

**STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF SAGINAW**

THOMAS BORCHARD; CHARLES
BORCHARD; DENNIS BORCHARD;
SALLY BRADLEY; PATRICK T.
WORTLEY D/B/A CRAWFORD
INSURANCE AGENCY; KRYSTIEN
GILLETTE; JOSHUA GILLETTE;
CHRISTOPHER ICE; CDI
CONSTRUCTION GROUP, INC.;
DALJEET KAUR; TOM MCCANN
FAMILY LLC; JOHN MADDENS;
TYLIA MADDENS; STEPHANIE
O'DELL; BRIAN PARENT; SHASTA
PARENT; MIKE ROBERSON; RONALD
ROENICKE; SANFORD CHAMBER OF
COMMERCE; BARBARA STEVENS;
TROY VALLEY; LAUREN VALLEY;
RON WASCHER; MARY WASCHER;
and ROBERT EMMET WITT
REVOCABLE LIVING TRUST,

Plaintiffs,

v.

BOYCE HYDRO POWER, LLC f/k/a
SYNEX MICHIGAN, LLC; BOYCE
HYDRO, LLC; BOYCE MICHIGAN LLC;
EDENVILLE HYDRO PROPERTY LLC
f/k/a BOYCE TRUST HYDRO
PROPERTY 2350, LLC; SMALLWOOD
HYDRO PROPERTY LLC f/k/a BOYCE
TRUST HYDRO PROPERTY 3649, LLC;
SECORD HYDRO PROPERTY LLC f/k/a
BOYCE TRUST HYDRO PROPERTY
3650, LLC; WILLIAM D. BOYCE TRUST
2350 U/A/D 10/1908; WILLIAM D.
BOYCE TRUST 3649 U/A/D 6/1929;
WILLIAM D. BOYCE TRUST 3650
U/A/D 6/1929; LEE W. MUELLER;
MICHELE G. MUELLER; MICHAEL W.
D'AVENAS; STEPHEN B. BULTBERG;
JPMORGAN CHASE & CO.;
WOLVERINE POWER CORPORATION
f/k/a EDENVILLE POWER COMPANY;

Civil Action No. 20-*042348* - ND *3*

**COMPLAINT AND JURY TRIAL
DEMANDED**

**JANET M. BOES
P37714**

SYNEX POWER, INC. f/k/a SYNEX
WOLVERINE, INC.; and SYNEX
WOLVERINE, LLC f/k/a SYNEX
HYDRO, LLC,

Defendants.

COMPLAINT

Plaintiffs Thomas Borchard; Charles Borchard; Dennis Borchard; Sally Bradley; Patrick T. Wortley d/b/a Crawford Insurance Agency; Krystien Gillette; Joshua Gillette; Christopher Ice; CDI Construction Group, Inc.; Daljeet Kaur; Tom McCann Family LLC; John Maddens; Tylia Maddens; Stephanie O'Dell; Brian Parent; Shasta Parent; Mike Roberson; Ronald Roenicke; Sanford Chamber of Commerce; Barbara Stevens; Troy Valley; Lauren Valley; Ron Wascher; Mary Wascher; and Robert Emmet Witt Revocable Living Trust bring this action against Defendants Boyce Hydro Power, LLC, formerly known as Synex Michigan, LLC; Boyce Hydro, LLC; Boyce Michigan LLC; Edenville Hydro Property LLC, formerly known as Boyce Trust Hydro Property 2350, LLC; Smallwood Hydro Property LLC, formerly known as Boyce Trust Hydro Property 3649, LLC; Secord Hydro Property LLC, formerly known as Boyce Trust Hydro Property 3650, LLC; William D. Boyce Trust 2350 U/A/D 10/1908; William D. Boyce Trust 3649 U/A/D 6/1929; William D. Boyce Trust 3650 U/A/D 6/1929; Lee W. Mueller; Michele G. Mueller; Michael W. d'Avenas; Stephen B. Bultberg; and JPMorgan Chase & Co. (collectively, "Boyce Defendants"); Wolverine Power Corporation, formerly known as Edenville Power Company; Synex Power, Inc., formerly known as Synex Wolverine, Inc.; and Synex Wolverine, LLC, formerly known as Synex Hydro, LLC (collectively, "Wolverine Defendants"). Unless stated otherwise, all allegations contained herein are made on information and belief, and all applicable conditions precedent have occurred. In support of their claims, Plaintiffs allege as follows:

I. NATURE OF THE CASE

1. Plaintiffs are residential and commercial property owners owning property and residing near the Edenville and Sanford dams, which failed catastrophically on May 19, 2020.

2. Defendants caused the catastrophic failures of these dams through their negligence and their knowing and purposeful acts. The failure of these dams was not the result of happenstance. Rather, it was the predictable result of Defendants' mismanagement over the course of years.

3. Boyce Defendants owned and operated the dams for years prior to the flooding. During that time period, the Federal Energy Regulatory Commission ("FERC") routinely cited violations to federal regulations and to the terms of the FERC license. These violations were so egregious that FERC eventually ordered the dam operators to cease power generation at Edenville Dam and revoked Defendant Boyce Hydro Power, LLC's license to operate the Dam.

4. Crucially, for decades the Edenville Dam was unable to meet federal or state standards for flood capacity. FERC repeatedly raised concerns and pressured Boyce Defendants to increase spillway capacity or otherwise address this issue, but the problem was never addressed.

5. In 2018, the Michigan Department of Environment, Great Lakes & Energy ("EGLE") and Michigan Department of Natural Resources ("DNR"), both Michigan State agencies, assumed regulatory responsibility for the Edenville Dam. Yet no action was taken to address spillway capacity or to mitigate the risk of dam failure. To the contrary, Defendants actually raised the water level of Wixom Lake, the reservoir behind the Edenville Dam.

6. On May 19, 2020, the inevitable occurred. After years of mismanagement, the Edenville Dam failed and caused the downstream Sanford Dam to fail as well. Around 10,000 residents were forced to evacuate. The resulting flooding caused millions of dollars in property damage. The dam failure also drained Wixom and Sanford Lakes, severely reducing the value of surrounding property and

businesses.

7. As a result of Defendants' wrongdoing, Plaintiffs have suffered significant harm. Among other things, their homes and personal property have been destroyed and seriously damaged; they have lost the use and enjoyment of their residences; their property has diminished in value; and their businesses have been deprived of future earnings.

8. Now, under the laws of the State of Michigan, Plaintiffs pray for relief from this Court.

II. PARTIES

A. Plaintiffs

9. Plaintiff Thomas Borchard is a citizen of California residing in San Juan Capistrano, California.

10. Plaintiff Charles Borchard is a citizen of Michigan residing in Saginaw, Michigan.

11. Plaintiff Dennis Borchard is a citizen of Michigan residing in Saginaw, Michigan.

12. Plaintiff Sally Bradley is a citizen of Michigan residing in Saginaw, Michigan.

13. Plaintiff Patrick T. Wortley is a citizen of Michigan residing at 1160 Curwood Road, Saginaw, Michigan.

14. Plaintiff Krystien Gillette is a citizen of Michigan currently residing at 3091 E. Stewart Road, Midland Michigan.

15. Plaintiff Joshua Gillette is a citizen of Michigan currently residing at 3091 E. Stewart Road, Midland Michigan.

16. Plaintiff Christopher Ice is a citizen of Michigan residing at 5095 N. Fox Road, Sanford, Michigan.

17. Plaintiff CDI Construction Group, Inc., is a for profit business incorporated in the state of Michigan with its principle place of business located at 5095 N. Fox Road, Sanford, Michigan.

18. Plaintiff Daljeet Kaur is a citizen of Michigan residing at 2727 S. Gladwin Road, Prudenville, Michigan.

19. Plaintiff Tom McCann Family LLC is a limited liability company formed in the state of Michigan, with its principle place of business located at 3310 Jefferson Avenue, Midland, Michigan.

20. Plaintiff John Maddens is a citizen of Michigan residing at 4907 Glencoe Street, Midland, Michigan.

21. Plaintiff Tylia Maddens is a citizen of Michigan residing at 4907 Glencoe Street, Midland, Michigan.

22. Plaintiff Stephanie O'Dell is a citizen of Michigan residing at 504 Hutchinson Lane, Midland, Michigan.

23. Plaintiff Brian Parent is a citizen of Michigan residing at 4913 Glencoe Street, Midland Michigan.

24. Plaintiff Shasta Parent is a citizen of Michigan residing at 4913 Glencoe Street, Midland Michigan.

25. Plaintiff Mike Roberson is a citizen of Michigan residing at 504 Hutchinson Lane, Midland, Michigan.

26. Plaintiff Ronald Roenicke is a citizen of Michigan residing at 4904 Perrine Road, Midland, Michigan.

27. Plaintiff Sanford Chamber of Commerce Plaintiff Sanford Chamber of Commerce is a non-profit business incorporated in the state of Michigan, with its principle place of business located at 165 W. Saginaw Road, Sanford, Michigan.

28. Plaintiff Barbara Stevens is a citizen of Michigan residing at 493 Flanders Beach Road, Sanford, Michigan.

29. Plaintiff Troy Valley is a citizen of Michigan residing at 2191 E. Pine River Road, Midland, Michigan.

30. Plaintiff Lauren Valley is a citizen of Michigan residing at 2191 E. Pine River Road, Midland, Michigan.

31. Plaintiff Ron Wascher is a citizen of Michigan residing at 1195 Short Street, Hope, Michigan.

32. Plaintiff Mary Wascher is a citizen of Michigan residing at 1195 Short Street, Hope, Michigan.

33. Plaintiff Robert Emmet Witt Revocable Living Trust is a trust formed under the laws of the state of Michigan with Robert Emmet Witt acting as Trustee.

B. Defendants

34. Defendant **Boyce Hydro Power, LLC, formerly known as Synex Michigan, LLC**, is a limited liability company organized under the laws of the State of Michigan, located at 414 Townsend Street, Suite 201, Midland, Michigan 48640. From July 12, 2007, through September 24, 2018, Defendant Boyce Hydro Power, LLC held a license by FERC to operate the Edenville Hydroelectric Project, including the Edenville Dam. At all relevant times, it has been engaged in a joint venture and acted in concert with others to own and operate the Edenville and Sanford Dams.

35. Defendant **Boyce Hydro, LLC** is a limited liability company organized under the laws of the State of Michigan, located at 414 Townsend Street, Suite 201, Midland, Michigan 48640. At all relevant times, it has been engaged in a joint venture and acted in concert with others to own and operate the Edenville and Sanford Dams.

36. Defendant **Boyce Michigan LLC** is a limited liability company organized under the laws of the State of Michigan, located at 414 Townsend Street, Suite 201, Midland, Michigan 48640. At all relevant times, it has been engaged in a joint venture and acted in concert with others to own and

operate the Edenville and Sanford Dams.

37. Defendant **Edenville Hydro Property LLC, formerly known as Boyce Trust Hydro Property 2350, LLC**, is a limited liability company organized under the laws of the State of Michigan, located at 414 Townsend Street, Suite 201, Midland, Michigan 48640. At all relevant times, it has been engaged in a joint venture and acted in concert with others to own and operate the Edenville and Sanford Dams.

38. Defendant **Smallwood Hydro Property LLC, formerly known as Boyce Trust Hydro Property 3649, LLC**, is a limited liability company organized under the laws of the State of Michigan, located at 414 Townsend Street, Suite 201, Midland, Michigan 48640. At all relevant times, it has been engaged in a joint venture and acted in concert with others to own and operate the Edenville and Sanford Dams.

39. Defendant **Secord Hydro Property LLC, formerly known as Boyce Trust Hydro Property 3650, LLC**, is a limited liability company organized under the laws of the State of Michigan, located at 414 Townsend Street, Suite 201, Midland, Michigan 48640. At all relevant times, it has been engaged in a joint venture and acted in concert with others to own and operate the Edenville and Sanford Dams.

40. Defendant **William D. Boyce Trust 2350 U/A/D 10/1908** is a citizen of, without limitation, the States of Nevada and California, and conducting business in Gladwin, Midland, and Saginaw Counties. It is a member owner of each of the Defendant LLCs, in conjunction with others. At all relevant times, it has been engaged in a joint venture and acted in concert with other Boyce Defendants to own and operate the Edenville and Sanford Dams.

41. Defendant **William D. Boyce Trust 3649 U/A/D 6/1929** is a citizen of, without limitation, the States of Nevada and California, and conducting business in Gladwin, Midland, and

Saginaw Counties. It is a member owner of each of the Defendant LLCs, in conjunction with others. At all relevant times, it has been engaged in a joint venture and acted in concert with other Boyce Defendants to own and operate the Edenville and Sanford Dams.

42. Defendant **William D. Boyce Trust 3650 U/A/D 6/1929** is a citizen of, without limitation, the States of Nevada and California, and conducting business in Gladwin, Midland, and Saginaw Counties. It is a member owner of each of the Defendant LLCs, in conjunction with others. At all relevant times, it has been engaged in a joint venture and acted in concert with other Boyce Defendants to own and operate the Edenville and Sanford Dams.

43. Defendant **Lee W. Mueller** is a citizen of the State of Nevada. He is a co-trustee and beneficiary of the Defendant trusts and a member and co-manager of the Defendant LLCs. At all relevant times, he has been engaged in a joint venture and acted in concert with other Boyce Defendants to own and operate the Edenville and Sanford Dams. At all relevant times, other Boyce Defendants have been alter egos of Defendant Lee W. Mueller.

44. Defendant **Michele G. Mueller** is a citizen of the State of Nevada. She is a member of Defendants Edenville Hydro Property LLC; Boyce Hydro Power, LLC; Boyce Hydro, LLC; and Boyce Michigan LLC. At all relevant times, she has been engaged in a joint venture and acted in concert with other Boyce Defendants to own and operate the Edenville and Sanford Dams. At all relevant times, other Boyce Defendants have been alter egos of Defendant Michele G. Mueller.

45. Defendant **Michael W. d'Avenas** is a citizen of the State of California. He is a co-trustee and beneficiary of the Defendant trusts and a member and co-manager of the Defendant LLCs. At all relevant times, he has been engaged in a joint venture and acted in concert with other Boyce Defendants to own and operate the Edenville and Sanford Dams. At all relevant times, other Boyce Defendants have been alter egos of Defendant d'Avenas.

46. Defendant **Stephen B. Hultberg** is a citizen of the State of Nevada. He is a co-trustee and beneficiary of the Defendant trusts and a member and co-manager of the Defendant LLCs. At all relevant times, he has been engaged in a joint venture and acted in concert with other Boyce Defendants to own and operate the Edenville and Sanford Dams. At all relevant times, other Boyce Defendants have been alter egos of Defendant Hultberg.

47. Defendant **JPMorgan Chase & Co.** is a for-profit corporation incorporated under the laws of the State of Delaware and with its principal place of business in New York. At all relevant times, it has been engaged in a joint venture and acted in concert with other Boyce Defendants to own and operate the Edenville and Sanford Dams. It is the successor in interest to Bank One Corporation and/or Bank One Trust Company NA following their merger in or around 2004 and is a co-trustee of the Defendant trusts. At all relevant times, other Boyce Defendants have been alter egos of Defendant JPMorgan Chase & Co.

48. Defendant **Wolverine Power Corporation, formerly known as Edenville Power Company**, is a for-profit corporation incorporated under the laws of the State of Michigan, located at 503 North Euclid Avenue, Suite 9-D, Bay City, Michigan 48706. Defendant Wolverine Power Corporation previously owned and operated the Edenville Dam.

49. Defendant **Synex Power, Inc., formerly known as Synex Wolverine, Inc.**, is a for-profit corporation incorporated under the laws of the State of Michigan, located at 313 South Washington Square, Lansing, Michigan 48933. Defendant Synex Power, Inc. previously owned and operated the Edenville Dam.

50. Defendant **Synex Wolverine, LLC, formerly known as Synex Hydro, LLC** is a limited liability company organized under the laws of the State of Michigan, located at 213 East Main Street, Suite 2, Midland, MI 48640. Defendant Synex Wolverine, LLC previously owned and operated the Edenville Dam.

III. JURISDICTION AND VENUE

51. This Court has subject matter jurisdiction over this action pursuant to M.C.L. §§ 600.605, 600.8301 because the amount in controversy, exclusive of interest, costs, and attorney's fees, exceeds \$25,000.

52. The Court has jurisdiction over each Defendant, pursuant to M.C.L. §§ 600.705, 600.711, and 600.715, because each Defendant transacted business within the State of Michigan; caused acts to be done and consequences to occur in the State resulting in an action for tort; owns, uses, or possesses real or tangible personal property situated within the State; has entered into contracts for services rendered or materials furnished in the State; acted as director, manager, trustee, or other officer of a corporation incorporated under the State's laws or having its principal place of business within the State; is incorporated under the laws of this State; or carried on a continuous and systematic part of its general business within the state.

53. Venue is proper in this court under M.C.L. § 600.1621 because Defendants reside, have places of business, and conduct business in Saginaw County, and because Plaintiffs reside and have places of business in Saginaw County.

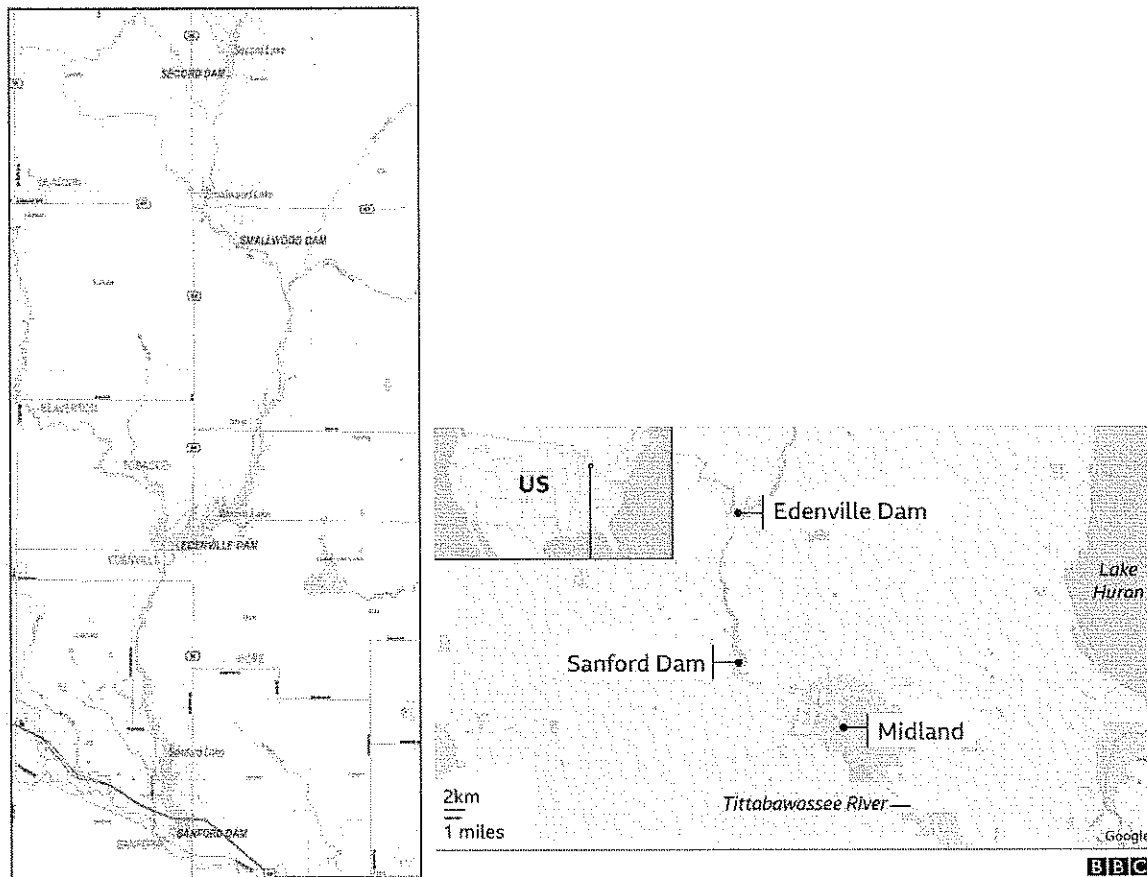
IV. FACTUAL ALLEGATIONS

A. The Edenville Dam

54. The Edenville Dam was constructed in 1924. It consists of earthen embankments totaling about 6,600 feet, with a maximum height of 54.5 feet. The dam spans the Tittabawassee and Tobacco Rivers, creating the 2,600-acre reservoir of Wixom Lake.

55. The Edenville Dam is the third in a series of four dams along the Tittabawassee River. Each dam forms its own reservoir (the "four lakes"). The four dams and corresponding reservoirs are the Secord Dam (Secord Lake), Smallwood Dam (Smallwood Lake), Edenville Dam (Wixom Lake), and Sanford Dam (Sanford Lake). Midland, Michigan sits along the River approximately 6 miles downstream

from the Sanford Dam.



56. In determining whether a dam is safe, federal regulators look to the dam’s ability to withstand the Probable Maximum Flood (“PMF”). As FERC has explained, “For about the last [70] years, the PMF has received general acceptance as the design flood for dams in the United States, whose failure would pose a threat to public safety. More recently, the PMF has received acceptance as the design flood for large dams in many other countries as well.”¹

57. The PMF is “the flood that may be expected from the most severe combination of critical meteorological and hydrologic conditions that are reasonably possible in the drainage basin under

¹ FERC, *Chapter VIII: Determination of the Probable Maximum Flood at 1* (Sept. 2001), <https://www.ferc.gov/industries/hydropower/safety/guidelines/eng-guide/chap8.pdf>.

study.”²

58. FERC requires dams, including the Edenville and Sanford Dams, to be designed to safely handle a flood as large as the PMF.³ As it explained with regard 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 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.⁴

59. FERC also required dams, including the Edenville Dam, to meet the requirements of its *Engineering Guidelines for the Evaluation of Hydropower Projects*.⁵ This document likewise required the Edenville Dam to have the capacity to withstand a PMF-level flood.⁶

60. However, at all relevant times the Edenville Dam had a capacity to withstand a flood only as large as about one-half of its PMF.⁷

61. FERC consistently advised owners and operators of the Edenville Dam that it did not

² *Id.*

³ Federal Emergency Management Agency, *Federal Guidelines for Dam Safety: Selecting and Accommodating Inflow Design Floods for Dams* (Apr. 2004), <https://www.ferc.gov/industries/hydropower/safety/guidelines/fema-94.pdf>.

⁴ Order on Stay, 162 FERC ¶ 16,007, at 2–3 (Jan. 5, 2018).

⁵ <https://www.ferc.gov/industries/hydropower/safety/guidelines/eng-guide.asp>.

⁶ *Id.*

⁷ See Compliance Order, 159 FERC ¶ 62,292, at 4 (June 15, 2017), <http://cdn.cnn.com/cnn/2020/images/05/20/ferc.boyce.compliance.order.pdf>.

meet its guidelines for withstanding the PMF.⁸ Among other things, FERC held multiple meetings to address the Dam's spillway capacity over the course of many years.

62. The owners and operators of the Edenville dam repeatedly failed to comply with the requirements of its license with FERC.⁹

63. FERC was not the only governmental body concerned about the capacity of the Edenville Dam. In a statement released after the dam failure, EGLE stated that it "had concerns that the dam might not have enough spillway capacity – which allows water to flow out of the Wixom Lake impoundment – 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 requirements."¹⁰

B. Defendants Acquire the Edenville and Sanford Dams and Repeatedly Fail to Meet the Requirements of The FERC Licenses

64. In 1987 and 1989, Defendant Wolverine Power Corporation applied to FERC for licenses to operate and maintain the four dams along the Tittabawassee River: the Secord, Smallwood, Edenville, and Sanford Projects.¹¹ On October 16, 1998, FERC granted a license to Defendant Wolverine Power Corporation for the Secord, Smallwood, and Edenville Dams.¹²

65. On June 23, 2004, Defendant Wolverine Power Corporation transferred its license to Defendant Boyce Hydro Power, LLC.¹³

66. Boyce Defendants' primary interest in the Edenville Dam and the other dams was to

⁸ See, e.g., Compliance Order, 159 FERC ¶ 62,292 (June 15, 2017), <http://cdn.cnn.com/cnn/2020/images/05/20/ferc.boyce.compliance.order.pdf>.

⁹ *Id.*

¹⁰ EGLE, *Edenville Dam Failure* (accessed June 10, 2020), <https://www.michigan.gov/egle/0,9429,7-135-3313-529696--,00.html>.

¹¹ FERC, Order Issuing Original License, 85 FERC ¶ 61,063 (Oct. 16, 1998).

¹² *Id.*

¹³ FERC, Order Approving Transfer of Licenses, 107 FERC ¶ 62,266 (June 23, 2004).

use the properties as a tax shelter:

[Lee] Mueller and his relatives needed to reinvest money from the sale of an Illinois property in less than a year — or pay \$600,000 in taxes to the IRS.

Eventually, a solution came to Mueller, an architect who lives in Las Vegas, and his cousin, Michel d'Avenas, a California musician who is the son of a French count and is now known as the Pebble Beach Bagpiper.

They would avoid taxes by purchasing four small hydroelectric dams in mid-Michigan near Midland

The cousins had 45 days to find alternative sites and six months to buy one, or they risked having to pay more than \$600,000 in capital gains taxes. Mueller and his associates identified the four Midland dams and buildings in Indianapolis and Houston as options, and bought the dams in 2006 after borrowing money to complete the purchase.¹⁴

67. Boyce Defendants were associated with Defendants Lee Mueller and Boyce Hydro Power, LLC and acted in concert as part of a coordinated effort to own and operate the Edenville and Sanford Dams. In law and in fact, Boyce Defendants all owned, operated, funded, and maintained the Edenville and Sanford Dams.

68. Defendant trusts and LLCs utilized generic and similar names to one another and were often registered at the same address by the same people. These Defendants did not have functioning officers, directors, members, and managers, and they did not observe any corporate formalities, exercise independent judgment, or maintain any pretense of independence from one another. To the contrary, they maintained no separate existence other than as instrumentalities, conduits, and alter egos of one another, which is unsurprising in light of the fact that the Edenville Dam was purchased as a tax shelter.

69. Boyce Defendants consistently held themselves out as individually conducting business activities in connection with the ownership and operation of the Edenville Dam and Sanford Dam

¹⁴ Mike Wilkinson, Kelly House, & Riley Beggin, *Two Heirs Bought Midland Dams as a Tax Shelter. Tragedy Followed.*, Bridge (May 27, 2020), <https://www.bridgemi.com/michigan-environment-watch/two-heirs-bought-midland-dams-tax-shelter-tragedy-followed>.

without the proper use of corporate names, and without identifying that their actions were taken as officers or employees of the other Boyce Defendants. They were not properly maintained, and were maintained for improper purposes including fraud and against public policy, and with the purpose of committing negligent, careless, reckless, willful, wanton, and malicious acts of wrongdoing with impunity to insulate themselves from liability, thereby exposing Plaintiffs to unjust losses and damages. They were insufficiently capitalized and maintained insufficient assets, including liability insurance coverage, considering the hazardous ownership and operation of the Edenville and Sanford Dams. Almost immediately after Defendant Boyce Hydro Power, LLC's purchase of the Edenville Dam, FERC began expressing concerns about the need for additional spillway capacity. Starting in 2004, FERC requested plans to construct auxiliary spillways¹⁵

70. FERC sent a letter in February 2005 stating that the requisite PMF study had not been completed, even after FERC had granted an extension for completion.¹⁶

71. Additionally, "For years, Commission [FERC] staff worked with the licensee . . . to increase the spillway capacity at the project needed to pass the PMF. Multiple meetings were held with the licensee, Commission staff, and a Board of Consultants to review and discuss plans for addressing spillway capacity. Such meetings took place on December 13–16, 2005; May 22–23, 2007; July 9–11, 2007; March 19–20, 2008; and February 4–5, 2009."¹⁷

72. FERC had originally requested that two auxiliary spillways be built by 2006. But these plans were delayed on multiple occasions. On February 9, 2009, FERC noted that Defendants did not have

¹⁵ Compliance Order, 159 FERC ¶ 62,292, at 6 (June 15, 2017), <http://cdn.cnn.com/cnn/2020/images/05/20/ferc.boyce.compliance.order.pdf>.

¹⁶ *Id.*

¹⁷ *Id.*

the funds to construct these spillways, and it granted Defendants more time.¹⁸ Defendant Boyce Hydro Power, LLC promised to complete construction in 2013.¹⁹ Defendant Boyce Hydro Power, LLC would later assure that construction would be completed on one spillway in 2014, and the other in 2015.²⁰ The spillway work was never completed.²¹

73. FERC routinely found Defendants' plans for auxiliary spillway work to be insufficient.²²

74. Rather than fund necessary repairs to its dams, Defendants attempted to coerce community members into paying. In August 2010, the Sanford Dam's earthen dike began to seep.²³ The next year, "Lee Mueller sa[id] he won't pay for the estimated \$83,000 repair. Footing that bill is up to property owners and businesses that benefit from the 1,250-acre recreational impoundment in Midland County, he argue[d]. . . . He sa[id] if funds aren't raised for the repair work, Boyce Hydro will surrender its license to operate the dam and permanently drain Sanford Lake."²⁴ One property owner characterized Defendants' actions as follows: "He's holding the dam hostage for someone else to fix it. Because he doesn't want to fix it."²⁵

75. In 2012, Tobacco Township sued Defendant Boyce Hydro Power, LLC for its failure

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *See, e.g., id.* at 7.

²³ Andrew Dodson, *Sanford Lake Dam Owner Says He's Not Paying for \$83,000 Repair Project*, mLive (Jan 28, 2011, updated Jan 21, 2019), https://www.mlive.com/midland/2011/01/sanford_dam_owner_says_hes_not_paying_for_83000_repair_project.html.

²⁴ *Id.*

²⁵ *Id.*

to make repairs to the Edenville Dam.

76. While Defendant Boyce Hydro Power, LLC had assured FERC that it would complete construction on auxiliary spillways in 2014, and 2015, it missed the 2014 deadline.²⁶ FERC promulgated a plan to have Defendants construct one of the spillways in 2015.²⁷ Defendants missed those deadlines as well.²⁸ The two auxiliary spillways were never constructed.

77. Not only did Defendants fail to construct the required spillways, they failed to even submit “complete and adequate plans” for the work.²⁹

78. In 2015, Defendants failed to disclose to FERC that a spillway wall had failed.³⁰ They attempted to repair the wall without reporting to FERC.³¹ FERC cited Defendant Boyce Hydro Power, LLC for these failures, stating, “[t]he licensee is presenting a serious risk to the infrastructure of this high hazard potential dam by performing unauthorized repairs and then providing no information about those repairs.”³²

79. In 2016, an independent safety inspection report found that Defendant Boyce Hydro Power, LLC “should continue to work for review and approval of the existing spillway rehabilitation projects which will allow the dam to safely pass the 100% PMF.”³³

C. FERC Issues a Compliance Order on June 15, 2017, Highlighting Defendants’ Long History of Mismanagement

²⁶ Compliance Order, 159 FERC ¶ 62,292, at 6–7 (June 15, 2017), <http://cdn.cnn.com/cnn/2020/images/05/20/ferc.boyce.compliance.order.pdf>.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 7.

³⁰ *Id.* at 14–15.

³¹ *Id.*

³² *Id.* at 19.

³³ *See* FERC, Order to Cease Generation, 161 FERC ¶ 62,119, at 7 (Nov. 20, 2017).

80. On June 15, 2017, FERC issued a Compliance Order.³⁴ The Order stated:

Boyce Hydro Power, LLC, licensee for the Edenville Hydroelectric Project No. 10808, is in violation of its license and the Commission's regulations for: 1) failing to increase the spillway capacity of the project; 2) performing unauthorized dam repairs; 3) performing unauthorized earth-moving activities; 4) failing to file an adequate Public Safety Plan; 5) failing to construct approved recreation facilities pursuant to the Commission's 2001 Order approving its Recreation Plan² and for restricting public access; 6) failing to acquire all necessary project property rights; and 7) failing to comply with the Commission's 1999 Order approving its Water Quality Monitoring Plan.³⁵

81. The Compliance Order specifically cited Defendants' failure to increase spillway capacity, stating, "the Commission's primary concern is the licensee's longstanding failure to address the project's inadequate spillway capacity."³⁶

82. FERC also recognized the incredible danger caused by this failure, stating, "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."³⁷

83. FERC then detailed Defendant Boyce Hydro Power, LLC's numerous violations. As for spillway capacity, the Compliance Order stated, "The existing spillway capacity at the project is approximately 50% of the PMF," and noted Defendants' "inadequate plans and specifications."³⁸ It stated, "since acquiring the license in 2004, the licensee has not filed adequate plans, specifications, or designs

³⁴ FERC, Compliance Order, 159 FERC ¶ 62,292, at 1 (June 15, 2017), <http://cdn.cnn.com/cnn/2020/images/05/20/ferc.boyce.compliance.order.pdf>.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 4–5.

as directed by the Regional Engineer for addressing spillway capacity concerns at the project.”³⁹

84. Over pages and pages, the Compliance Order discussed the long history of Defendants’ non-compliance. It concluded:

The licensee has shown a persistent pattern of requesting additional time; missing deadlines; providing deficient designs, plans, and specifications; and has not shown due diligence obtaining a permit from the Michigan DEQ. . . .

As mentioned earlier, 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 licensee must immediately file complete plans, specifications, and designs for the Tobacco auxiliary spillway[;] resolve its permitting issues with the Michigan DEQ[;] proceed with developing preliminary plans and specifications for the Tittabawassee auxiliary spillway[; and] develop a plan to address the full PMF.⁴⁰

85. The Compliance Order also detailed Defendants’ failures to raise the minimum dam crest elevation:

The licensee must also address the independent consultant’s repeated recommendations to raise the minimum dam crest elevation by re-grading the embankments in certain locations which will also augment spillway capacity. However, the licensee has never filed any specific plans and specifications to do so other than a general schedule to complete this work by November 1, 2013 – a schedule the licensee did not meet. The licensee’s plans for additional measures are unclear because the licensee has not filed plans and specifications with the Commission despite the Regional Engineer’s directives to do so on multiple occasions.⁴¹

86. While noting that its “primary concern is the licensee’s longstanding failure to address the project’s inadequate spillway capacity,” FERC also catalogued Defendant Boyce Hydro Power, LLC’s repeated “fail[ure] to comply with other requirements in its license.”⁴² This included unauthorized dam

³⁹ *Id.* at 5.

⁴⁰ *Id.* at 11.

⁴¹ *Id.* at 5.

⁴² *Id.* at 1.

repair work, unauthorized earth-moving activity, failure to follow regional engineer directives to file an adequate public safety plan, failure to construct approved recreational facilities, restriction of public access, failure to clarify property rights, and failure to comply with the project's Water Quality Monitoring Plan.

87. FERC ordered, "The licensee must provide the Commission the requested plans, specifications, reports, and other information" ⁴³

D. FERC Orders Defendant Boyce Hydro Power, LLC to Cease Power Generation on November 20, 2017

88. While the Compliance Order should have served as a wake-up call for Defendants, it did not lead to any improvement in the safety of the Edenville Dam. As a Sanford Lake homeowner explained, Defendant Lee Mueller "hates government, he hates paying taxes, and nothing makes him happier than when he can stick his finger in the eye of government." ⁴⁴

89. Defendants continued to run afoul of their obligations afterwards. FERC issued further directives to Defendant Boyce Hydro Power, LLC on August 31, 2017 and September 18, 2017; both were violated. ⁴⁵

90. FERC later noted that Defendant Boyce Hydro Power, LLC was required "to file a plan and schedule to perform a Focused Spillway Assessment pursuant to Article 4 of the license and directives issued by the Regional Engineer on April 28, 2017. This plan and schedule were due October 3, 2017. Neither of the above two plans and schedules have been filed with the Commission." ⁴⁶

⁴³ *Id.*

⁴⁴ Mike Wilkinson, Kelly House, & Riley Beggin, *Two heirs bought Midland dams as a tax shelter. Tragedy followed*, Bridge (May 27, 2020), <https://www.bridgemi.com/michigan-environment-watch/two-heirs-bought-midland-dams-tax-shelter-tragedy-followed>.

⁴⁵ FERC, Order to Cease Generation, 161 FERC ¶ 62,119, at 4 (Nov. 20, 2017).

⁴⁶ *Id.* at 5.

91. On November 20, 2017, FERC issued an Order to Cease Generation, finding that Defendant Boyce Hydro Power, LLC to be “in violation of [the] Compliance Order.”⁴⁷ FERC specifically identified *eight violations of the Compliance Order in the five months since it had been issued.*⁴⁸

92. FERC also found “violation of the Federal Power Act (FPA), Commission regulations, and the license for the Edenville Hydroelectric Project No. 10808.”⁴⁹

93. Not only was Defendant Boyce Hydro Power, LLC in violation of the Compliance Order, state and federal law, and its license, it had also committed “new violations” in the five short months since the Compliance Order.⁵⁰

94. FERC summarized its concerns as follows:

The Commission’s primary concern with the Edenville Project is the licensee’s longstanding failure to address the project’s inadequate spillway capacity. The project’s spillway deficiencies must be remedied. Commission staff have worked with the licensee for over 13 years to address this problem but to no avail. The licensee has similarly been unresponsive in addressing other compliance matters related to dam safety, recreation at the project, and property rights.⁵¹

95. In light of Defendants’ repeated failures over the course of many years, FERC ordered Defendants to cease power generation at the Edenville Dam:

Commission staff have worked with the licensee for over 13 years on the spillway capacity issue alone and have sent numerous letters and other communications directing the licensee to bring the project into compliance. Notwithstanding multiple extensions and other accommodations by staff, the licensee still has not made substantial progress toward meeting its compliance obligations. Given the licensee’s persistent pattern of non-compliance, and the unlikely chance that the licensee will change course without further Commission action, we are

⁴⁷ FERC, Order to Cease Generation, 161 FERC ¶ 62,119, at 1 (Nov. 20, 2017).

⁴⁸ *Id.* at 3–4.

⁴⁹ *Id.* at 1.

⁵⁰ *Id.*

⁵¹ *Id.*

requiring the licensee to cease generation at the project by November 27, 2017. We are also referring this matter to the Commission's Office of Enforcement for further action which could include penalties, license revocation, or other action.⁵²

96. Citing safety concerns, FERC later temporarily stayed its Order to Cease Generation.⁵³

But FERC refused to issue a permanent stay, once again raising the significant damage that could result from continued failure to improve safety conditions at the 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 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.

In light of the importance of protecting public safety, Boyce's lengthy, extensive record of noncompliance, and Boyce's failure to show that justice requires a stay, we will not issue a permanent stay of the order to cease generation.⁵⁴

E. FERC Revokes Defendant Boyce Hydro Power, LLC's License on September 10, 2018

97. On February 15, 2018, FERC proposed revoking Defendant Boyce Hydro Power, LLC's license to operate the Edenville Dam.⁵⁵

98. FERC once again noted the myriad regulatory and licensing violations that it had

⁵² *Id.* at 5–6.

⁵³ FERC, Order on Stay, 162 FERC ¶ 61,007, at 5 (Jan. 5, 2018).

⁵⁴ *Id.* at 2–3, 5.

⁵⁵ FERC, Order Proposing Revocation of License, 162 F.E.R.C. ¶ 61,115 (F.E.R.C. February 15, 2018), <https://www.ferc.gov/whats-new/comm-meet/2018/021518/H-2.pdf>.

previously documented, stating “Boyce Hydro Power, LLC (Boyce Hydro or licensee) is in violation of numerous provisions of its license for the Edenville Hydroelectric Project No. 10808 (Edenville Project), the Federal Power Act (FPA), and multiple Commission regulations and orders, including a Compliance Order issued pursuant to section 31(a) of the Federal Power Act.”⁵⁶

99. Once again, FERC emphasized the risk to human life and property that continued unabated:

The Commission’s primary concern has been the licensee’s longstanding failure to address the project’s inadequate spillway capacity, which currently is designed to pass only approximately 50 percent of the PMF. Failure of the Edenville dam could result in the loss of human life and the destruction of property and infrastructure.⁵⁷

100. Finally, on September 10, 2018, FERC revoked Defendant Boyce Hydro Power, LLC’s license for the Edenville Dam.⁵⁸

101. In its Order Revoking License, FERC detailed the long history of concerns about the Edenville Dam’s ability to pass only around half of its PMF and concerns about inadequate spillway capacity.

102. FERC also listed the many other license conditions violated by Defendants over the past several years:

These violations . . . include: (1) performing unauthorized dam repairs in violation of Regional Engineer directives pursuant to Standard Article 4 of the license and Part 12 of the Commission’s regulations; (2) performing unauthorized earth-moving activities in violation of Standard Articles 19-21 of the license; (3) failing to file an adequate Public Safety Plan in violation of Standard Article 4 of the license and Part 12 of the Commission’s regulations; (4) unduly restricting public access to project facilities and failing to construct and maintain approved recreation facilities in violation of Standard Article 18 and Article 410 of the license

⁵⁶ *Id.* at 1.

⁵⁷ *Id.* at 3.

⁵⁸ FERC, Order Revoking License, 164 FERC ¶ 61,178 (Sept. 10, 2018).

and the Commission's Order Modifying and Approving Recreation Plan; (5) failing to acquire and document all necessary project property rights in violation of Standard Article 5 of the license; and (6) failing to comply with the Commission's 1999 Order approving Boyce Hydro's Water Quality Monitoring Plan and Article 402 of the license.⁵⁹

103. Once again, FERC raised concerns about the dam's inability to handle a flood at a level above about 50% of the PMF:

In summary, Commission staff has attempted to ensure the licensee corrected noncompliance issues at this project since Boyce Hydro's acquisition of the license in 2004 – a period of over 14 years. Of particular concern is the project's inability to pass the Probable Maximum Flood (PMF) due to inadequate spillway capacity. The Commission's Dam Safety Guidelines require the project works to be designed to safely handle a flood up to the PMF either by withstanding overtopping of the loading condition during such a flood or alleviating the risk such that dam failure would no longer constitute a hazard to downstream life or property. In the alternative, the capacity of the spillway must be adequate to prevent the reservoir from rising to an elevation that would endanger the safety of the project works. Currently, spillway capacity at the Edenville Project can only pass about 50 percent of the PMF.⁶⁰

104. Following the FERC Order revoking its license, Defendant Boyce Hydro Power, LLC requested rehearing.⁶¹ FERC denied that request, finding that the proposed timeline for constructing one of the spillways was inadequate as “it would take over two years for the licensee to fully fund the construction of the Tobacco Auxiliary spillway, and, in the absence of detailed plans and schedules, it is unclear whether the escrowed funds would be sufficient or how long construction would take.”⁶²

F. EGLE and DNR Assume Regulatory Authority for the Edenville Dam

105. Following FERC's decision to revoke Defendant Boyce Hydro Power, LLC on

⁵⁹ *Id.* at 7.

⁶⁰ *Id.* at 2.

⁶¹ FERC, Order Denying Rehearing, 162 FERC ¶ 61,116 (Feb. 15, 2018).

⁶² *Id.* at 11.

September 10, 2018, EGLE and DNR assumed regulatory authority for the Edenville Dam.⁶³

106. Michigan Law requires dam spillways to have the capacity to pass 100- or 200-year floods, or the flood of record, depending on the dam. *See* M.C.L. § 324.31516(1). The Edenville Dam, as a “high hazard potential” dam, was required to have a spillway capacity to meet half of the PMF (half as stringent as FERC’s requirements).⁶⁴

107. Michigan Law also requires that,

If a dam cannot pass the design flood, an auxiliary spillway must be provided. The owner must document, to the satisfaction of the department, that the dam has sufficient spillway capacity, and that proper means are available to operate the spillway or spillways during the design flood.

§ 324.31516(3).

108. Despite the change in regulatory authority, no Defendant took any action to increase the spillway capacity of the Edenville Dam or to otherwise remedy longstanding safety concerns.

109. On October 4, 2018, Jim Pawloski from the Michigan Hydrologic Studies and Dam Safety Unit Water Resources Division of EGLE met with the owner of the Edenville Dam and inspected the Dam.

110. On October 8, 2018, Pawloski issued a report stating that “[d]uring the inspection, the dam was observed to be in fair structural condition.”⁶⁵

111. However, after the Dam broke, EGLE issued a statement calling Pawloski’s report a

⁶³ MDEQ, Report of Jim Pawloski P.E. on Edenville Dam at 1 (Oct. 8, 2018), https://www.michigan.gov/documents/egle/egle-EdenvilleDamInspection-10042018_691245_7.pdf

⁶⁴ § 324.31516; Spicer Group, Inc., *Edenville Dam Inspection Report* (accessed June 12, 2020), <https://assets.documentcloud.org/documents/6941514/Spicer-Report.pdf>; *see also* Beth LeBlanc, *State Found by January that Edenville Dam Didn’t Meet Michigan Safety Standards*, Detroit Free News (May 22, 2020), <https://www.detroitnews.com/story/news/local/michigan/2020/05/22/state-found-edenville-dam-failed-safety-standards-four-months-before-flood/5241158002/>.

⁶⁵ *Id.*

“preliminary assessment” that followed “an initial inspection.”⁶⁶ It claimed, “That preliminary assessment was not intended to determine if the dam met state safety standards.”⁶⁷ To the contrary,

EGLE had concerns that the dam might not have enough spillway capacity – which allows water to flow out of the Wixom Lake impoundment – 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 requirements. That study had not been received by EGLE prior to the dam failure.⁶⁸

112. EGLE and DNR were aware that the dam was unsafe well before its failure in May 2020. According to internal emails, “Four months before the Edenville Dam failed, the state discovered the 96-year-old structure didn’t meet even state standards for its capacity to withstand major flooding.”⁶⁹ According to others, “state regulators were ‘aware of the deficiencies associated with Edenville Dam’ in September 2019.”⁷⁰

113. Lucas Trumble, an employee of EGLE and one of only three state officials responsible for all state-regulated dams in Michigan,⁷¹ concluded on January 31, 2020 that the Edenville Dam “did not meet the flood capacity requirements of the state, which are half as stringent as the federal standards.”⁷²

⁶⁶ EGLE, *Edenville Dam Failure* (accessed June 10, 2020), <https://www.michigan.gov/egle/0,9429,7-135-3313-529696--,00.html>.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Beth LeBlanc, *State Found by January that Edenville Dam Didn’t Meet Michigan Safety Standards*, Detroit Free News (May 22, 2020), <https://www.detroitnews.com/story/news/local/michigan/2020/05/22/state-found-edenville-dam-failed-safety-standards-four-months-before-flood/5241158002/>.

⁷⁰ Mike Wilkinson & Riley Beggin, *Neighbors of Edenville Dam Don’t Want State Investigating its Failure*, Bridge (June 9, 2020), <https://www.bridgemi.com/michigan-environment-watch/neighbors-edenville-dam-dont-want-state-investigating-its-failure>.

⁷¹ EGLE, *Dam Safety Staff* (July 3, 2019), https://www.michigan.gov/documents/deq/wrd-damsstaff_402870_7.pdf.

⁷² Beth LeBlanc, *State Found by January that Edenville Dam Didn’t Meet Michigan Safety Standards*, Detroit Free News (May 22, 2020),

114. In fact, EGLE and DNR were aware of the Edenville Dam’s failure to meet its spillway capacity as early as 2016. EGLE employee Teresa Seidel explained, “According to information provided to us at the time of the license revocation (Fall 2018), the dam had a maximum spillway capacity of approximately 28,000 cfs. So, it was very clear that the dam did not meet the FERC spillway capacity requirements which ultimately led to the revocation of the license by FERC and jurisdiction over the dam to revert to the state under Part 315.” Seidel also explained that Defendant EGLE conducted a ½ PMF flow estimate in 2016 that was reevaluated in 2019.

115. And while EGLE and DNR were offered detailed safety reports written by FERC, “the state did not want to see them.”⁷³

116. Spicer Group, Inc. also informed EGLE and DNR that the Edenville Dam lacked the capacity to meet ½ PMF. According to Seidel, “We have not received any official reports from this data collection/reanalysis, but communications with Spicer indicate that the capacity of the dam was previously over estimated, and that the true capacity (in its current condition) does not meet the state requirement to safely pass ½ PMF.”

117. In other words, after the transition of regulatory authority from FERC to EGLE and DNR, concerns about the safety of the Dam persisted. As Governor Gretchen Whitmer stated after the dam failed, “The initial readout is that this was a known problem for a while.”⁷⁴ U.S. Senator Debbie Stabenow called the failure “another example of the serious consequences when there is a lack of

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

⁷³ Mike Wilkinson & Riley Beggin, *Neighbors of Edenville Dam Don’t Want State Investigating its Failure*, Bridge (June 9, 2020), <https://www.bridgemi.com/michigan-environment-watch/neighbors-edenville-dam-dont-want-state-investigating-its-failure>.

⁷⁴ Riley Beggin, Mike Wilkinson, & Kelly House, *Feds Revoked Dam’s License Over Safety Issues. Then Michigan Deemed it Safe.*, Bridge (May 20, 2020), <https://www.bridgemi.com/michigan-environment-watch/feds-revoked-dams-license-over-safety-issues-then-michigan-deemed-it-safe>.

accountability in our enforcement system and a failure to invest in our critical infrastructure.”⁷⁵

118. Despite that fact, “Michigan regulators didn’t demand any repairs to the dam.”⁷⁶ Instead, “regulators did not move beyond ‘continued conversations’ about repairs.”⁷⁷ No action was taken to remedy the Edenville Dam’s safety problems.

119. “[S]afety experts . . . say the state should have moved faster to protect the public against a dam with a 25-year history of noncompliance and safety warnings.”⁷⁸ Hiba Baroud, Professor of Civil and Environmental Engineering at Vanderbilt University, stated, “When there’s public safety at stake, you don’t have conversations. You actually do something about it. . . . Nature is not going to wait until these issues are resolved within a system. If it’s going to rain, it’s going to rain and you’re going to have to deal with it.”⁷⁹ Denis Binder, Professor of Law at Chapman University, stated that FERC’s warnings in its 2017 Compliance Order “should have been a big ‘red flag’ for Michigan inspectors to fast-track inspections and take action.”⁸⁰

G. Defendants Continue to Ignore Safety Problems and Raise Water Levels

120. Although Defendant Boyce Hydro Power, LLC had lost regulatory authority to operate the Edenville Dam as a hydroelectric power station, it maintained ownership of the Dam.

121. After its license was revoked, Defendant Boyce Hydro Power, LLC began drawing down the water level on Wixom Lake. Normal pond elevation of the lake is 675.8 National Geodetic

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Riley Beggin, *Michigan Should Have Protected Public from Unsafe Edenville Dam, Experts Say*, Bridge (May 31, 2020), <https://www.bridgemi.com/michigan-environment-watch/michigan-should-have-protected-public-unsafe-edenville-dam-experts-say>.

⁷⁹ *Id.*

⁸⁰ *Id.*

Vertical Datum (“NGVD”).⁸¹ The water level was reduced to 669 NGVD from October 2018 through April 8, 2019, with the exception of occasional natural variation due to precipitation.

122. In 2019 or 2020, Boyce Defendants reached an agreement with the Four Lakes Task Force (“FLTF”), a 501(c)(3) entity exercising authority for Midland County and Gladwin County, under which water levels on Wixom Lake would be restored to their traditional summer levels. During this transitory period, all Defendants shared responsibility for the operation and maintenance of the Edenville Dam.

123. FLTF then formed the Four Lakes Operations Company (“FLOC”) as a private business to take advantage of revenue expected from the hydroelectric power generated by the Edenville Dam.

124. In a September 18, 2019 memorandum to Lucas Trumble from EGLE, FLTF wrote, “At this point in time, based on the documents reviewed, the FLTF does not believe that the Edenville Dam can be operated to meet the EGLE dam safety requirement to pass the ½ PMF without certain repairs and improvements.”

125. FLTF commissioned a report by Spicer Group, Inc., which was based on inspections conducted between June 2019 and March 2020.⁸² That study reported, “During the FLTF due diligence associated with the pending purchase of the Edenville Dam, it was known that significant repairs are needed.”⁸³

126. The report concluded that “The visual inspection of the dam and its appurtenant

⁸¹ NGVD provides a uniform measure of water level. *See* FEMA, *NGVD - NAVD?* (Mar. 30, 2007), https://www.fema.gov/media-library-data/20130726-1755-25045-0634/ngvd_navd.pdf.

⁸² Spicer Group, Inc., *Edenville Dam Inspection Report* (accessed June 12, 2020), <https://assets.documentcloud.org/documents/6941514/Spicer-Report.pdf>.

⁸³ *Id.* at 3.

structures indicate that the dam is in fair to poor condition.”⁸⁴ The report specifically identified the Edenville Dam’s inability to pass even one half of the PMF previously required by FERC:

Currently, there are deficiencies which need to be corrected. The dam does not provide adequate capacity to pass the ½ Probable Maximum Flood (PMF) event sufficiently to meet EGLE Dam Safety requirements. This has been previously identified during review of the rating curves by EGLE Dam Safety Engineers and confirmed by the FLTF engineering team.⁸⁵

127. Reiterating concerns that FERC had stressed for years, the report found that “the existing spillways do not have the capacity to pass this flow.”⁸⁶

128. The report also recommended “[r]epairs to abutment and retaining walls,” “[a]n embankment stability analysis,” and “repairs to existing spillways and gate system” given the finding that “the current method to operate the gates was not an adequate or safe method.”⁸⁷

129. Despite this knowledge, Defendants took no action to address the Dam’s serious safety defects.

130. On November 20, 2019, Keto Gyekis, an EGLE employee, wrote to Defendant DNR advocating that water levels not be drawn down, citing concerns about mussel populations.

131. In late 2019, as Boyce Defendants began drawing down lake levels, EGLE issued an Enforcement Notice ordering Boyce Defendants to cease drawing down the water level.

132. EGLE and DNR also threatened legal action against Boyce Defendants, and eventually sued them in the spring of 2020, in order to compel Boyce Defendants not to reduce water levels.⁸⁸

⁸⁴ *Id.* at 4.

⁸⁵ *Id.*; *see also id.* at 9.

⁸⁶ *Id.* at 9.

⁸⁷ *Id.* at 7–8.

⁸⁸ *Attorney General of Michigan v. Lee Mueller*, No: 20-255 (30th Circuit Court); *see also* Riley Beggin, *Michigan Should Have Protected Public from Unsafe Edenville Dam, Experts Say*, Bridge (May

133. Eventually, in April 2020 Defendants agreed to raise water levels in anticipation of the summer season. Despite the many warnings about the safety of the Edenville Dam – first made by FERC and subsequently confirmed by EGLE and DNR and others – *Defendants increased the water level at Wixom Lake shortly before the tragic events of May 19, 2020.*

134. As FLTF explained on its website, “The dams require maintenance and certain improvements to ensure long-term safety. Our goal is to maintain the water levels and complete the needed maintenance and improvements within the next couple of years to ensure public safety.”⁸⁹

135. Defendants refused to bring the water level down on Wixom Lake. In fact, Defendants raised the water level.

H. The Edenville Dam and Sanford Dams Fail, Leading to Significant Losses by Plaintiffs

136. On May 19, 2020, flooding on the Tittabawassee River caused Wixom Lake to flood, causing property damage to owners and residents along the Lake.

137. Later the same day, the eastern portion of the Edenville Dam collapsed, releasing billions of gallons of water from Wixom Lake.⁹⁰ Wixom Lake was almost completely emptied within one hour of the Dam breach.⁹¹

31, 2020), <https://www.bridgemi.com/michigan-environment-watch/michigan-should-have-protected-public-unsafe-edenville-dam-experts-say>.

⁸⁹ FLTF, *Frequently Asked Questions* (accessed June 10, 2020), <http://www.four-lakes-taskforce-mi.com/frequently-asked-questions.html>.

⁹⁰ *At 21.5 Billion Gallons, Wixom Lake Is Twice as Big as Oakland County's Largest Lake*, FOX 2 Detroit (May 21, 2020, updated May 22, 2020), <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> (claiming a volume of 21.5 billion gallons); Spicer Group, Inc., *Edenville Dam Inspection Report* (accessed June 12, 2020), <https://assets.documentcloud.org/documents/6941514/Spicer-Report.pdf> (claiming a volume of 40,000 acre-feet, or 13 billion gallons).

⁹¹ *Id.*

138. According to a letter sent by Governor Whitmer, “High water levels of the Edenville Dam Impoundment (Wixom Lake) likely contributed to the failure of the earthen embankment at the east side of the dam.”⁹²

139. Additionally, Defendants and others responsible for operating the dam failed to open all three gates inside the dam spillway. The failure to open all three gates resulted in increased pressure that contributed to the dam’s failure.

140. Excess water left the now-draining Wixom Lake, moving down the Tittabawassee River and reaching Sanford Lake. More flooding occurred in the environs of Sanford Lake.

141. The mass of water also caused Sanford Dam to breach and overflow.⁹³ While Sanford Lake drained, the flooding continued down the River and into the City of Midland.

142. As a result of the flood, both Governor Whitmer and President Trump declared a State of Emergency.⁹⁴ Additionally, eight counties declared local states of emergency.⁹⁵

143. Around 10,000 residents were forced to abandon their homes, many of whom were forced into closely-congregated shelters in the midst of the global COVID-19 pandemic.⁹⁶ As stated by

⁹² Letter from Gov. Gretchen Whitmer to Pres. Donald Trump (June 15, 2020), <https://tinyurl.com/ybuzerza>.

⁹³ Keith Matheny, *Sanford Dam Also Failed, State Confirms; GOP Calls for AG Dana Nessel's Recusal*, Detroit Free Press (May 22, 2020), <https://www.freep.com/story/news/local/michigan/2020/05/22/sanford-dam-michigan-flooding/5245255002/>.

⁹⁴ Riley Beggin, *Midland Failed Dams, Floods Caused \$200M in Damages to 2,500 Buildings, Bridge* (June 8, 2020), <https://www.bridgemi.com/michigan-government/midland-failed-dams-floods-caused-200m-damages-2500-buildings>.

⁹⁵ Letter from Gov. Gretchen Whitmer to Pres. Donald Trump (June 15, 2020), <https://tinyurl.com/ybuzerza>.

⁹⁶ Riley Beggin, *Midland Failed Dams, Floods Caused \$200M in Damages to 2,500 Buildings, Bridge* (June 8, 2020), <https://www.bridgemi.com/michigan-government/midland-failed-dams-floods-caused-200m-damages-2500-buildings>.

Governor Whitmer, “[I]t cannot be denied that COVID-19 greatly burdens the recovery from this disaster. Local, county, and state governments across the country have focused their efforts on responding to and preventing the spread of COVID-19 for the last several months. Consequently, the personnel tasked with responding to disasters are fatigued and resources are spread thin. Governments are facing significant financial pressure as COVID-19 -related costs are soaring, and tax revenues will sharply decline due to, among other factors, increased unemployment and reduced economic activity.”⁹⁷

144. The COVID-19 pandemic also exacerbated the severity of this disaster for individuals and households. As explained by Governor Whitmer, “The communities impacted by this disaster were already under stress due to measures taken to sustain and protect life such as Stay Home Stay Safe orders and other restrictions on many activities of everyday life, which were and remain critically necessary to curtail the spread of the virus. Residents suffered emotional trauma from observing rising case numbers and death tolls, and, most tragically, the loss of friends and family members. Many residents are also facing financial impacts, as they lost jobs or businesses. Stores and businesses are operating under limited hours and capacity, and cleaning supplies essential for flood cleanups and muck outs are in short supply, complicating the cleanup of affected residences. There were even reports that evacuated disaster survivors slept in their vehicles instead of in congregate care shelters to avoid potential exposure to the COVID-19. These factors and more impede the ability of disaster survivors to recover from this disaster effectively and quickly.”⁹⁸

145. The resulting flooding caused millions of dollars in damage to buildings.⁹⁹

⁹⁷ Letter from Gov. Gretchen Whitmer to Pres. Donald Trump (June 15, 2020), <https://tinyurl.com/ybuzerza>.

⁹⁸ *Id.*

⁹⁹ *Id.*; Riley Beggin, *Midland Failed Dams, Floods Caused \$200M in Damages to 2,500 Buildings*, Bridge (June 8, 2020), <https://www.bridgemi.com/michigan-government/midland-failed-dams-floods-caused-200m-damages-2500-buildings>.

146. The flood destroyed thousands of homes and business and significant amounts of personal property, and it destroyed many homes' mechanical and electrical systems.¹⁰⁰ The flood also compromised water supplies and rendered residential wells undrinkable. The flood also reached containment ponds at Dow Chemical, risking significant health problems to nearby residents.

147.

148. The failure of the dams also drained nearly all of the water in Wixom and Sanford Lakes. “[Wixom] lake is now little more than a stream surrounded by scoured rising banks of earth, a lake bottom exposed.”¹⁰¹ This has reduced the value of nearby property, and the use and enjoyment of the property for owners. In this photograph, published in the *Detroit Free Press*, a resident sits on his dock on Wixom Lake:

¹⁰⁰ Letter from Gov. Gretchen Whitmer to Pres. Donald Trump (June 15, 2020), <https://tinyurl.com/ybuzerza>.

¹⁰¹ Beth LeBlanc, *State Found by January that Edenville Dam Didn't Meet Michigan Safety Standards*, *Detroit Free News* (May 22, 2020), <https://www.detroitnews.com/story/news/local/michigan/2020/05/22/state-found-edenville-dam-failed-safety-standards-four-months-before-flood/5241158002/>.



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149. At all material times thereto, Plaintiffs Thomas Borchard, Charles Borchard, Dennis Borchard, and Sally Bradley (hereinafter “Borchard Owners”) owned property located at 4541 Island Drive, Sanford Michigan, (hereinafter “Borchard Property”). The Borchard Property faces the Sanford Lake and is close to the Edenville Dam. As a result of the dam breach described above, the Borchard Property was flooded with water that rose to a level of five feet of water throughout the entire home, garage, surrounding buildings which housed outdoor equipment, and the dock. The Borchard Property and personal possessions therein suffered significant damage, with all furnishing and appliances in the home destroyed by the flood waters. In addition, the Borchard Owners have lost the use and enjoyment of their property, which has diminished in value as a result of the flood. Among other things, the flooding caused a loss of electrical power, tap water, and septic service. In addition to this property damage, the

¹⁰²Keith Matheny, *After Midland Flood, Wixom, Sanford Lake Residents Face Long, Complicated Restoration*, Detroit Free Press (June 3, 2020), <https://www.freep.com/story/news/local/michigan/2020/06/03/wixom-sanford-lake-flood-midland-edenville-dam/5284218002/>.

flood has caused significant destruction to the surrounding area and drained both the Wixom and Sanford Lakes, reducing the value of the Borchard Owners' property.

150. At all material times thereto, Plaintiff Patrick T. Wortley operated and did business as Crawford Insurance Agency in the State of Michigan with its principle place of business and operation in the rental property located at 165 W. Saginaw Road, Sanford Michigan, downstream from both the Edenville and Sanford Dams. As a result of the dam breach described above, Crawford Insurance Agency's property was flooded with five feet of water throughout the entire office space. Crawford Insurance Agency's rental property and personal possessions suffered significant damage, of all electronics, including the computer system and phone, office workstations, filing cabinets and seven years' worth of stored records. In addition, Crawford Insurance Agency has lost the use of the business office which has required additional rental expense. Among other things, the flooding caused a loss of electrical power, tap water, and septic service. In addition to this property damage, the flood has caused significant destruction to the surrounding area and drained both the Wixom and Sanford Lakes, and making the area less conducive to tourism and other commerce that would have occurred but for the flood. As a result, the value of Crawford Insurance Agency's business prospects has been diminished.

151. At all material times thereto, Plaintiffs Krystien and Joshua Gillette resided in Midland, Michigan, in a rental property located at 1305 Soper Street, close to the Edenville and Sanford Dams. As a result of the dam breach described above, Krystien and Joshua Gillette's property was flooded by approximately seven feet of water throughout the entire home. Krystien and Joshua Gillette's residence and personal possessions suffered significant damage, including total loss of all belongings within the home and the garage. In addition, Krystien and Joshua Gillette have lost the use and enjoyment of their residence. Among other things, the flooding caused a loss of electrical power, tap water, and septic service.

152. At all times material thereto, Plaintiff Christopher Ice owned property located at 5095 N. Fox Road, Sanford, Michigan, close to the Edenville Dam. As a result of the dam breach described above, Christopher Ice's property was flooded with seven feet of water throughout the first floor of the entire home. Christopher Ice's home and personal possessions suffered significant damage and complete destruction of all furniture and house belongings on the first floor, including specialized items such as hand carved teak furniture and Level 5 dry wall finish, two boats, two boat hoists, a boathouse, a dock, and all aquatic recreational equipment. In addition, Christopher Ice has lost the use and enjoyment of his property, which has diminished in value as a result of the flood. Among other things, the flooding caused a loss of electrical power, tap water, and septic service. In addition to this property damage, the flood has caused significant destruction to the surrounding area and drained Sanford Lake, reducing the value of Christopher Ice's property.

153. At all times material thereto, Plaintiff CDI Construction Group, Inc.'s principle place of business was located at 5095 N. Fox Road, Sanford, Michigan, close to the Edenville Dam. As a result of the dam breach described above, CDI Construction Group, Inc.'s principle place of business was flooded with seven feet of water throughout the entire area. CDI Construction Group, Inc., suffered the loss of all commercial tools, materials, electronics, computer system, specialized computer software, phones, office workstations, filing cabinets and years of stored records. As a result of this damage, CDI Construction Group, Inc., has lost the ability to conduct all routine business in addition to the ability to engage in new business and profitable projects. Additionally, the flood has caused significant destruction to the surrounding area and drained both Wixom and Sanford Lakes, making the area less conducive to tourism and other commerce that would have occurred but for the flood. As a result, CDI Construction Group, Inc.'s business prospects have been diminished.

154. At all times material thereto, Plaintiff Daljeet Kaur owned the MC30 Market LLC (hereinafter “Edenville Market”) and the commercial property located at 6650 M-30 in Edenville, Michigan, close to the Edenville Dam. Edenville Market is a commercial market centrally located between Wixon Lake and Sanford Lake, offering groceries, prepared food, drinks, and other items to the general public. As a result of the dam breach described above, Daljeet Kaur’s property was flooded with water and two inches of mud through the entire business. Daljeet Kaur’s real and personal property suffered significant damage, including the loss of seven coolers and freezers, all ice cream, dairy products, meats, vegetables, and other perishable merchandise. In addition, the property diminished in value as a result of the flood. Among other things, the flooding caused a loss of electrical power, tap water, and septic service. In addition to this property damage, the flood has caused significant destruction to the surrounding area and drained Wixom and Sanford Lakes, diminishing the value of Daljeet Kaur’s property and making the area less conducive to tourism and other commerce that would have occurred but for the flood. As a result, the value of Daljeet Kaur’s commercial property and Edenville Market’s business prospects have been diminished.

155. At all material times thereto, Plaintiff Tom McCann Family LLC owned 265 properties in Midland County, Michigan, (hereinafter “McCann Family Property”) which it offers for rent for both residential and commercial use. As a result of the dam breach described above, McCann Family Property at six locations were flooded and suffered damage: 4907 Glencoe Street, Midland (entire property flooded with four feet of water); 1305 Soper Street, Midland (entire property flooded with six feet of water); 504 Hutchison Lane, Midland (entire property flooded with almost four feet of water); 508 Hutchison Lane, Midland (entire property flooded with almost four feet of water); 516 Hutchison Lane, Midland (partial property flooded with four inches of water); and 2516 Isabella Road, Midland (partial property flooded with four inches of water). In addition, the properties all diminished in value as a result of the flood.

Among other things, the flooding caused a loss of electrical power, tap water, and septic service. In addition to the specific damage to these six properties, the flood has caused significant destruction to the surrounding area and drained both the Wixom and Sanford Lakes, diminishing the value of the McCann Family Property and making the area less conducive to tourism and other commerce that would have occurred but for the flood. As a result, the value of the McCann Family Property's residential and commercial rental properties and the Tom McCann Family LLC's business prospects have been diminished.

156. At all material times thereto, Plaintiffs John and Tylia Maddens resided in Midland, Michigan, in a rental property located at 4907 Glencoe Street, close to the Edenville and Sanford Dams. As a result of the dam breach described above, John and Tylia Maddens' property was flooded by approximately five feet of water throughout the entire home. John and Tylia Maddens' residence and personal possessions suffered significant damage of the total loss of all belongings within the home and the garage, including appliances, electronics, tools and lawnmower, trampoline and above ground swimming pool. In addition, John and Tylia Maddens have lost the use and enjoyment of their residence. Among other things, the flooding caused a loss of electrical power, tap water, and septic service. In addition to this property damage, the flood has caused significant destruction to the surrounding area and drained both the Wixom and Sanford Lakes, reducing the value of John and Tylia Maddens' property.

157. At all material times thereto, Plaintiff Stephanie O'Dell resided in Midland, Michigan, in a rental property located at 504 Hutchinson Lane, close to the Edenville and Sanford Dams, upstream from the dams. As a result of the dam breach described above, Stephanie O'Dell's property was flooded by approximately four feet of water throughout the entire home. Stephanie O'Dell's residence and personal possessions suffered significant damage and the total loss of all belongings within the home and the shed, including furniture, appliances, electronics, tools, and lawn equipment. In addition, Stephanie

O'Dell has lost the use and enjoyment of her residence. Among other things, the flooding caused a loss of electrical power, tap water, and septic service.

158. At all material times hereto, Plaintiffs Brian and Shasta Parent lived in Midland, Michigan, and owned residential property located at 4913 Glencoe Street, Midland, close to the Sanford Dam. As a result of the dam breach described above, Brian and Shasta Parent's property was flooded with over two feet of water throughout the entire first floor of the home. Brian and Shasta Parent's home and personal possessions suffered significant damage, including the total destruction of all furniture, personal household items, and appliances. In addition, Brian and Shasta Parent have lost the use and enjoyment of their property, which has diminished in value as a result of the flood. Among other things, the flooding caused a loss of electrical power, tap water, and septic service. In addition to this property damage, the flood has caused significant destruction to the surrounding area and drained both the Wixom and Sanford Lakes, reducing the value of Brian and Shasta Parent's property.

159. At all material times thereto, Plaintiff Mike Roberson resided in Midland, Michigan, in a rental property located at 504 Hutchinson Lane, close to the Edenville and Sanford Dams, upstream from the dams. As a result of the dam breach described above, Mike Roberson's property was flooded by approximately four feet of water throughout the entire home. Mike Roberson's residence and personal possessions suffered significant damage and the total loss of all belongings within the home and the shed, including furniture, appliances, electronics, tools, lawn equipment, and a 2002 Harley Davidson Sportster motorcycle. In addition, Mike Roberson has lost the use and enjoyment of his residence. Among other things, the flooding caused a loss of electrical power, tap water, and septic service.

160. At all material times thereto, Plaintiff Ronald Roenicke resided in Midland, Michigan, in a rental property located at 4904 Perrine Road, close to the Edenville and Sanford Dams. As a result of the dam breach described above, Ronald Roenicke's property was flooded by approximately eight feet of

water throughout the basement and four feet of water throughout the entire main floor of the home. Ronald Roenicke's residence and personal possessions suffered significant damage of the total loss of all belongings within the home and the garage, including bedroom, office, and dining room furniture; electronics including a computer and television, and several specialty items, including handmade stained glass art and a medically necessary bed/mattress, as well as other household and personal items. In addition, Ronald Roenicke has lost the use and enjoyment of his residence. Among other things, the flooding caused a loss of electrical power, tap water, and septic service.

161. At all material times thereto, Plaintiff Sanford Chamber of Commerce owned the commercial property at 165 W. Saginaw Road, Sanford, Michigan, less than ½ mile from the Sanford Dam. The Sanford Chamber of Commerce promotes tourism and local business, as well as renting out the physical space at 165 W. Saginaw Road for other businesses, as well as its Chamber Hall for parties and community gatherings. As a result of the dam breach described above, Sanford Chamber of Commerce's property was flooded with five feet of water throughout the entire building. Sanford Chamber of Commerce's real and personal property suffered significant damage with total destruction of all items within the building and the adjacent storage barn/garage, which had its foundation washed out and cement floor caved in. In addition, the property diminished in value as a result of the flood. Among other things, the flooding caused a loss of electrical power, tap water, and septic service. In addition to this property damage, the flood has caused significant destruction to the surrounding area and drained both the Wixom and Sanford Lakes, diminishing the value of Sanford Chamber of Commerce's property and making the area less conducive to tourism and other commerce that would have occurred but for the flood. As a result, the value of Sanford Chamber of Commerce's commercial property and Sanford Chamber of Commerce's business prospects and income have been diminished.

162. At all times material thereto, Plaintiff Barbara Stevens owned residential property located at 493 Flanders Beach Road, Sanford, Michigan, close to the Edenville Dam. As a result of the dam breach described above, Barbara Stevens' property was flooded with over one foot of water throughout the entire home. Barbara Stevens' home and personal possessions suffered significant damage including the complete loss of all flooring (hardwood and carpet), all appliances, custom build fireplace wall and hearth, and all other furnishings and personal contents within the home. In addition, Barbara Stevens has lost the use and enjoyment of her property, which has diminished in value as a result of the flood. Among other things, the flooding caused a loss of electrical power, tap water, and septic service. In addition to this property damage, the flood has caused significant destruction to the surrounding area and drained both the Wixom and Sanford Lakes, reducing the value of Barbara Stevens' property.

163. At all times material to, Plaintiffs Troy and Lauren Valley owned residential property located at 2191 E. Pine River Road, Midland, Michigan, (hereinafter the "Valley Property") downstream from both the Edenville and Sanford Dams. As a result of the dam breach described above, the Valley Property was flooded with water completely filling the finished basement to the ceiling, and three feet of water in the surrounding lawn/yard. Troy and Lauren Valley's home and personal possessions suffered significant damage of the complete loss of all basement contents, including appliances, electronics, exercise equipment, as well as, items maintained on the property including a popup camper and 2005 Impala, and other equipment in an outdoor shed, such as a riding lawn mower, fishing equipment, and other home and lawn maintenance items. In addition, Troy and Lauren Valley have lost the use and enjoyment of their property, which has diminished in value as a result of the flood. Among other things, the flooding caused a loss of electrical power and destruction of the well from which they receive drinking water. In addition to this property damage, the flood has caused significant destruction to the surrounding area and drained both the Wixom and Sanford Lakes, reducing the value of the Valley Property.

164. At all times material thereto, Plaintiff Ron and Mary Wascher owned residential property located at 1195 Short Street, Hope, Michigan (hereinafter the “Wascher Property”). The Wascher Property faces the Wixom Lake and is close to the Edenville Dam. As a result of the dam breach described above, the Wascher Property was flooded with over two feet of water throughout the entire home and throughout the full crawl space underneath the home. Ron and Mary Wascher’s home and personal possessions suffered significant damage including the complete loss of all flooring (hardwood and carpet), all appliances, and all other furnishings and contents within the home, as well as items outside them home, including a riding lawnmower, two All-Terrain Vehicles, and a deep water well which now must be replaced. In addition, Ron and Mary Wascher have lost the use and enjoyment of their property, which has diminished in value as a result of the flood. Among other things, the flooding caused a loss of electrical power, tap water, and septic service. In addition to this property damage, the flood has caused significant destruction to the surrounding area and drained both the Wixom and Sanford Lakes, reducing the value of the Wascher Property.

165. At all times material thereto, Plaintiff Robert Emmet Witt Revocable Living Trust (hereinafter “Witt Trust Property”) owned residential property located at 4462 N. Verity Road, Sanford. The Witt Trust Property faces the Sanford Lake and is close to the Edenville Dam. As a result of the dam breach described above, the Witt Trust Property was flooded with over twelve feet of water onto the property, which damaged the seawall, retaining walls, and boathouse and its contents. In addition, the Witt Trust has lost the use and enjoyment of its property, which has diminished in value as a result of the flood. Among other things, the flooding caused a loss of electrical power which caused additional loss of food and further inconvenience. In addition to this property damage, the flood has caused significant destruction to the surrounding area and drained both the Wixom and Sanford Lakes, reducing the value of the Witt Trust’s Property.

V. CAUSES OF ACTION

**COUNT 1
NEGLIGENCE**

166. Plaintiffs re-allege and incorporate by reference all the allegations contained in Paragraphs 1 through 158.

167. Defendants had a duty to Plaintiffs to exercise reasonable care in the maintenance and operation of the Edenville and Sanford Dams as well as their spillways, reservoirs, and other features within their control.

168. Defendants had a duty to ensure that the dams could withstand a flood equivalent to the PMF, or to take other measures to mitigate the harm that would occur as a result of a PMF-level flood.

169. Defendants had a duty to ensure that the dams did not pose an unreasonable danger or risk of harm to Plaintiffs, particularly through flooding.

170. Defendants had a duty to maintain the dams and their associated features consistent with reasonable care under the circumstances, as determined by relevant engineering standards, state and federal regulatory expectations, and other relevant guidelines.

171. Defendants breached these duties. Defendants failed to act at a reasonable standard of care by operating the dam in poor condition; maintaining inadequate spillways; raising water levels in a manner that elevated the risk of flooding; failing to undertake necessary repairs; failing to take mitigatory action to prevent harm to Plaintiffs; and violating accepted engineering, regulatory, and other standards.

172. Defendants' negligence caused harm to Plaintiffs, in that Plaintiffs' harm would not have occurred but for Defendants' negligence.

173. Harm to Plaintiffs resulted directly from Defendants' negligence. The harm was also foreseeable, in that the harm caused was of the kind that could be reasonably expected to result from Defendants' negligence.

174. As a result of Defendants' negligence, Plaintiffs have suffered harm in the form of property damage and destruction; loss of the use and enjoyment of property; and diminished value of real and personal property, residence, and business.

175. Wherefore, Plaintiffs seek damages for their injuries, in an amount to be determined at trial, sufficient to restore them to their position but-for Defendants' wrongdoing, as well as punitive damages, injunctive relief, and other relief.

COUNT 2
NEGLIGENCE PER SE

176. Plaintiffs re-allege and incorporate by reference all the allegations contained in Paragraphs 1 through 158.

177. Defendants owed duties to Plaintiffs as a result of FERC's Dam Safety Guidelines:

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 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.¹⁰³

178. FERC, through multiple regulatory guidelines and communications, emphasized to Defendants the requirement that the Edenville Dam be able to withstand a PMF-level flood.

179. Michigan law also created a duty for dams to maintain a spillway capacity that is less stringent than the federal requirements. *See* M.C.L. § 324.31516.

180. These statutorily-created duties exist to prevent the kind of harm – namely, the harm that

¹⁰³ Order on Stay, 162 FERC ¶ 16,007, at 2–3 (Jan. 5, 2018).

results from dam failure and flooding – that Plaintiffs incurred.

181. These statutorily-created duties exist to protect the class of individuals to which Plaintiffs belong, *i.e.* those living and owning property near dams and reservoirs, and those who would be harmed by dam failure and flooding.

182. Defendants breached their duties under federal and state law. Defendants failed to act at a reasonable standard of care by operating the dam in poor condition; maintaining inadequate spillways; raising water levels in a manner that elevated the risk of flooding; failing to undertake necessary repairs; failing to take mitigatory action to prevent harm to Plaintiffs; and violating accepted engineering, regulatory, and other standards.

183. FERC ordered Boyce Defendants to cease power generation at the Edenville dam, and later revoked Defendant Boyce Hydro Power, LLC's license, as a result of repeated failures to meet regulatory requirements. After the transfer of regulatory authority to EGLE and DNR, Defendants were aware of the Edenville Dam's lack of compliance with State law.

184. Defendants' negligence caused harm to Plaintiffs, in that Plaintiffs' harm would not have occurred but for Defendants' negligence.

185. Harm to Plaintiffs resulted directly from Defendants' negligence. The harm was also foreseeable, in that the harm caused was of the kind that could be reasonably expected to result from Defendants' negligence.

186. As a result of Defendants' negligence, Plaintiffs have suffered harm in the form of property damage and destruction; loss of the use and enjoyment of property; and diminished value of real and personal property, residence, and business.

187. Wherefore, Plaintiffs seek damages for their injuries, in an amount to be determined at trial, sufficient to restore them to their position but-for Defendants' wrongdoing, as well as punitive damages,

injunctive relief, and other relief.

COUNT 3
GROSS NEGLIGENCE

188. Plaintiffs re-allege and incorporate by reference all the allegations contained in Paragraphs 1 through 158.

189. Defendants had a duty to Plaintiffs to exercise reasonable care in the maintenance and operation of the Edenville and Sanford Dams as well as their spillways, reservoirs, and other features within their control.

190. Defendants had a duty to ensure that the dams could withstand a flood equivalent to the PMF, or to take other measures to mitigate the harm that would occur as a result of a PMF-level flood.

191. Defendants had a duty to ensure that the dams did not pose an unreasonable danger or risk of harm to Plaintiffs, particularly through flooding.

192. Defendants had a duty to maintain the dams and their associated features consistent with reasonable care under the circumstances, as determined by relevant engineering standards, state and federal regulatory expectations, and other relevant guidelines.

193. Defendants breached these duties. Defendants failed to act at a reasonable standard of care by operating the dam in poor condition; maintaining inadequate spillways; raising water levels in a manner that elevated the risk of flooding; failing to undertake necessary repairs; failing to take mitigatory action to prevent harm to Plaintiffs; and violating accepted engineering, regulatory, and other standards.

194. Defendants' gross negligence caused harm to Plaintiffs, in that Plaintiffs' harm would not have occurred but for Defendants' gross negligence.

195. Harm to Plaintiffs resulted directly from Defendants' gross negligence. The harm was also foreseeable, in that the harm caused was of the kind that could be reasonably expected to result from Defendants' gross negligence.

196. As a result of Defendants' gross negligence, Plaintiffs have suffered harm in the form of property damage and destruction; loss of the use and enjoyment of property; and diminished value of real and personal property, residence, and business.

197. Defendants were aware of the safety issues surrounding the Edenville Dam. Both federal and state regulatory authorities acknowledge that the Dam was unable to withstand a serious flood of the kind that occurred.

198. Despite Defendants' knowledge of safety hazard, Defendants failed to exercise reasonable care in the operation and maintenance of the Dam. Defendants' gross negligence was so reckless that it demonstrates a substantial lack of concern for whether an injury will result.

199. Wherefore, Plaintiffs seek damages for their injuries, in an amount to be determined at trial, sufficient to restore them to their position but-for Defendants' wrongdoing, as well as punitive damages, injunctive relief, and other relief.

COUNT 4
STRICT LIABILITY – ABNORMALLY DANGEROUS ACTIVITY

200. Plaintiffs re-allege and incorporate by reference all the allegations contained in Paragraphs 1 through 158.

201. At all relevant times, Defendants had supervision and control of the Edenville and Sanford Dams.

202. Defendants have engaged in an abnormally dangerous activity by owning, operating, and maintaining a Dam that collects large quantities of water in dangerous and hazardous conditions.

203. The scale of the Edenville and Sanford Dams created a likelihood of imminent and catastrophic harm stemming from any breach, malfunction, or failure of the respective Dams.

204. Storing water and operating dams near residential and commercial properties significantly increases the risk of potential harm as a result of any breach, malfunction, or failure of the

dams.

205. Defendants were under a continuing duty to protect Plaintiffs from flooding and escape of the waters held by the Edenville and Sanford Dams and their associated features.

206. Defendants owned, operated, and maintained the Dams near residential and commercial properties under dangerous conditions, including by operating without adequate spillways, raising water levels, and failing to take mitigatory actions to reduce potential harm.

207. Defendants' actions caused harm to Plaintiffs, in that Plaintiffs' harm would not have occurred but for Defendants' actions.

208. Harm to Plaintiffs resulted directly from Defendants' actions. The harm was also foreseeable, in that the harm caused was of the kind that could be reasonably expected to result from Defendants' actions.

209. The harm sustained by Plaintiffs and Class Members is exactly the kind of harm posed by engaging in the abnormally dangerous activity alleged herein.

210. Wherefore, Plaintiffs seek damages for their injuries, in an amount to be determined at trial, sufficient to restore them to their position but-for Defendants' wrongdoing, as well as punitive damages, injunctive relief, and other relief.

COUNT 5
WILLFUL AND WANTON CONDUCT

211. Plaintiffs re-allege and incorporate by reference all the allegations contained in Paragraphs 1 through 158.

212. Defendants were aware of the safety issues surrounding the Edenville Dam. Both federal and state regulatory authorities acknowledge that the Dam was unable to withstand a serious flood of the kind that occurred.

213. Despite Defendants' knowledge of this safety hazard, Defendants failed to exercise

reasonable care in the operation and maintenance of the Dam. Defendants' actions were willful in that Defendants knew of safety concerns and yet continued to maintain the Dam in a dangerous condition, and therefore acted with the intention of harming Plaintiffs. Defendants' actions were wanton in that they exhibited such indifference to whether harm will result as to be equal to a willingness that harm will result.

214. Defendants acted willfully and wantonly by maintaining the dam in poor condition; maintaining inadequate spillways; raising water levels in a manner that elevated the risk of flooding; failing to undertake necessary repairs; failing to take mitigatory action to prevent harm to Plaintiffs; and violating accepted engineering, regulatory, and other standards.

215. Defendants' actions caused harm to Plaintiffs, in that Plaintiffs' harm would not have occurred but for Defendants' actions.

216. Harm to Plaintiffs resulted directly from Defendants' actions. The harm was also foreseeable, in that the harm caused was of the kind that could be reasonably expected to result from Defendants' actions.

217. As a result of Defendants' actions, Plaintiffs have suffered harm in the form of property damage and destruction; loss of the use and enjoyment of property; and diminished value of real and personal property, residence, and business.

218. Wherefore, Plaintiffs seek damages for their injuries, in an amount to be determined at trial, sufficient to restore them to their position but-for Defendants' wrongdoing, as well as punitive damages, injunctive relief, and other relief.

COUNT 6
COMMON LAW TRESPASS

219. Plaintiffs re-allege and incorporate by reference all the allegations contained in Paragraphs 1 through 158.

220. Defendants' actions in maintaining the dam in poor condition; maintaining inadequate

spillways; raising water levels in a manner that elevated the risk of flooding; failing to undertake necessary repairs; failing to take mitigatory action to prevent harm to Plaintiffs; and violating accepted engineering, regulatory, and other standards caused a release of flood waters on Plaintiffs' properties.

221. That release of flood waters constituted an unauthorized, direct, and immediate intrusion of a physical object onto real and personal property over which Plaintiffs have a right of exclusive possession.

222. Defendants knew or reasonably should have known that its actions would result in the physical invasion of Plaintiffs' property by flood waters.

223. Defendants exercised operation, ownership, and control of the Edenville and Sanford Dams and their corresponding features under dangerous conditions, and maintained the same carelessly, recklessly, and negligently.

224. Defendants' actions caused harm to Plaintiffs, in that Plaintiffs' harm would not have occurred but for Defendants' actions.

225. Harm to Plaintiffs resulted directly from Defendants' actions. The harm was also foreseeable, in that the harm caused was of the kind that could be reasonably expected to result from Defendants' actions.

226. As a result of Defendants' actions, Plaintiffs have suffered harm in the form of property damage and destruction; loss of the use and enjoyment of property; and diminished value of real and personal property, residence, and business.

227. Wherefore, Plaintiffs seek damages for their injuries, in an amount to be determined at trial, sufficient to restore them to their position but-for Defendants' wrongdoing, as well as punitive damages, injunctive relief, and other relief.

COUNT 7
STATUTORY TRESPASS

228. Plaintiffs re-allege and incorporate by reference all the allegations contained in Paragraphs 1 through 158.

229. M.C.L. § 600.2919(1) provides in relevant part:

Any person who:

(a) cuts down or carries off any wood, underwood, trees, or timber or despoils or injures any trees on another's lands, or

(b) digs up or carries away stone, ore, gravel, clay, sand, turf, or mould or any root, fruit, or plant from another's lands, or

(c) cuts down or carries away any grass, hay, or any kind of grain from another's lands without the permission of the owner of the lands, or on the lands or commons of any city, township, village, or other public corporation without license to do so, is liable to the owner of the land or the public corporation for 3 times the amount of actual damages.

230. Defendants' actions in maintaining the dam in poor condition; maintaining inadequate spillways; raising water levels in a manner that elevated the risk of flooding; failing to undertake necessary repairs; failing to take mitigatory action to prevent harm to Plaintiffs; and violating accepted engineering, regulatory, and other standards caused a release of flood waters on Plaintiffs' properties.

231. Defendants knew of safety concerns and yet continued to maintain the Dam in a dangerous condition, and therefore Defendants knew or reasonably should have known that its actions would result in the physical invasion of Plaintiffs' property by flood waters.

232. Defendants' actions caused harm to Plaintiffs, in that Plaintiffs' harm would not have occurred but for Defendants' actions.

233. Harm to Plaintiffs resulted directly from Defendants' actions. The harm was also foreseeable, in that the harm caused was of the kind that could be reasonably expected to result from Defendants' actions.

234. Plaintiffs were harmed, *inter alia*, when materials described by M.C.L. § 600.2919(1)

were removed from their property as a result of Defendants' actions.

235. Wherefore, Plaintiffs seek damages for their injuries, consistent with the statute, as well as punitive damages, injunctive relief, and other relief.

VI. DEMAND FOR A JURY TRIAL

236. Pursuant to Michigan Court Rule 2.508(B)(1), Plaintiffs demand a jury trial as to all issues so triable.

VII. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that Plaintiffs be awarded any and all appropriate relief, including:

- a. compensatory damages for Plaintiffs' past injuries, including but not limited to costs to repair or replace damaged or destroyed property; diminution in value of property, use and enjoyment of property, residence, and business; costs incurred to obtain housing, shelter, clothing, and other goods caused by the destruction of Plaintiffs' property; costs associated with loss of business and business interruption; costs associated with emotional distress, pain, and suffering;
- b. exemplary, punitive damages and statutory damages;
- c. injunctive relief sufficient to restore Plaintiffs' position to what it would have been but-for Defendants' actions, and to prevent ongoing and future harm;
- d. pre-judgment and post-judgment interest;
- e. reasonable attorney's fees and costs; and
- f. such other relief as is just and proper under the circumstances.

Respectfully submitted,



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