

**STATE OF MICHIGAN
42ND CIRCUIT MIDLAND COUNTY COURT**

THOMAS HOLLEY, KATHERINE HOLLEY,
MONTY WISEMAN, JILL WISEMAN,
THOMAS DECOE, MICHELLE DECOE
ROBERT MISHLER, JR., and SUSAN MISHLER,
individually and on behalf of
a class of all similarly situated persons,

Plaintiffs,

Case No.20 - -ND
Hon.

CLASS ACTION COMPLAINT

vs.

BOYCE HYDRO POWER LLC,
BOYCE HYDRO LLC, BOYCE MICHIGAN LLC,
EDENVILLE HYDRO PROPERTY LLC,
BOYCE TRUST HYDRO PROPERTY 2350 LLC,
BOYCE TRUST HYDRO PROPERTY 3649 LLC,
BOYCE TRUST HYDRO PROPERTY 3650 LLC,
WILLIAM D. BOYCE TRUST 2350 u/a/d 10/1908,
WILLIAM D. BOYCE TESTAMENTARY TRUST 3649 u/a/d 6/1929,
WILLIAM D. BOYCE TESTAMENTARY TRUST 3650 u/a/d 6/1929,
LEE W. MUELLER, MICHAEL W. d'AVENAS,
STEPHEN B. HULTBERG, JPMORGAN CHASE & CO.,

Defendants.

GEOFFREY N. FIEGER (P30441)
JAMES J. HARRINGTON (P65351)
TODD J. WEGLARZ (P48035)
DONALD DAWSON, JR. (P29692)
MARC S. BERLIN (P37140)
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Attorney for Plaintiffs

CLASS ACTION COMPLAINT AND JURY DEMAND

NOW COMES, Plaintiffs THOMAS HOLLEY, KATHERINE HOLLEY, MONTY WISEMAN, JILL WISEMAN, THOMAS DECOE, MICHELLE DECOE, ROBERT MISHLER, JR. and SUSAN MISHLER, individually and on behalf of all members of the proposed class defined below, by and through their counsel Fieger, Fieger, Kenney & Harrington, P.C., and for their Class Action Complaint against the above-named Defendants hereby states as follows:

INTRODUCTION

1. This class action arises out of the Edenville Dam disaster that occurred on May 19, 2020, causing devastating floods and massive damage to and destruction of property, as well as forced evacuations, of more than ten thousand Michigan residents.

2. On or around May 19, 2020 there was catastrophic devastation throughout Midland County, Michigan as a result of a tremendous amount of water which was released as a result of the failure of the Edenville Dam. The water release overwhelmed the downstream Sanford Dam which breached and damaged multiple properties as a result. There were in excess of 11,000 individuals evacuated from the damaged area and even more harmed by the incredible release of water.

3. The Edenville Dam was built in 1925. It is an earth-gravity dam completed in Michigan's Gladwin County, approximately 25 miles west of Saginaw Bay. The Edenville Dam impounds both the Tittabawasee River and its tributary the Tobacco River, resulting in the formation of Wixom Lake. The Dam was created to generate hydroelectric power and for flood control.

4. After heavy rainfall and flash flooding, on or about May 19, 2020, the Edenville Dam's "earthen dike collapsed at the south end of Wixom Lake north of Midland" sending "the combined force of an impoundment and the Tobacco River . . . south toward Midland" Garret

Ellison, “Feds warned years ago Edenville Dam couldn’t handle a historic flood,” *Saginaw & Bay City News* (May 20, 2020), *available at* mlive.com.

5. In fact, Defendant Boyce Hydro was sued in 2012 by Tabacco Township, which alleged in the suit that the Edenville dam required “significant repairs / new construction”, and that “Defendant does not have the requisite funds to finance the Dam Project.” *Tobacco Twnshp v Boyce Hydro, LLC*, Case No 1:13-cv-12331.

6. Shortly after the Edenville Dam broke, the floodwaters overtopped the Sanford Dam. Although the Sanford Dam did not break, it did not stop or otherwise prevent the floodwater from the north, from reaching the City of Midland or to property owners’ homes that abut waterways connected to the Tittabawassee River.

7. Over 10,000 people in Midland County have found themselves displaced—their surrounding homes underwater or severely damaged.

8. The homes directly surrounding Wixom Lake, once beautiful lakeside properties are now a barren mud pit.

9. This was not an unforeseen event, but rather the result of longstanding and a decades-long failure to comply with regulatory requirements.

10. As Plaintiffs allege more fully below, Defendants owned, operated, or maintained the Sanford and Edenville Dams situated on the Tittabawassee River.

11. Defendants knew and/or should have known that the dams could not sustain a major flooding event.

12. Defendants failed year after year to bring the dams into compliance.

13. Plaintiffs are homeowners who were directly impacted by Defendants' actions including their trespass, nuisance, negligence, gross negligence, and various violations of Michigan Statutes.

14. Plaintiffs now bring this class action seeking damages on behalf of themselves and other similarly situated. Plaintiffs and the class of persons they seek to represent are property owners who experienced and continue to experience serious property damage and destruction caused by Defendant's oversight of and regulatory actions with respect to the Edenville Dam.

15. These actions caused Plaintiffs to sustain serious property damages and economic harm.

JURISDICTION AND VENUE

16. Jurisdiction is proper because the amount in controversy grossly exceeds \$500,000,000.00 exclusive of costs, interests, and attorney fees.

17. Venue is proper because the incidents giving rise to this Complaint occurred in the County of Midland and Defendants conduct regular and systemic business in the County of Midland.

18. This Court has jurisdiction over all Defendants pursuant to, *inter alia*, Mich. Comp. Laws §§ 600.705(1), 600.705(2) and 600.705(3) because all Defendants: (1) regularly conduct and transact business within Midland County, Michigan; (2) own and operate the Edenville and Sanford Dams in Midland County, Michigan; and (3) committed negligent, careless, reckless, willful, wanton and malicious acts of wrongdoing resulting in a tort in this District. Through these regular business operations in Midland County, Michigan, Defendants intentionally and regularly avail themselves of the markets and jurisdiction in Midland County, Michigan, conferring this Court with personal jurisdiction over Defendants consistent with Michigan law.

19. Venue is proper in this Midland County, Michigan as a substantial part of the events and omissions giving rise to this action occurred in Midland County, Michigan, Defendants' operations in Midland County, Michigan resulted in catastrophic flooding within Midland County, Michigan, causing harm to Plaintiffs and Class Members residing in this District.

20. Additionally, Plaintiffs and the putative class live or own property near four 100-year-old major dams on the Tittabawassee River in the State of Michigan. They had no reason to believe that doing so put their lives or property at risk. Rather, any objective person would reasonably expect that the dams' owners and operators, including the Owner/Operator Defendants, and the regulators overseeing them, including the State Defendants, would comply with all existing laws and regulations and the standard of care.

21. Venue and jurisdiction are vested in this court and this Complaint is being brought pursuant to MCR 3.501.

PARTIES

22. Plaintiff THOMAS HOLLEY and KATHERINE HOLLEY, ("HOLLEYS") are individual citizens of the State of Michigan and resides in Midland, County.

23. Plaintiffs MONTE WISEMAN and JILL WISEMAN ("WISEMANS") are individual citizens of the State of Michigan and resides in Gladwin County, Michigan.

24. Plaintiffs THOMAS DECOE and MICHELLE DECOE ("DECOES") is an individual citizen of the State of Michigan and resides in Midland County, Michigan.

25. Plaintiffs ROBERT MISHLER, JR., and SUSAN MISHLER ("MISHLERS") is an individual citizen of the State of Michigan and resides in Midland County, Michigan.

26. Defendant William D. Boyce Trust 2350 u/a/d 10/1908 is an Illinois-registered Trust. It is a member owner of each of the LLC Defendants, in conjunction with the other Trust

Defendants. At all times relevant, defendant William D. Boyce Trust 2350 has been engaged in a joint venture with the other Trust Defendants and the LLC Defendants to own and operate the Edenville and Sanford Dams. Additionally, at all times relevant hereto, the LLC Defendants have been alter egos of the Trustee Defendants and the Trust Defendants.

27. Defendant William D. Boyce Trust 3649 u/a/d 06/1929 is an Illinois-registered Trust. It is a member owner of each of the LLC Defendants, in conjunction with the other Trust Defendants. At all times relevant, defendant William D. Boyce Trust 3649 has been engaged in a joint venture with the other Trust Defendants and the LLC Defendants to own and operate the Edenville and Sanford Dams. Additionally, at all times relevant hereto, the LLC Defendants have been alter egos of the Trustee Defendants and the Trust Defendants.

28. Defendant William D. Boyce Trust 3650 u/a/d 06/1929 is an Illinois-registered Trust. It is a member owner of each of the LLC Defendants, in conjunction with the other Trust Defendants. At all times relevant hereto, defendant William D. Boyce Trust 3650 has been engaged in a joint venture with the other Trust Defendants and the LLC Defendants to own and operate the Edenville and Sanford Dams. Additionally, at all times relevant hereto, the LLC Defendants have been alter egos of the Trustee Defendants and the Trust Defendants.

29. Defendant Lee W. Mueller is a citizen of Nevada. He is sued personally as co-trustee and beneficiary of the Trust Defendants, and personally as member and co-manager of the LLC Defendants. At all times relevant hereto, Lee W. Mueller has been engaged in a joint venture with the Trust Defendants and LLC Defendants to own and operate the Edenville and Sanford Dams. Additionally, at all times relevant hereto, the LLC Defendants have been alter egos of Lee W. Mueller.

30. Defendant Michael d'Avenas is a citizen of California. He is sued personally as co-trustee and beneficiary of the Trust Defendants. At all times relevant hereto, Michael d'Avenas has been engaged in a joint venture with the Trust Defendants and LLC Defendants to own and operate the Edenville and Sanford Dams. Additionally, at all times relevant hereto, the LLC Defendants have been alter egos of Michael d'Avenas.

31. Defendant Stephen B. Hultberg is a citizen of Nevada. He is sued personally as co-trustee and beneficiary of the Trust Defendants, and personally as member and co-manager of the LLC Defendants. At all times relevant hereto, Stephen B. Hultberg has been engaged in a joint venture with the Trust Defendants and LLC Defendants to own and operate the Edenville and Sanford Dams. Additionally, at all times relevant hereto, the LLC Defendants have been alter egos of Stephen B. Hultberg.

32. Defendant JPMorgan Chase & Co. is a Delaware Corporation with its principal place of business in New York. Upon information and belief, JPMorgan Chase & Co. is the successor in interest to Bank One Corporation and/or Bank One Trust Company NA following their merger in or about 2004. It is sued personally and directly as a co-trustee of the Trust Defendants. At all times relevant hereto, JPMorgan Chase & Co. has been engaged in a joint venture with the Trust Defendants and LLC Defendants to own and operate the Edenville and Sanford Dams. Additionally, at all times relevant hereto, the LLC Defendants have been alter egos of JPMorgan Chase & Co.

33. Defendant Boyce Trust Hydro Property 2350 LLC is a Michigan limited liability company with its primary place of business in Gladwin County. It is wholly owned and operated by the Trust Defendants, and an alter ego of the Trust Defendants and Trustee Defendants. At all

times relevant hereto, it has been in a joint venture with the other LLC Defendants and Trust Defendants to own and operate the Edenville and Sanford Dams.

34. Defendant Boyce Trust Hydro Property 3649 LLC is a Michigan limited liability company with its primary place of business in Gladwin County. It is wholly owned and operated by the Trust Defendants, and an alter ego of the Trust Defendants and Trustee Defendants. At all times relevant hereto, it has been in a joint venture with the other LLC Defendants and the Trust Defendants to own and operate the Edenville and Sanford Dams.

35. Defendant Boyce Trust Hydro Property 3650 LLC is a Michigan limited liability company with its primary place of business in Gladwin County. It is wholly owned and operated by the Trust Defendants, and an alter ego of the Trust Defendants and Trustee Defendants. At all times relevant hereto, it has been in a joint venture with the other LLC Defendants and the Trust Defendants to own and operate the Edenville and Sanford Dams.

36. Defendant Boyce Hydro Power LLC is a Michigan limited liability company with its primary place of business in Gladwin County. It is wholly owned and operated by the Trust Defendants, and an alter ego of the Trust Defendants and Trustee Defendants. At all times relevant hereto, it has been in a joint venture with the other LLC Defendants and the Trust Defendants to own and operate the Edenville and Sanford Dams.

37. Defendant Boyce Hydro LLC is a Michigan limited liability company with its primary place of business in Gladwin County. It is wholly owned and operated by the Trust Defendants, and an alter ego of the Trust Defendants and Trustee Defendants. At all times relevant hereto, it has been in a joint venture with the other LLC Defendants and the Trust Defendants to own and operate the Edenville and Sanford Dams.

38. Defendant Boyce Michigan LLC is a Michigan limited liability company with its primary place of business in Gladwin County. It is wholly owned and operated by the Trust Defendants, and an alter ego of the Trust Defendants and Trustee Defendants. At all times relevant hereto, it has been in a joint venture with the other LLC Defendants and the Trust Defendants to own and operate the Edenville and Sanford Dams.

39. Defendant Edenville Hydro Property LLC is a Michigan limited liability company with its primary place of business in Gladwin County. It is wholly owned and operated by the Trust Defendants, and an alter ego of the Trust Defendants and Trustee Defendants. At all times relevant hereto, it has been in a joint venture with the other LLC Defendants and the Trust Defendants to own and operate the Edenville and Sanford Dams.

40. In law and in fact, all of the Defendants own, operate, fund and maintain the Dams which failed on or around May 20, 2020.

41. Upon information and belief, the LLC Defendants had no separate existence other than as conduits for the Trust Defendants and Trustee Defendants, and the Trust Defendants and Trustee Defendants consistently held themselves out as individually conducting business affairs in connection with the ownership and operation of the Edenville and Sanford Dams without the proper use of corporate names and without identifying that their actions were taken as officers or employees of the various, respective LLC Defendants.

42. Upon information and belief, the LLC Defendants:

- a. were insufficiently capitalized and maintained insufficient assets, including liability insurance coverage, considering the ultrahazardous ownership and operation of the Edenville and Sanford Dams as alleged more fully herein;
- b. were intermingling funds between and among themselves and the personal and/or trust assets of the Trust Defendants and Trustee Defendants in the ownership and operation of the Edenville and Sanford Dams;

- c. failed to have any functioning officers, directors, members and managers;
- d. failed to observe corporate formalities evidencing a distinction in fact between themselves and the Trust Defendants and Trustee Defendants;
- e. were mere instrumentalities of the Trust Defendants and Trustee Defendants in the ownership and operation of the Edenville and Sanford Dams; and
- f. were created, maintained and utilized for the express or implied purpose of committing negligent, careless, reckless, willful, wanton and malicious acts of wrongdoing with impunity by attempting to insulate the Trust Defendants and Trustee Defendants from potential liability in connection with the ownership and operation of the Edenville and Sanford Dams, thereby exposing Plaintiffs and all others similarly situated to unjust losses and damages as alleged herein.

FACTUAL ALLEGATIONS

A. THE FLOODS

43. Plaintiffs hereby restate and reallege and incorporate the preceding paragraphs as though fully set forth herein.

44. The Edenville Dam, built in 1924, is a 4.8-megawatt, 6,600-foot dam, located at the confluence of the Tittabawassee River and its tributary, the Tobacco River.

45. The Edenville Dam is located about one mile north of Edenville, Michigan, mostly in the southeast corner of Tobacco Township in Gladwin County, with its southeastern end reaching into Edenville Township, in Midland County.

46. The Edenville Dam held back the water of the Tittabawassee River and Tobacco River, forming Wixom Lake.¹

47. On Monday, May 18, 2020, a rainstorm caused flooding in Midland County, Michigan.

¹ <https://www.mlive.com/news/saginaw-bay-city/2020/05/flooding-in-michiganeverything-we-know-about-midland-county-dam-break.html>

48. At about 12:22 a.m. on Tuesday, May 19, 2020, Midland County Central Dispatch issued an alert advising Edenville Township residents to leave their homes due to an “imminent dam failure.”²

49. People living along Sanford Lake and Wixom Lake were told to vacate their homes and head to shelters, which had been set up at two area schools.³

50. On Tuesday May 19, 2020 at approximately 5:46 p.m., due to rising water on the Tittabawassee Rivers, the eastern side of the Edenville Dam collapsed.⁴

51. Residents in Edenville and Sanford were told to immediately evacuate, and additional evacuation orders followed for some city of Midland residents.⁵

52. On Tuesday, May 19, 2020, floodwaters flowed over the impoundment at Sanford Dam, in Midland County, approximately 10 miles downstream of the Edenville Dam and six miles upstream of the city of Midland.⁶

53. The Sanford Dam also failed.

54. At all times relevant it was known to all defendants that there was a potential and/or even a likelihood that the whole structure may and/or would collapse, resulting in a much higher surge and a quick rise of water levels.⁷

55. Upon all information and belief, toxic contamination from the Dow Chemical facility could also be discharged due to the flooding resulting in even more serious damage and destruction of Plaintiffs’ property.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

56. In response to the collapse of the Edenville Dam and the flooding of water over the top of the Sanford Dam, Governor Whitmer issued an emergency declaration on Tuesday, May 19, 2020 and sent the National guard to help.⁸

57. On Tuesday, May 19, 2020, approximately 10,000 people in the City of Midland were evacuated, along with others in Sanford and Edenville.⁹

58. Water levels along the Tittabawassee River continued to rise on the evening of Tuesday, May 19 and into Wednesday, May 20, 2020, forcing additional residents to evacuate.¹⁰

59. At approximately 6:36 a.m. on Wednesday, May 20, 2020, Midland County Central Dispatch sent an alert stating that the Poseyville dike had broken and advising all residents in the area of Ashby road between Poseyville and Patterson Roads, in Midland Township, to evacuate the area.¹¹

60. As a result of the failure of the Edenville Dam and the resulting flood of water over the Sanford Dam, flooding damages and closed area roads and bridges, some of which were destroyed by the impact of the water.¹²

61. The M-30 bridge in Wixom Lake, Gladwin County, Michigan, collapsed around 8 p.m. on Tuesday, May 19, 2020.¹³

62. Saginaw County officials have warned residents that flooding could get worse downstream when and if the Sanford Dam fails.¹⁴

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

63. As of the afternoon of Wednesday, May 20, 2020, floodwaters had reached as far west as Shields, Michigan, which is located approximately 6 miles west of Saginaw and downstream of Midland.¹⁵

64. The heavy May 19, 2020, rain was foreseeable to all defendants. It was also known to all defendants that heavy Spring rains would cause the Edenville Dam to fail, having a potential and/ or even a likelihood of unleashing a deluge of floodwaters downriver through the Sanford Lake and Tittabawassee Rivers. This torrent overtopped the Sanford Dam downstream, and further endangering the Plaintiffs and the proposed Class Members.

65. As up to 10 feet of floodwaters raced into neighborhoods near these waterways, resident Class Members were forced into the night without notice and without the opportunity to collect their belongings. More than 11,000 residents were compelled to flee, abandoning their homes and property to the inundation.

66. Even those Class Members who were not actively forced to flee from the floodwaters suffered, and in fact continue to suffer untold disruption to their daily lives as critical infrastructures, such as roads and bridges, as well as essential services, like sanitary sewage, have been impacted, deprived, limited or otherwise cut off.

67. To this day, the floodwaters have not yet fully receded, and the full extent of damage to property, as well as the scope of rebuilding and restoration efforts, is not yet known. While only time will tell the full extent of the Class' losses from this catastrophic – yet easily preventable – flooding, it is virtually certain that Class Members' lives will not return to normal for many months, if not years.

¹⁵ *Id.*

68. What is worse, this disaster cast Plaintiffs and Class Members into the waiting arms of the global COVID-19 Pandemic. At the time of the May 2020 floods, the State of Michigan remained under strict restrictions of personal movement and economic activity, severely limiting the ability of residents to find food, shelter and other necessary provisions. Mandates were in place to protect citizens from the Pandemic by limiting contact and the spread of COVID-19.

B. DEFENDANTS' LONGSTANDING, CONSCIOUS DISREGARD FOR THE GRAVE THREAT POSED TO PUBLIC SAFETY BY THE EDENVILLE AND SANFORD DAMS.

69. Defendants had been warned for years that this very type of catastrophic flood would happen. Since Defendants' acquisition of the Edenville and Sanford Dams in or about 2006, the Federal Energy Regulatory Commission ("FERC") repeatedly warned that the Edenville Dam was inadequate, unsafe, prone to catastrophic failure, and a major hazard to life and property downstream.

70. The hazards posed by the Edenville Dam were many. Specifically, it was known since at least July 2004 that the Dam would not be able to handle a Probable Maximum Flood ("PMF") and/or Probable Maximum Precipitation ("PMP") event due to inadequate spillway capacity. While federal regulations require hydroelectric dams to be designed to withstand anticipate flooding scenarios, the Edenville Dam was only capable of withstanding about half such an amount.

71. Between the time they first assumed ownership and responsibility for the dam and the present, Defendants refused to pay for much-needed repairs and upgrades, despite knowing full well that the Edenville Dam could fail at any moment, endangering life and property downstream.

72. Instead of performing these critically important repairs and upgrades, Defendants instead intentionally sought to hide the further deteriorating condition of the Edenville Dam.

73. For example, in 2015, Defendants were cited by FERC for concealing the failure of a spillway wall, and secretly trying to repair the failing wall without reporting this to FERC, without submitting plans and specifications for such repairs, and without submitting to quality control inspections. Even after being informed of these violations, Defendants proceeded with further unauthorized repairs to the failing spillway wall.

74. Similarly, FERC also found that Defendants had engaged in a significant amount of unauthorized earth-moving absent appropriate erosion control measures and without following regulatory directives or filing soil erosion control plans.

75. In light of this flagrant disregard for FERC's regulatory authority and the basic principles of dam safety, it is no surprise that Defendants have even failed to submit acceptable Public Safety and Emergency Actions Plans since 2013.

76. By 2017, FERC had seen enough of the Defendants' negligent, careless, reckless, willful, wanton and malicious acts, and noted that Defendants' actions had shown a pattern of delay and indifference to addressing dam safety requirements.

77. Finally, in 2018, due to the extreme hazards posed by the condition of the Edenville Dam and Defendants' callous indifference towards the lives and properties of others, FERC revoked Defendants' license to generate hydroelectric power from the Dam. FERC determined that Defendants **“knowingly and willfully refused to comply with major aspects of its license”** and had **“repeatedly failed to comply”** with directives to **“develop and implement plans and schedules to address the fact that the [Edenville Dam's] spillways are not adequate to pass the probable maximum flood, *thereby creating a grave danger to the public*”**. In doing so, FERC

observed that **“the licensee has displayed a history of obfuscation and outright disregard of its obligations. We do not often revoke a license, but the licensee has left us with no other way to vindicate the public interest here.”**

78. Even though FERC revoked Defendants’ license to use the Edenville Dam to generate hydroelectric power, it was powerless to outright strip Defendants of their ownership of the Dams and instead transferred regulatory authority over the structures to the Michigan Department of Environmental, Great Lakes and Energy (“EGLE”).

79. Following this transition of regulatory authority from FERC to EGLE in 2018, Defendants were still responsible for inspecting, maintaining, and repairing the Dams’ physical structures in order to keep downstream residents, businesses, and properties safe from the release of water.

80. However, there is no evidence that Defendants undertook any safety upgrades in the time between the revocation of its hydroelectric generating license and the May 2020 floods.

81. To the contrary, despite their joint venture and substantial, intertwined assets, the Defendants repeatedly pleaded poverty to their regulators – all the while refusing to disclose their actual financial resources under the guise of “privacy and confidentiality” – arguing that it is the resident Class Members, themselves, who must bear the expense of maintaining and repairing these private Dams for their own safety.

82. Unfortunately, but predictably, the Defendants’ repeated failures to exercise even scant care in the ownership and operation of the Dams resulted in the Edenville Dam’s failure on May 19, 2020, when heavy rains throughout the region overcame inadequate spillway capacity and exposed long-standing structural flaws.

83. The resulting cascade of floodwaters eventually reached a height of more than 35 feet, overtopping the similarly-dilapidated and inadequate Sanford Dam and unleashing a devastating torrent of water that caused catastrophic damage to downstream properties, businesses and residents like Plaintiffs and the other Class Members.

C. NAMED PLAINTIFFS' LOSSES AND DAMAGES

84. Plaintiffs and Class Members were going about their day-to-day lives when the floodwaters unleashed by the Dam failures rolled through their neighborhoods. Within hours, their homes, properties and businesses were inundated.

85. Plaintiff HOLLEYS home was filled with floodwaters from floor to ceiling. His home, along with the personal property contained therein, has been completely destroyed. They and their small children have been forced to evacuate, unsure of where they will live or how he will pick up the pieces.

86. Plaintiff WISEMANS shed was filled with floodwaters from floor to ceiling. Personal property contained therein has been completely destroyed. The garage door came off its foundation. Their seawall is warped and has suffered significant damage. Two other lots they either co-own or own outright, including a beach lot, have suffered significant damage and are completely unusable. They have been forced to evacuate, unsure of where they will live or how they will pick up the pieces.

87. Plaintiff DECOES home was filled with floodwaters from floor to ceiling. Their home, along with the personal property contained therein, has been completely destroyed. They were forced to evacuate, unsure of where they will live or how they will pick up the pieces.

88. Plaintiff MISHLERS home was filled with floodwaters in the lower level of the home. Their home, along with the personal property contained therein, has been completely destroyed.

D. HYDROELECTRIC DAMS

89. A hydroelectric dam is one of the major components of a hydroelectric facility. A dam is a large, man-made structure built to contain a body of water. In addition to construction for the purpose of producing hydroelectric power, dams are created to control river flow and regulate flooding.

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

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

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

93. Spillways are an important functional part of a hydroelectric facility. If there is too much water going through the dam, elements like the turbines cannot function properly and can be damaged. Spillways protect these other parts from damage or complications.

94. Every hydroelectric reservoir has a certain capacity or amount of water it can hold. If the reservoir is already full but floodwaters enter the reservoir, the water level will increase, and this could result in the over-topping of the dam. 42. Spillways are built to prevent this, as it allows some water to be drawn from the top of the reservoir to make room for the new water.

95. When a reservoir is full, its water level will be equal to the height of the spillway. As soon as any excess water enters the reservoir, water will immediately start flowing out through the spillway.

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

E. THE EDENVILLE DAMS

97. Plaintiffs and the putative class live or own property near four 100-year-old major dams on the Tittabawassee River in the State of Michigan. They had no reason to believe that doing so put their lives or property at risk. Rather, any objective person would reasonably expect that the dams' owners and operators, including the Owner/Operator Defendants, and the regulators overseeing them, including the State Defendants, would comply with all existing laws and regulations and the standard of care.

98. From at least August 6, 1993 until September 24, 2018, the Federal Energy Regulatory Commission ("FERC" or the "Commission") had repeatedly, in a series of communications with and orders to the Owner/Operator Defendants, emphasized the potentially unsafe condition of at least one of the fours – the Edenville Dam, a 95-year-old high-hazard earthen embankment structure.

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

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

5. FERC further assigned the Edenville Dam a high hazard potential rating, because its failure, or negligent operation, could pose a significant risk to the Village of Sanford, Northwood University, the City of Midland, and other downstream areas, and stated on several occasions “Given Edenville dam’s high hazard potential rating, the potential loss of life and destruction of property and infrastructure is grave should the project not be maintained and operated appropriately, with consequences that could certainly affect the Village of Sanford, Northwood University, City of Midland, Michigan, and other areas downstream.”

101. Moreover, the Secord Dam – also owned and operated by Boyce – does not have adequate spillway capacity to meet federal regulations.

102. Yet, despite repeated promises to fulfill their obligations as owners and under their licenses to operate the dams, the Owner/Operator Defendants knowingly and willfully refused to comply with major aspects of their licenses and FERC’s regulatory regime, with the result that public safety was put at risk. Moreover, according to FERC, the Owner/Operator Defendants “displayed a history of obfuscation and outright disregard of [their] obligations.” <http://www.four-lakes-taskforce-mi.com/updates> (last accessed May 22, 2020).

103. After the Owner/Operator Defendants’ license to operate the Edenville Project was revoked in September 2018 by FERC, oversight was transferred to the State Defendants.

104. All Defendants knew of the high risks caused by the deterioration of and inadequate spillways at the Edenville Dam.

105. As a result of the Defendant’s failures, all individual plaintiffs and class plaintiffs were harmed.

F. THE COMMISSIONS DAM SAFETY GUIDELINES

106. Inflow design flood (IDF) is the flood flow above which the incremental increase in water surface elevation due to failure of a dam or other water impounding structure is no longer considered to present an unacceptable threat to downstream life and property.

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

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

109. The same era witnessed an increase in the number and size of dams built. When the “big dam” era began in the 1930s, safety clearly became a more dominant factor. It was recognized that dams needed to be designed to accommodate water flows that might be greater than the anticipated “normal” flow.

110. Engineers began consulting with hydro meteorologists to determine if upper limits for rates of precipitation could be established on a rational basis by looking at, *inter alia*, the meteorology of storms that produced major floods in various parts of the country, large scale features of storms, measures of atmospheric moisture (such as dewpoint temperatures), and the rainfall depth-area-duration values produced by these storms.

111. It was then possible to increase the storm dewpoint temperature and other factors affecting rainfall to the maximum appropriate values. This increase resulted in estimates of probable maximum precipitation (PMP), and thus introduced the concept of a physical upper limit to precipitation. When translated to runoff from a dam, the estimated flood flow is known as the probable maximum flood (PMF).

112. Today, the PMF is generally accepted as the standard for the safety design of dams where the incremental consequences of failure have been determined to be unacceptable.

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

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

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

116. Today, the ICODS members include FEMA, the U.S. Army Corps of Engineers, the U.S. Department of Energy, U.S. Nuclear Regulatory Commission, U.S. Bureau of Reclamation, U.S. Department of Labor, and the National Weather Service, among others.

117. In 1998, the newly convened Guidelines Development Subcommittee of the ICODS completed work on the update of the following guidelines: Federal Guidelines for Dam Safety: Emergency Action Planning for Dam Owners; Federal Guidelines for Dam Safety: Hazard Potential Classification System for Dams; Federal Guidelines for Dam Safety: Earthquake Analyses and Design of Dams; Federal Guidelines for Dam Safety: Selecting and Accommodating Inflow Design Floods for Dams; and Federal Guidelines for Dam Safety: Glossary of Terms.

118. The purpose of the Federal Guidelines for Dam Safety: Selecting and Accommodating Inflow Design Floods for Dams, according to ICODS "is to provide thorough and consistent procedures for selecting and accommodating Inflow Design Floods (IDF's). The IDF is the flood flow above which the incremental increase in water surface elevation downstream

due to failure of a dam or other water retaining structure is no longer considered to present an unacceptable additional downstream threat.”¹⁶

119. The standard practice in the design of dams is “to use the IDF that is deemed appropriate for the hazard potential of the dam and reservoir, and to design spillways and outlet works that are capable of safely accommodating the flood flow without risking the loss of the dam or endangering areas downstream from the dam to flows greater than the inflow.”

120. The upper limit of the IDF is the probable maximum flood (PMF). The PMF event is the “flood that may be expected from the most severe combination of critical meteorological and hydrologic conditions that are reasonably possible in the drainage basin under study.”¹⁷

121. 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.”¹⁸

122. According to the Commission, “[m]any dam owners have a difficult time believing that their dams could experience a rainfall many times greater than any they have witnessed over

¹⁶ FEMA, Federal Guidelines for Dam Safety: Selecting and Accommodating Inflow Design Floods for Dams (April 2004) (“IDF Guidelines”), at 1, available at <https://www.ferc.gov/industries/hydropower/safety/guidelines/fema-94.pdf>.

¹⁷ IDF Guidelines, at 7.

¹⁸ *Boyce Hydro Power, LLC*, 2018 FERC LEXIS 1323, *3-4, 164 F.E.R.C. P61,178, 2018 WL 4350809 (F.E.R.C. September 10, 2018).

their lifetimes. Unfortunately, this attitude leads to a false sense of security because floods much greater than those experienced during any one person's lifetime can and do occur.”

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

G. The Secord, Edenville, Sanford Dams

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

125. In existence since the 1920s, the four projects’ reservoirs occupy about 39 river miles on the Tittabawassee River, with the tailwater of each project being the headwater of the next downstream project. 65. Beginning furthest downstream, the projects are the 3.3-megawatt (MW) Sanford Hydroelectric Project No. 2785, the 4.8-MW Edenville Project No. 10808, the 1.2-MW Smallwood Project No. 10810, and the 1.2-MW Secord Project No. 10809.

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

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

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

129. The top of the earth embankment is at elevation 757.8. The reservoir is approximately 1,100 acres surface area at normal pool elevation of 750.8. The normal tail water is 705. The total length of the dam is about 2100 feet with the concrete spillway and powerhouse comprising about 100 feet in length. 70. An aerial picture of the Secord Dam follows:



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

131. Due to inadequate spillways, among other issues, flooding at Secord usually occurs in the spring as the result of heavy spring rains or snow cover over ground in a fairly saturated condition. Major floods occurred on June 24, 2017, September 13, 1986, March 21, 1948, and June 3, 1943.¹⁹

¹⁹ <https://gladwincounty-mi.gov/dam-information/> (last accessed May 22, 2020).

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

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

134. The Edenville dam spans both the Tittabawassee and Tobacco Rivers creating a 2,600-acre reservoir known as Wixom Lake with a gross storage capacity of about 40,000 acre-feet and a 49-mile-long shoreline at full pool.

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

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

137. The Tobacco spillway is about 72 feet long and 72 feet wide with a crest height of about 40 feet and contains three steel Tainter gates located on the western side (Tobacco River side) of the project. Michigan State Highway 30 bisects both Wixom Lake and the projects dam.²⁰

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

139. A picture of the Edenville dam prior to the failures is as follows:²¹



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

²⁰ *Boyce Hydro Power, LLC*, 159 F.E.R.C. P62,292, 64669, 2017 FERCLEXIS 735, *3-4 (F.E.R.C. June 15, 2017).

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

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

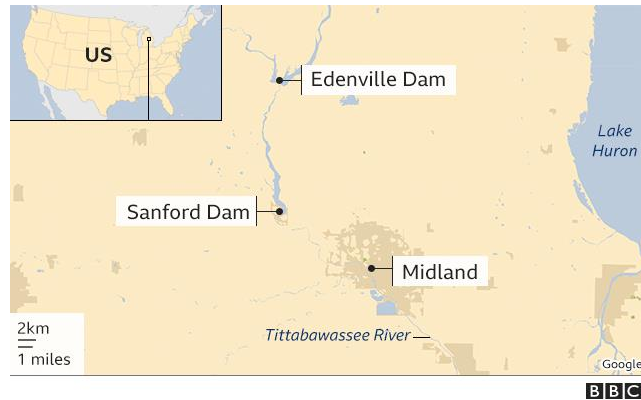
142. Sanford Lake is a 1,250-acre impoundment of the Tittabawassee River created by the Sanford Dam.

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

144. A picture of the Sanford Dam prior to the failure is as follows:



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



H. OWNERSHIP AND LICENSING OF THE DAMS

146. In 1976, the Commission determined that the Tittabawassee River is a navigable waterway of the United States and that therefore the four projects are required to be licensed by Section 23(b)(1) of the Federal Power Act (FPA).

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

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

149. On October 16, 1998, the Commission issued a license for the Edenville Project. The license includes terms and conditions concerning dam safety, property rights, water quality, public recreation and safety, and other areas of public concern.

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

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

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

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

152. Wolverine owned, and since 1926, had operated the four dams and hydroelectric projects at Sanford, Edenville, Smallwood and Secord.²²

153. In an August 6, 1993 letter from the Commission's Office of Energy Projects, Division of Dam Safety and Inspections, Chicago Regional Engineer ("Regional Engineer") to Wolverine, FERC advised that the spillway capacity of the Edenville Project did not meet the Commission's guidelines for passing the PMF.

154. The "PMF event" 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 study.

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

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

²² 51 FERC ¶ 63,012.

157. Standard Article 4 of the project license states:

The project, including its operation and maintenance and any work incidental to additions or alterations authorized by the Commission, whether or not conducted upon lands of the United States, shall be subject to the inspection and supervision of the Regional Engineer, Federal Energy Regulatory Commission, in the region wherein the project is located, or of such other officer or agent as the Commission may designate, who shall be the authorized representative of the Commission for such purposes. ***The licensee shall comply with such rules and regulations of general or special applicability as the Commission may prescribe from time to time for the protection of life, health, or property.”²³

158. Section 12.35(b)(1) of the Commissions regulations states:

159. Specific inspection requirements

(b) Evaluation of spillway adequacy. The adequacy of any spillway must be evaluated by considering hazard potential which would result from failure of the project works during flood flows.

(1) If structural failure would present a hazard to human life or cause significant property damage, the independent consultant must evaluate the ability of project works to withstand the loading or overtopping which may occur from a flood up to the probable maximum flood or the capacity of spillways to prevent the reservoir from rising to an elevation that would endanger the project works.²⁴

160. In its order granting the license, FERC “address[ed], among other matters, issues of pertinence to some or all of the four projects [including the Edenville Dam], notably including mode of operation, function of reservoir levels and fish entrainment.”²⁵

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

²³ See *Boyce Hydro Power, LLC*, 159 F.E.R.C. P62,292, 64669-64670, 2017 FERC LEXIS 735, *4-7 (F.E.R.C. June 15, 2017).

²⁴ *Id.*

²⁵ *Wolverine Power Corp.*, 85 F.E.R.C. P61,063, 61205, 1998 FERC LEXIS 2058, *5 (F.E.R.C. October 16, 1998).

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

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

164. On June 13, 2002, the Regional Engineer issued a letter requiring Wolverine to file, by July 31, 2002, a detailed plan and schedule for the completion of the spillway upgrades, and ordered Wolverine to complete the modifications to address the inadequate spillway capacity by December 31, 2006.²⁶

165. Wolverine failed to do so.

166. Wolverine transferred the license to Synex Michigan, LLC on June 23, 2004.²⁷

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

167. At the time the license was transferred, FERC notified Synex (n/k/a Boyce) that it needed to increase capacity of the Edenville Dam's spillways to prevent a significant flood from overcoming the structure.

168. As detailed in multiple orders, throughout its ownership of the project Boyce repeatedly failed to comply with its license for the Edenville Project, the Commission's regulations, and Commission orders, or to otherwise fix or maintain the Edenville Dam as required by the standard of care.²⁸

²⁶ *Boyce Hydro Power, LLC*, 2018 FERC LEXIS 1323, *5, 164 F.E.R.C. P61,178, 2018 WL 4350809 (F.E.R.C. September 10, 2018).

²⁷ *See Wolverine Power Corporation and Synex Michigan, LLC*, 107 FERC ¶ 62,266 (2004).

²⁸ *See, e.g., Wolverine Power Corporation*, 85 FERC ¶ 61,063, at 61,205 (1998); *Boyce Hydro Power, LLC*, 159 FERC ¶ 62,292 (2017) (2017 Compliance Order); *Boyce Hydro Power, LLC*, 161 FERC ¶ 62,119 (2017) (Cease Generation Order), *reh'g denied*, 162 FERC ¶ 61,116 (2018)

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

170. For years, FERC staff worked with Boyce to increase the spillway capacity at the project needed to pass the PMF. 111. For example, FERC held multiple meetings with Boyce, Commission staff, and a Board of Consultants to review and discuss plans for addressing spillway capacity, including on December 13-16, 2005; May 22-23, 2007; July 9-11, 2007; March 19-20, 2008; and February 4-5, 2009.

171. Letters from FERC, including those issued by the Regional Engineer on August 6, 2011, March 5, 2014, and July 15, 2015, to Boyce "all state that the licensee's filings of designs, specifications, and plans over the years for the auxiliary spillway work were insufficient."

172. On February 9, 2009, FERC's Regional Engineer granted Boyce an extension of time to construct the auxiliary spillways due to Boyce's inability to finance the work. This extension was based on Boyce's promise to complete the construction over a three-year period, instead of one, with construction to be completed in 2013.

173. Later, after a series of letters dated September 30, 2013, October 9, 2013, and November 29, 2013, Boyce proposed to construct two auxiliary spillways, one in 2014 and one in 2015. However, Boyce never completed this work.

(Cease Generation Rehearing Order); *Boyce Hydro Power, LLC*, 162 FERC ¶ 61,115 (2018) (Order Proposing Revocation); *Boyce Hydro Power, LLC*, 164 FERC ¶ 61,178 (2018) (Revocation Order).

174. After Boyce missed those deadlines, FERC's Regional Engineer then proposed and required implementation of a new plan and deadline to construct one auxiliary spillway in 2015.

116. Boyce did not meet this deadline either.

175. A December 5, 2014 letter from the Regional Engineer formalized yet another timeline for completing the two auxiliary spillways with the Tobacco auxiliary spillway to be completed in 2015.

176. This letter included a schedule with due dates for filing certain plans and specifications, monthly progress reports, and new construction deadlines.

177. Under this schedule, an initial auxiliary spillway would be constructed by November 14, 2015 on the Tobacco side of the project, and the second auxiliary spillway would be constructed by December 31, 2016 on the Tittabawassee side of the project.

178. Boyce failed to meet either of these new deadlines.

179. By June 15, 2017, Boyce still had not filed or completed adequate plans for either auxiliary spillway.

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

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

182. By June 2017, FERC issued a compliance Order, after citing Boyce for violations of its license and the Commission's regulations for years for: "1) failing to increase the spillway capacity of the project; 2) performing unauthorized dam repairs; 3) performing unauthorized earth-moving activities; 4) failing to file an adequate Public Safety Plan; 5) failing to construct approved recreation facilities pursuant to the Commission's 2001 Order approving its Recreation Plan and for restricting public access; 6) failing to acquire all necessary project property rights; and 7) failing to comply with the Commission's 1999 Order approving its Water Quality Monitoring Plan."²⁹

183. In the Compliance Order, FERC made clear, however, that its "primary concern is the licensee's longstanding failure to address the project's inadequate spillway capacity. The Edenville dam has a high hazard potential rating, which means a failure of the project's works would create a threat to human life and/or would cause significant property damage. The project's spillway deficiencies must be remedied."³⁰

184. FERC emphasized that Boyce's failures caused a "grave" risk for the "potential loss of life and destruction of property and infrastructure":

Given Edenville dam's high hazard potential rating, the potential loss of life and destruction of property and infrastructure is grave should the project not be maintained and operated appropriately, with consequences that could certainly affect the Village of Sanford, Northwood University, City of Midland, Michigan, and other areas downstream. The Commission's Dam Safety Guidelines require the project works to be designed to either withstand overtopping of the loading condition that would occur during a flood up to the probable maximum flood (PMF), or to the point where a failure would no longer constitute a hazard to downstream life and/or property. In the alternative, the capacity of the spillway must be adequate to prevent the reservoir from rising to an elevation that would endanger the safety of the project works. As summarized in an August 6, 1993 letter from the Regional Engineer to the prior licensee, the spillway capacity of the Edenville Project does

²⁹ *Boyce Hydro Power, LLC*, 159 F.E.R.C. P62,292, 64669, 2017 FERCLLEXIS 735, *1 (F.E.R.C. June 15, 2017).

³⁰ *Id* at *2

not meet the Commission's guidelines for passing the PMF. The Regional Engineer has repeatedly directed the licensee to address the spillway capacity concerns at the project....³¹

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

186. FER also documented that Boyce was conducting unapproved and inadequate repairs to the Edenville dam.

187. Finally, in the Complaint Order, FERC found: “Thirteen years after acquiring the license for the project, the licensee has still not increased spillway capacity leaving the project in danger of a PMF event. The licensee has shown a pattern of delay and indifference to the potential consequences of this situation. A situation that must be remedied in order to protect life, limb and property.”³²

188. Citing the owner’s “longstanding failure to address the project’s inadequate spillway capacity at this high hazard dam,” FERC held:

The licensee is in violation of Article 4 for failing to follow directives from the Regional Engineer requiring the project to meet the Commission's guidelines for passing the PMF. The existing spillway capacity at the project is approximately 50% of the PMF. In working with the licensee, Commission staff identified certain risk reduction measures the licensee was required to implement in stages to increase spillway capacity until the full PMF can be passed. These risk reduction measures include the construction of auxiliary spillways on both the east and west sides of the project in proximity to the existing spillways to add additional hydraulic capacity. Given Commission staff's current assessment of what the licensee is developing, albeit based on inadequate plans and specifications as discussed in more detail below, after both risk reduction auxiliary spillways are constructed, the spillway capacity at the project would be increased to approximately 66% of the PMF. The licensee would therefore still need to implement additional measures to increase spillway capacity further. 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,

³¹ *Boyce Hydro Power, LLC*, 159 F.E.R.C. P62,292, 64670, 2017 FERC LEXIS 735, *7-9 (F.E.R.C. June 15, 2017).

³² *Boyce Hydro Power, LLC*, 159 F.E.R.C. P62,292, 64671-64672, 2017 FERC LEXIS 735, *11-17 (F.E.R.C. June 15, 2017).

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.³³

189. On July 14, 2017 and July 27, 2017, Boyce filed two requests for more time to comply with certain requirements in the Compliance Order.³⁴

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

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

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

³³ Id. At *10-11.

³⁴ Boyce Hydro Power, LLC, 161 F.E.R.C. P62, 119, 64244, 2017 FERC LEXIS 1604, *4 (F.E.R.C. November 20, 2017).

- c. Ordering paragraph (F), which provided: “By October 13, 2017 (extended to November 14, 2017), the licensee was required to file with the Regional Engineer, a plan and schedule for additional modifications to the project to meet the full (100%) Probable Maximum Flood.
- d. Ordering paragraph (G), which provided in pertinent part: “By July 30, 2017 (extended to September 30, 2017), the licensee was required to file with the Regional Engineer, complete plans and specifications for permanent repairs to both left and right Tobacco abutment spillway walls, a complete work schedule, detailed drawings, a water management plan, an erosion control plan, a Temporary Construction Emergency Action Plan, and a Quality Control Inspection Program as originally specified in the Regional Engineer’s letter to the licensee issued December 8, 2016.”³⁵

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

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

³⁵ *Boyce Hydro Power, LLC*, 161 F.E.R.C. P62,119, 64244, 2017 FERC LEXIS 1604, *5-8 (F.E.R.C. November 20, 2017).

193. FERC thus ordered: “Boyce Hydro Power, LLC (licensee) must cease generation at the Edenville Hydroelectric Project by November 27, 2017. Generation must not resume until further order by the Commission.”³⁶

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

195. Over time, the Commission has continuously put Defendants on notice of the fact that the Edenville Dam “could pose a significant risk to the Village of Sanford, Northwood University, the City of Midland, and other downstream areas” within the meaning of the Guidelines. *In re Boyce Hydro Power, LLC*, 162 FERC ¶ 61,007, 2018 WL 305524, at *2 (Jan. 5, 2018).

196. The Commission also put Defendants on notice that the Edenville Dam lacked, among other things, the necessary spillways to reduce the risk of failure as required by the Guidelines.

197. Defendants ignored the request.

198. At one point in 2009, Defendants committed to construct two auxiliary spillways in 2014 and 2015 respectively. Defendants, however, never met their deadlines or completed the work. *Boyce Hydro Power, LLC*, 2017 WL 2619269, at *4.

³⁶ *Id.*

199. In 2014, the Commission again worked with Defendants in an effort to finalize a timeline for completing two spillways in 2015 and 2016. Defendants again failed to meet these deadlines or even file “complete and adequate plans.” *Id.*

200. According to the Commission in 2017:

Since acquiring the license in 2004, **the licensee has not filed adequate plans, specifications, or designs as directed by the Regional Engineer for addressing spillway capacity concerns at the project.** The licensee has failed to follow Regional Engineer directives to meet the PMF, has consistently filed inadequate and untimely reports, studies, plans, and specifications in preparing for construction of risk reduction measures to address spillway capacity deficiencies, and has failed to acquire a necessary permit.

Id. The Commission sounded the alarm, finding:

Thirteen years after acquiring the license for the project, the licensee has still not increased spillway capacity leaving the project in danger of a PMF event. **The licensee has shown a pattern of delay and indifference to the potential consequences of this situation. A situation that must be remedied in order to protect life, limb, and property.**

Id. at *5 (emphasis added).

201. On June 15, 2017, the Commission found Defendant to be in violation of the terms of its license and the regulations for, among other things, “failing to increase the spillway capacity of the project to address the probable maximum flood (PMF).” *Id.* The Commission explained:

[T]he Commission’s primary concern is the licensee’s longstanding failure to address the project’s inadequate spillway capacity. The Edenville dam has a high hazard potential rating, which **means a failure of the project’s work would create a threat to human life and/or would cause significant property damage. The project’s spillway deficiencies must be remedied.**

Id. at *1.

202. On November 20, 2017, the Commission found Defendants to be in violation of the Federal Power Act (FPA), Commission regulations, and their license relating to the Edenville Dam. *Id.* In its order, the Commission noted:

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.

In re Boyce Hydro Power, LLC, 161 FERC ¶ 62,119, 2017 WL 5586862 (Nov. 20, 2017) (emphasis added). As a result, Defendants had to cease their generation until further notice.

203. In 2018, the Commission again noted that “Boyce has repeatedly failed to comply with requests by the Regional Engineer . . . to address the fact that **the project spillways are not adequate to pass the probable maximum flood, thereby creating a grave danger to the public.**” *In re Boyce Hydro Power, LLC*, 2018 WL 305524, at *2 (emphasis added).

204. When Defendants lost their license, the dam came under the regulatory authority of the Michigan Department of Environment, Great Lakes, and Energy. The Michigan Department also had “strong concerns” about the dam’s inadequate spillway capacity.

205. At no time since 2018, and up until May 19, 2020, did Defendants increase the Edenville Dam’s spillway capacity. Ellison, *supra*.

206. To be sure, Defendants publicly acknowledged that “the federal government had voiced concerns from 1993 through 2018 about the Edenville Dam’s unsafe condition, specifically ‘the risk of catastrophic erosion from overtopping due to inadequate spillway capacity.’” Beth LeBlanc, “Dangers of Edenville dam failure evaded state scrutiny,” *The Detroit News* (May 20, 2020).

207. On May 19, 2020, following heavy rains and flash floods, the Edenville Dam collapsed. By early Wednesday morning, the Tittabawassee River crested at 33.9 feet in downtown Midland. Ellison, *supra*.

208. The Edenville Dam's earthen dike collapsed eviscerating Wixom Lake and allowing a massive flood to spill out toward Midland.

209. As a result, homes became submerged under water. Tens of thousands were forced to evacuate and the National Guard has been deployed.

210. Nearby Dow Chemical was forced to shut down as a precaution. Concerns mount that Dow's own dams may not be able to withstand the devastation unleashed by Defendants.

211. Michigan Governor Gretchen Whitmer announced an "emergency declaration" on Tuesday, May 19, 2020. Ellison, *supra*.

212. On May 20, 2020, David Capka, director of the Division of Dam Safety and Inspections for FERC, directed Defendants to "undertake a forensic analysis of the root cause of the overtopping damage to Sanford Dam as well as any other contributing causes." Roberto Acosta, "Federal regulators order Sanford Dam's owner to investigate after flood," *Saginaw & Bay City News* (May 20, 2020), *available at* Mlive.com.

213. Additionally, all plaintiffs have been displaced from their home and or have suffered a loss of use of their home.

CLASS ACTION ALLEGATIONS

214. Plaintiffs request certification pursuant to MCR 3.501 on behalf of a proposed damages class defined as follows: all individuals and entities who from May 19, 2020 to present owned property and experienced injuries and damages to their person or property as a result of the failure of the Edenville Dam, the flooding of water over the Sanford Dam, and the resulting damage and destruction of Plaintiffs' property in the ensuing floods.

215. Plaintiffs also request certification pursuant to MCR 3.501 on behalf of a proposed injunctive relief class defined as follows: all individuals and entities who from May 19, 2020 to

present owned property and experienced injuries and damages to their person or property as a result of the failure of the Edenville Dam, the flooding of water over the Sanford Dam, and the resulting damage and destruction of Plaintiffs' property in the ensuing floods.

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

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

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

219. Plaintiff Class representatives will fairly and adequately protect the interests of the Plaintiff Class members.

220. Plaintiffs' counsel are unaware of any conflicts of interest between the Class representatives and absent Class members with respect to the matters at issue in this litigation; the Class representatives will vigorously prosecute the suit on behalf of the Class; and the Class representatives are represented by experienced counsel.

221. Plaintiffs are represented by attorneys with substantial experience and expertise in complex and class action litigation involving personal and property damage.

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

223. The maintenance of the action as a class action will be superior to other available methods of adjudication and will promote the convenient administration of justice.

224. Moreover, the prosecution of separate actions by individual members of the Class could result in inconsistent or varying adjudications with respect to individual members of the Class and/or one or more of the Defendants.

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

CAUSES OF ACTION

COUNT I: **NEGLIGENCE**

226. Plaintiffs hereby restate and reallege and incorporate the preceding paragraphs as though fully set forth herein.

227. The acts and conduct of all above Defendants alleged above when considered under the laws of the State of Michigan, constitute negligence.

228. Defendants owed a duty of care to those persons who own real property on or near waterways that are controlled, in part, by the dams owned, operated and maintained by Defendants.

229. Defendants breached their duty to Plaintiffs and the proposed Class Members' safety, protection, and health by:

- a) Failing to maintain and operate the Edenville Dam in proper working order;
- b) Failing to maintain and operate the Sanford Dam in proper working order;
- c) Failing to maintain state and all compliance measures regarding the Edenville Dam;
- d) Failure to warn all who could potentially be affected by the above actions and inactions, prior to and after May 19, 2020;
- e) Specifically, consistently ignoring the Commission's warnings that their failure to increase the spillways would result in substantial loss of property and loss of life.

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

230. It was foreseeable that Defendants' actions and omissions would result in injury to Plaintiffs as demonstrated by the Commission's persistent warnings.

231. Defendants' negligence was the factual cause of Plaintiffs' and the proposed Class Members' injuries.

232. Defendants' actions and inactions were the most immediate, efficient, and direct cause of Plaintiffs' and the Class Members' injuries.

233. The conduct of the Defendants was so reckless as to demonstrate a substantial lack of concern for whether injury would result to those individuals who own property on or near waterways that are controlled, in part, by the dams owned, operated and maintained Defendants.

234. As the direct and proximate result of Defendants' negligence Plaintiffs and the Class Members are entitled to recover all damages and relief available at law and equity.

COUNT II:
NUISANCE

235. Plaintiffs, on behalf of themselves and the proposed Class, reallege and incorporate the preceding paragraphs as though fully set forth herein.

236. Defendants' failure to properly operate, manage, and maintain Edenville and Sanford Dams caused a release of flood waters on the Plaintiffs' and potential Class members' properties.

237. Defendants' failure to properly operate, manage, and maintain the Edenville and Sanford Dams, in compliance with the law and pertinent regulations as described herein constituted a nuisance.

238. Such wrongful acts by Defendants was and is a foreseeable and proximate cause of injury to Plaintiffs' the proposed Class Members' persons and their property.

239. The nuisances created by Defendants caused damages to the Plaintiffs and the proposed Class, and unreasonably interfered (and continues to unreasonably interfere) with their use and enjoyment of real and personal property.

240. Defendants' conduct is the legal cause of the intentional, unreasonable, negligent, and/or reckless invasion of Plaintiffs' and the proposed Class Members' interests in the private use and enjoyment of their land.

241. Defendants' conduct in performing acts or failing to act has caused one or more substantial, unreasonable, and intentional interference with Plaintiffs' and the Proposed Class Members' right to use and enjoy their property as discussed above.

242. Accordingly, Plaintiffs on behalf of themselves and proposed Class members seek general damages from Defendants, in an amount to be determined at trial, directly resulting from their injuries in a sufficient amount to compensate them for the injuries and losses sustained by Plaintiffs and the Proposed Class Members and to restore Plaintiffs and the Proposed Class members to their original position, including, but not limited to the difference between the current value of their properties and such value if the harm had not been done, the cost of repair or restoration, the value of the use of the continuous trespass, injury to persons, and direct and consequential damages flowing from the nuisance and trespass which are the natural and proximate result of Defendants' conduct in an amount to be proved at trial, and exemplary or punitive damages.

COUNT III:
TRESPASS (COMMON LAW)

243. Plaintiffs, on behalf of themselves and the proposed Class, reallege and incorporate the preceding paragraphs as though fully set forth herein.

244. Defendants' failure to properly operate, manage, and maintain Edenville and Sanford Dams caused a release of flood waters on the Plaintiffs' and the potential Class Members' property which was an unauthorized trespass.

245. Upon information and belief, Defendants had exclusive control over the Edenville and Sanford Dams which caused damage to Plaintiffs and potential Class Members.

246. Defendants created an unauthorized direct and/ or immediate intrusion of a physical, tangible object onto land over which the Plaintiffs had a right of exclusive possession.

247. The diversion of water was did effect an intrusion onto land.

248. A direct and/ or immediate invasion for purposes of trespass is one that is accomplished by any means that the offender knew or reasonably should have known would result in the physical invasion of the plaintiff's land.

249. The above-described affirmative, voluntary, and intentional acts were performed with willful intent.

250. Defendants' wrongful actions resulted in the immediate and continued trespass, injury and damage to Plaintiffs and potential Class Members, their property, and their right of possession of their property.

251. Based upon the above, Plaintiffs on behalf of herself and the Class, seek general damages from Defendants, in an amount to be determined at trial, directly resulting from their injuries in a sufficient amount to compensate them for the injuries and losses sustained by Plaintiffs and potential Class members, and to restore Plaintiffs and potential class members to their original position, including, but not limited to the difference between the current value of the land and such value if the harm had not been done, the cost of repair or restoration, the value of the use of the continuous trespass, injury to persons, consequential damages flowing from the trespass which are the natural and proximate result of Defendants' conduct, and exemplary or punitive damages.

COUNT IV
STATUTORY TRESPASS – VIOLATION OF MCL 600.2919(1)

252. Plaintiffs and Plaintiff Class incorporate by reference the allegations set forth in all foregoing paragraphs, as if fully set forth herein.

253. MCL 600.2919(1) provides in relevant part:

254. 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.

255. Defendants' violation(s) of MCL 600.2919(1) were statutory violations making defendants negligent per se for the statutory violations.

RELIEF REQUESTED

256. WHEREFORE, Plaintiffs pray on behalf of themselves and the members of the proposed Class for entry of judgment finding and awarding as follows:

- A. Certifying the Class under MCR 3.501;
- B. For an Order adjudging that Defendants were negligent;
- C. For an Order adjudging that Defendants are liable for nuisance, trespass and statutory trespass (violation of MCL 600.2919(1);

D. For an award to Plaintiffs against Defendants, all relief available under Michigan law, to be determined at trial, with interest on such amounts;

E. For an award to the Class Members against Defendants, all relief available under Michigan law, to be determined at trial, with interest on such amounts;

F. For an award to Plaintiffs and the Class Members of actual damages, including those arising from loss of real property loss, loss of temporary or permanent living expenses, loss of use and enjoyment of property, diminution in value of the real property, humiliation, mental anguish, loss of reputation, emotional distress and other harm, in an amount in excess of \$75,000 against Defendants;

G. For an award of punitive damages in an amount to be determined at trial;

H. For an award to Plaintiffs of their attorneys' fees, disbursements, and costs in this action available at law or in equity;

I. For an award of prejudgment interest;

J. For such other and further relief as the Court deems just and equitable.

Respectfully submitted,

/s/: Geoffrey N. Fieger

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Attorney for Plaintiffs

Dated: May 28, 2020

On behalf of Plaintiffs and the Putative Class.