., Complaint in Docket No. 20-000094-MM, ¶ 66; Complaint in Docket No. 20-000102-MM ¶ 66; Complaint in Docket No. 20-000103-MM, ¶ 98; ; Docket No. 20-000112-MM, ¶¶ 90-101; Complaint in Docket No. 20-000240-MZ, ¶ 82. While the other complaints contain examples as well, this opinion, for the sake of brevity, only cites a few examples of allegations of affirmative acts directed at plaintiffs' properties.

[6] Defendant contend that the enforcement lawsuit should not be considered in determining whether plaintiffs have stated a claim. According to defendant, the lawsuit was filed after Boyce had already raised the level of Wixom Lake in the spring of 2020. While defendant is correct about the timing of the lawsuit, the Court finds that the lawsuit is not the only pressure applied to Boyce that was alleged in the complaint. Indeed, plaintiffs have alleged that, prior to the filing of the lawsuit, defendant pressured Boyce to keep lake levels high by threatening enforcement action, and that this pressure led to the elevated lake levels that precipitated the flooding. Thus, there are allegations of defendant's affirmative actions that allegedly led to the elevated lake levels which came before the enforcement action defendant filed in May 2020.

As support for the above, the Court notes the lead opinion authored by Justice Bernstein in *Mays v Governor*, 506 Mich 157; __ NW2d __ (2020), and the discussion of inverse condemnation claims therein.[7] That case, which involved the Flint water crisis, involved a decision by emergency managers and state officials to use the Flint River as an interim water source for the City of Flint. *Id*. at 168. The decision was made despite, as was alleged in the complaint, state officials' knowledge of a study that cautioned against using the Flint River as a drinking water source. *Id*. at 168-169. The plaintiffs alleged an inverse-condemnation claim arising out of the decision to switch the city's water source to the Flint River; according to the plaintiffs, this decision led to physical damage to pipes, service lines, and water heaters. *Id*. at 174. They also alleged that the contaminated water substantially impaired the market value of their properties. *Id*.

Writing for the majority, Justice Bernstein rejected the notion that the plaintiffs in that case failed to allege that the state defendants abused their powers and took affirmative actions directed at the plaintiffs' property. In rejecting this argument, Justice Bernstein explained:

> Plaintiffs allege that defendants committed an affirmative act directed at their property when the state defendants authorized the city defendants to use the Flint River as an interim water source while both sets of defendants knew that using the river could result in harm to property. Defendants then allegedly concealed or misrepresented data and made false statements about the safety of the river water in an attempt to downplay the risk of its use and consumption. The state defendants argue that if there were an affirmative act that was directed at the plaintiffs' property, it was the city defendants who effectuated the act, not the state defendants. While discovery may bear evidence that supports this conclusion, at this stage of proceedings, we must accept all of plaintiffs' allegations as true. . . . If true, plaintiffs' allegations are sufficient to conclude that the state defendants abused

[7] Justice Bernstein's lead opinion garnered majority support on the inverse condemnation discussion, but not on the remainder of the opinion. *Mays*, 506 Mich at 167, 172 n 5 (opinion by BERNSTEIN, J.)

> their powers and took affirmative actions directly aimed at plaintiffs' property. [*Id.* at 174-175 (citations omitted).]

In other words, the plaintiffs in *Mays* alleged sufficient "affirmative acts" by alleging that the state officials not only authorized the switch in water sources despite knowing the risks, but they later allegedly obfuscated the safety risks involved in the switch to Flint River water.

Here, just like in *Mays*, plaintiffs have alleged that defendant committed an affirmative act aimed at their properties when defendant required Boyce to raise water levels at Wixom Lake in the spring of 2020 and/or to keep the water levels high. And defendant did so, according to the allegations, despite knowing of the risks of flooding that were associated with such a decision. Moreover, there are allegations that defendant concealed or obfuscated the risks at the time. These allegations are similar to the allegations in *Mays* that the defendants committed an affirmative act by authorizing the use of the Flint River as a drinking water source despite knowing of the risks, while at the same time concealing those risks.

In response to the above, defendant's reply brief argues that no one tried to lower Wixom Lake in the spring of 2020 and that any raising of lake levels was a simple return of water levels to their normal summer levels. According to defendant, these levels had been in place for over 100 years. This argument does not account for plaintiffs' allegations however, nor does it account for the idea that this Court, on a review of plaintiffs' pleadings, must accept the well-pled allegations as true. As noted above, plaintiffs alleged that defendant exerted pressure on Boyce and required Boyce, out of concerns for aquatic life, particularly freshwater mussels, to keep lake levels high at Wixom Lake. And defendant did so, according to the allegation in ¶ 67-73 of the complaint in Docket No. 20-000094-MM, despite knowing that Bocye had previously asked to lower the levels in order to make necessary repairs to spillways. In other words, plaintiffs have

alleged that defendant acted to ensure that Boyce would not lower lake levels, even if doing so would have facilitated necessary repairs to the dam. They also allege that the normal summer levels were, effectively, unsafe, given the condition of the dam. Defendant's assertions that no one tried to lower Wixom Lake in the spring of 2020 ignore that plaintiffs have alleged defendant effectively coerced Boyce into keeping lake levels at their normal (allegedly unsafe) summer levels despite known risks that existed at those levels.[8]

Accordingly, plaintiffs have adequately alleged affirmative acts by defendant that were directed at their properties. Additionally, plaintiffs have adequately alleged a causal connection between the government's actions and the alleged damages. See *Hinojosa*, 263 Mich App at 548. The various complaints allege that defendant's actions resulted in the failure of the Edenville Dam and the resultant flooding. These allegations include defendant's alleged imposition of pressure on Boyce to maintain high dam levels, despite knowledge that the spillways were inadequate. In seeking to refute these allegations, defendant argues that it never concealed anything about the dam's condition. However, this argument ignores that the Court must, when addressing defendant's contention about purportedly inadequate pleadings, accept as true the allegations

[8] Defendant supports its assertion with a bevy of documentary evidence. Again, however, given that the crux of defendant's position is concerned with the adequacy of plaintiffs' pleadings—an assertion that plainly implicates MCR 2.116(C)(8)—the Court declines to engage in a lengthy discussion of the documentary evidence at this time. If defendant wishes to make a proper motion and argument under subrule (C)(10), it is free to do so. However, the Court would note that a (C)(10) motion would appear to be premature at this time—even if defendant had properly made such a motion—given that no discovery has occurred and that defendant moved for summary disposition in lieu of filing an answer. See *West v Dep't of Natural Resources*, __ Mich App __, __; __ NW2d __ (2020) (Docket No. 348452), slip op at 2. Moreover, having reviewed the evidence submitted in this case, it is not apparent from the face of the evidence that plaintiffs' allegations have been disproven or that the inverse-condemnation claims are fatally flawed.

contained in the complaint. *Dalley*, 287 Mich App at 304-305; *Dextrom v Wexford Co*, 287 Mich App 406, 428; 789 NW2d 211 (2010). Defendant also again attempts to argue that its only actions in this case were limited to a brief visual inspection of the dam in 2018 and in issuing or denying various permits. Again, however, this ignores that plaintiffs have raised allegations that defendant took affirmative acts that led to the flooding.[9]

In short, plaintiffs have pled inverse-condemnation claims on which relief can be granted. Defendant's arguments and repeated assertions that plaintiffs' allegations are not true or are contradicted by the documentary evidence ignore the nature of the arguments defendant has made about plaintiffs' inability to plead a claim and the Court's review of such an argument. See *Dalley*, 287 Mich App at 304-305 (describing subrule (C)(8) review). Defendant's arguments implicate MCR 2.116(C)(10), a subrule under which defendant did not make a motion. And because defendant filed its motion in lieu of an answer and before any discovery occurred, its attempts to point to holes in the record evidence would appear to make summary disposition premature under subrule (C)(10) even if defendant had properly argued and submitted a motion under subrule (C)(10). See *West v Dep't of Natural Resources*, __ Mich App __, __; __ NW2d __ (2020) (Docket No. 348452), slip op at 2.

[9] Furthermore, questions regarding causation are generally factual issues, see *Holton v A+ Ins Associates, Inc*, 255 Mich App 318, 326; 661 NW2d 248 (2003), and are not ripe for summary disposition on the current motion brought by defendant in any event. Thus, defendant's assertions about a 2013 submission from Boyce to FERC regarding preemptively drawing down Wixom Lake to avert flooding do not mandate a different result. For one, they are outside of the complaint. And even if the Court were to consider them, they would at most point to a factual issue to be resolved, and not to a reason for dismissing the complaint on summary disposition.

IV. CONCLUSION

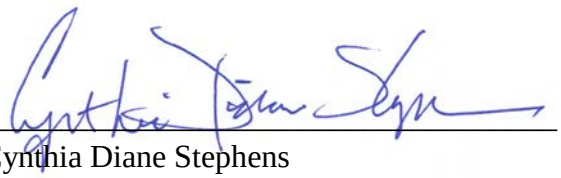
IT IS HEREBY ORDERED that defendant's motion for partial summary disposition is GRANTED as it concerns plaintiffs' trespass claims.

IT IS HEREBY FURTHER ORDERED that defendant's motion is DENIED with respect to the inverse-condemnation claims asserted by plaintiffs in these consolidated actions.

For the avoidance of doubt, this opinion and order does not address or resolve any claims made by plaintiffs beyond the inverse-condemnation and trespass claims noted above.

This is not a final order and it does not resolve the last pending claim or close the case.

May 21, 2021



Cynthia Diane Stephens
Judge, Court of Claims