

TO: Dave Kepler, President, Four Lakes Task Force (FLTF)
Four Lakes Board of Directors

FROM: Joseph W. Colaianne

DATE: March 15, 2021

SUBJECT: Feasibility Report – Legal Framework

This memorandum was prepared in preparation of the Feasibility Report and addresses the legal framework and history in connection with the restoration of the Four Lakes to the legal (“normal”) levels in accordance with the Part 307 “Inland Lake Levels” of the Michigan Natural Resources and Environmental Protection Act, 1994 PA 451, as amended. The memorandum provides the legal framework and background to be incorporated as part of the Feasibility Report.

LEGAL FRAMEWORK

Introduction.

Secord, Smallwood, Wixom and Sanford Lakes (the “Four Lakes”) are located in Midland and Gladwin counties in central Michigan and were created by the impoundment of the Tittabawassee and Tobacco rivers by four hydroelectric dams. The hydroelectric dams were in place for nearly 100 years and are regulated by the Federal Energy Regulatory Commission (FERC).¹ Over that period, properties dependent on the Four Lakes developed which included cottages and homes, public parks and commercial enterprises. In addition, a thriving fishery and ecosystem developed, creating a recreational haven for retirees and residents in the region. Over 8,480 parcels, eight townships, a village, two counties and the State of Michigan directly benefit from maintenance of lake levels created by dams.

Looking for long-term stability of the Four Lakes, in 2018 representatives from lake associations representing the Four Lakes began the process of transitioning the four hydroelectric dams from private ownership to public ownership. The counties of Midland and Gladwin formed a citizen task force to explore the process of acquiring, financing, and managing the dams and lake levels in accordance with Part 307 “Inland Lake Levels” of the Michigan Natural Resources and Environmental Protection Act (“Part 307”). In 2019, legal or normal levels were established, and the Four Lakes Task Force (FLTF) was appointed by the Counties to pursue acquisition, financing and repairs of the four dams.

¹ With the exception of the Edenville Dam that impounds the rivers creating Wixom Lake. In 2018, FERC revoked the hydroelectric power license for the Edenville Dam.

FLTF is a Michigan nonprofit IRS 501(c)(3) organization. As the Counties' Part 307 Delegated Authority, FLTF represents the lake property owners within the Four Lakes Special Assessment District.

In December 2019, FLTF and Boyce Hydro Power, LLC (and various Boyce entities) entered into a purchase agreement for the acquisition of dams and flowage rights. However, prior to making the first installment and option payment, on May 19, 2020 the dam on Wixom Lake (Edenville Dam) failed resulting in a surge of flood waters causing the dam at Sanford Lake to fail; the upstream dams at Secord and Smallwood lake were also damaged. Catastrophic flooding occurred throughout the region, destroying and damaging homes and businesses, and the region was declared a national disaster by President Trump. The transaction to purchase the dams did not go forward, and subsequently Midland and Gladwin counties moved forward with the acquisition of the dams and flowage rights through condemnation. In December 2020, the counties received title to all four dams (effective July 31, 2020).

In the aftermath of the catastrophic May 19th flood, FLTF has partnered with United States Department of Agriculture (USDA) Natural Resources and Conservation Services (NRCS), the State of Michigan, the counties, and local municipalities, and most importantly, the Four Lakes community to address the immediate emergency concerns that included dam stabilization, shoreline erosion and restoration, and debris removal. This effort is ongoing and is estimated to cost over \$50 million. The long-term goal is to restore and repair the four dams, without hydroelectric power generation. The estimated cost of this effort is approximately \$300 million.

The goal of FLTF for the near-term is to:

1. Stabilize the four dams and lake bottoms.
2. Acquire the properties and develop a restoration plan.
3. Study flood impacts and develop a feasible design.
4. Design for the next 75+ years and start to rebuild the future for the community.

History.

Four Lakes System Built to Produce Hydroelectric Power

[insert historical photos: <https://bit.ly/39kn4Ve>]

The four hydroelectric dams have been in place since the 1920s. Most of the original properties required for hydroelectric generation were acquired in 1923 when the Wolverine Power Company, a Delaware corporation, purchased land from the Riverdale Farms Company, a Michigan corporation. A warranty deed dated May 30, 1923 (and recorded on July 23, 1923) in Gladwin County conveyed “forever, all the certain pieces or parcels of land situated and being in the Townships of Tobacco, Billings, Hay, Secord and Clement in the County of Gladwin...” and further provided “ and “[W]henever in the following descriptions or any parcel part or parts thereof, referenced is made to ‘elevation above said level’ or ‘elevation above the mean tide of the Atlantic Ocean’ such elevation is and shall be determined from the bench mark heretofore established at Sanford, in the Township of Jerome, County of Midland... which bench mark will

be transferred by“ the Riverdale Farms Company “[to] a permanent location on its property at the Sanford dam site...”.²

In connection with flowage rights, the warranty deed from Riverdale Farms stated the following:

“[i]n addition to the right title and interest here and conveyed by this indenture by said party of the first part [Riverdale Farms Company] to said party of the second part (Wolverine Power Company] in and to the above described land, property and rights and not in limitation thereof, said party of the first part of itself, it’s successors or assigns, hereby grants, bargains, sells, conveys and sets over unto said party of the second part, it’s successors and assigns forever, the exclusive and perpetual right to overflow any and all of the above described property and any and all of the property which said party of the first part now owns or is possessed in said Townships of Tobacco, Billings, Hay, Secord and Clement, County of Gladwin, State of Michigan, by the construction and operation of a dam across the Tittabawassee and Tobacco Rivers ...”³

In regards to the operation of the dams, the Riverdale Farms Company granted to Wolverine Power Company the “right and the authority to raise and lower the water of the Tittabawassee and Tobacco Rivers in the “constriction, maintenance, and operation of any such dam or dams”, but also reserved an inferior right for purposes of boating, hunting and fishing:

“...Said party of the first part [Riverdale Farms Company] hereby expressly reserves to itself, its successors and assigns forever, the perpetual nonexclusive right but at its on their own risk, to use the waters of the Tittabawassee River and its tributaries impounded by the dams and the water power developments contemplated by the party of the second part [Wolverine Power Company], for domestic and farm purposes, *the same to be taken under conditions satisfactory to said party of the second part and for purposes of boating, hunting and fishing, and the right to ingress and egress for such purposes from adjacent land owned or possessed by said party of the first part to said waters over and across the lands hereby conveyed to said party of the second part* which are not submerged by said waters, but such rights also reserved shall at no time nor under any circumstances be used to interfere with or obstruct the full use and enjoyment of the property and rights are conveyed by said party of the first part for any use or uses to which said party of the second part may use or desire to use said property and the waters of the Tittabawassee and Tobacco Rivers and their tributaries so impounded for the operation of or in connection with said water power plants or developments in any and rights reserved by said party of the first part, its successors and assigns shall be subject to and inferior to the rights of second part, its successors and assigns, and said party of the second part, its successors and

² Warranty Deed, Dated May 30, 1923 recorded Liber 60, Pages 507-533, July 23, 1923; p507

³ Id. at p529.

assigns, shall not be liable of any injury, damage, cost and expense which said party of the first part, its successors and assigns...”⁴

{Emphasis added} Thus, historically the purpose of the dams was to authorize the construction and development of the hydroelectric dams to generate electricity, but a second, inferior right was reserved for utilization of the reservoirs created (i.e., the Four Lakes) for the purpose of development, “boating, hunting and fishing.”

Since the 1920s until about 2004, the dams continued to be owned by Wolverine Power Company, until they were transferred to the Boyce Trusts (and eventually, to other entities affiliated with Boyce Hydro Power, LLC; “Boyce Hydro”). Each of dams includes a reservoir (i.e., lake) and a powerhouse. The Four Lakes occupy about 39 river miles of the Tittabawassee River, with the tailwater of each dam being the headwater of the next downstream dam. Meaning that the Four Lakes are hydraulically and hydrologically interrelated. From Sanford Dam, the most downstream dam, the river flows 35 miles to its confluence with the Shiawassee River where it forms the Saginaw River.

Historically, Wolverine Power Company had drawn down the Four Lakes from 3 to 4 feet in late winter to maximize the benefits of winter power generation and to minimize spilling during spring snowmelt and runoff. The Four Lakes would then be refilled to normal pool elevations before water temperatures reach levels that stimulate pike spawning.

FERC Regulatory Oversight.

In 1976, The federal Energy Commission (FERC) determined that the Tittabawassee River was a navigable waterway of the United States and issued a jurisdictional order requiring the four projects to be licensed under the Federal Power Act (“FPA”), 55 FPC 673. In 1983, Wolverine filed an application for a FERC license for the Sanford Dam, and in 1987, a license was issued. Similarly, in 1989 Wolverine submitted license applications for the Edenville, Smallwood, and Secord projects and licenses were issued in 1998. All four licenses were transferred to Boyce Hydro Power, LLC in 2004.

From the onset Boyce’s compliance record was uneven, at best. Issues ranged from failing to comply with environmental and recreational conditions of the licenses to serious dam safety issues. The situation culminated at Edenville on September 18, 2018, when FERC issued an order revoking the license for failure to provide adequate spillway capacity. The water levels at Wixom Lake were ordered to be lowered, and jurisdiction over the project and dam safety was transferred to Michigan’s Department of Energy, Great Lakes and Environment (EGLE).

On December 31, 2019, FLTF and Boyce Trusts entered into a purchase agreement to acquire the dams, lake bottoms and related real estate of each lake. The first installment to purchase was scheduled for June 2020.

⁴ Id. at p531.

On May 17, 2020 storms brought heavy rainfall across the area. On the evening of May 19th an embankment failed on the Edenville Dam after the Tittabawassee River surpassed a height of 26.5 feet. Several hours later excess water from the Edenville Dam failure caused the Sanford Dam to breach. Thousands of homes, properties and businesses along the four lakes and downstream of the lakes were destroyed during this catastrophic flood event. President Trump declared it a national disaster.

Post-Dam Failures Acquisition of Boyce Hydro Properties.

After the dam failures, the purchase agreement with Boyce Trusts did not take place. Pursuant to Part 307, FLTF, as the legally delegated authority, began the process of recovery and restoration. In June 2020, the Counties authorized the condemnation and taking of the properties from Boyce Hydro. The Counties also appointed FLTF as its Delegated Authority for all federal and state coordination and funding in connection with the recovery and restoration of the Four Lakes. At this time, Boyce Hydro filed for bankruptcy protection. On December 7, 2020, Judge Daniel Opperman of the U.S. Bankruptcy Court for the Eastern District of Michigan approved a settlement in connection with the condemnation. On December 23, 2020, the circuit courts in both Midland and Gladwin counties entered a “Consent Judgment Vesting Title and Awarding Compensation.” More than 6,000 acres of former Boyce-owned properties were transferred to the counties.

Establishing the Legal (“Normal”) Levels; Four Lakes Task Force.

In early 2018, a group of lakefront property owners learned that Boyce was not in compliance with its terms of the FERC license (in connection with the Edenville Dam) and that FERC was threatening to revoke the Edenville license. Concerned with the potential loss of Wixom Lake, and future loss of the other three lakes, the Four Lakes community was looking for a long-term solution to managing lakes levels, and if possible, transition private ownership of the dams to public ownership.

In July 2018, the Counties of Midland and Gladwin (Counties) adopted resolutions recommending and inviting the lake associations or representatives for all Four Lakes, to form a “Citizen Task Force” to develop a plan and present recommendations for establishing the normal (i.e., legal) levels of all Four Lakes. The Citizen Task Force was also to address recommendations with respect to the potential special assessment boundaries and the entity to serve as the Counties’ Delegated Authority (to oversee and manage the lake levels, prepare the special assessment district, and the options for the long-term ownership, finance, operations, maintenance and improvement of the lake level structures).

At this time, after years of obfuscation, needless extensions and outright delays perpetrated by Boyce Hydro, on September 18, 2018, FERC revoked the license for the Edenville dam. The water levels at Wixom Lake were lowered, and pending jurisdiction over dam safety was to transition from FERC oversight to Michigan’s dam safety unit. The regulatory framework in place did not adequately address this transition, and the Four lakes community expressed concerns in connection with dam safety to FERC and the State of Michigan’s Department of Environment, Great Lakes and Energy (EGLE).

In October 2018, the Counties adopted resolutions finding that in “order to protect the public’s health, safety and welfare, to best preserve the natural resources of the state, and to preserve and protect the value of property around the lakes”⁵ that it was necessary to establish the normal levels for all Four Lakes. In addition, the resolutions provided that all costs in connection with the maintenance of the normal levels of the Four Lakes “shall be defrayed by special assessments for the benefits derived against privately owned parcels of land, political subdivisions of the state, and state owned lands.”⁶ The Sanford Lake Preservation Association (now known as Four Lakes Task Force, FLTF) was appointed the Counties’ Delegated Authority, and to act on behalf of the Board of Commissioners to oversee the lake level project, to prepare a special assessment district(s) and special assessment roll(s), and to “take all other actions as necessary and required by the delegated authority as provided in Part 307.”⁷ The Counties further directed their respective legal counsel to file a petition in the circuit courts of the Counties for the determination of the legal lake levels and boundaries of the special assessment district.

Legal Lake Levels Established Under Part 307.

Michigan common law does not require a private dam owner to maintain the existence of a dam or the artificial level of a lake. The case of *Goodrich v McMillan*,⁸ established the rule that ownership of a dam *does not impose a duty* on the dam owner to maintain the water at an artificial level created by operation of a dam. The harshness of the common law created considerable uncertainty among lakefront property owners. Part 307 (and prior Michigan law dating back to the early 1900’s) provides a public solution for preserving lakes that were created by the artificial impoundment of water.

Section 30701 of Part 307 defines "Normal level" of an inland lake as:

[t]he level or levels of the water of an inland lake that provide the most benefit to the public; that best protect the public health, safety, and welfare; that best preserve the natural resources of the state; and that best preserve and protect the value of property around the lake.⁹

The purpose of Part 307 is to provide for the control and maintenance of inland lake levels for the benefit and welfare of the public.¹⁰ Part 307 essentially authorizes counties to make policy decisions as to the levels of their inland lakes, and to build and finance dams as necessary to maintain the desired lake levels.¹¹ However, it is the county circuit court that ultimately has the authority to weigh competing factors in its determination of the normal levels of an inland lake.

⁵ County of Gladwin Resolution 2018-034, adopted October 9, 2018; County Midland Resolution, adopted October 16, 2018.

⁶ Id.

⁷ Id.

⁸ *Goodrich v. McMillan*, 217 Mich. 630, 187 NW 368 (1922).

⁹ MCL 324.30701(h)

¹⁰ *In Re Martiny Lakes Project*, 381 Mich 180, 187; 160 NW2d 909 (1968); *Lenawee Board of Comm’s v Abraham*, 93 Mich App 774, 779; 287 NW2d 371 (1979).

¹¹ *In re Matter of Van Etten Lake*, 149 Mich App 517, 525; 386 NW 2d 572 (1986).

Before a circuit court determined the “Normal level”, the court must consider many, and in some instances, competing factors. Section 30707 of Part 307, in pertinent part, provides:

- (4) In a determination of the normal level of an inland lake, the court shall consider all the following:
 - (a) Past lake level records, including the ordinary high-water mark and seasonal fluctuations.
 - (b) The location of septic tanks, drain fields, sea walls, docks, and other pertinent physical features.
 - (c) Government surveys and reports.
 - (d) The hydrology of the watershed.
 - (e) Downstream flow requirements and impacts on downstream riparians.
 - (f) Fisheries and wildlife habitat protection and enhancement.
 - (g) Upstream drainage.
 - (h) Rights of riparians.
 - (i) Testimony and evidence offered by all interested persons.
 - (j) Other pertinent facts and circumstances.¹²

Moreover, once established, the circuit court has “continuing jurisdiction” over the lake levels, which means, anything affecting the lake levels, including departures from the normal levels, should be presented to the circuit court for its consideration.

Part 307 also provides the financial model for sustainability of lake level structures. Part 307 authorizes the establishment of a special assessment district to defray the costs in connection with administration, operation, maintenance and improvement of lake level structures.¹³ Moreover, the special assessment district is authorized to issue municipal bonds, notes and lake level orders in anticipation of special assessments.¹⁴ Municipal securities (i.e., Bonds and Notes) can be issued for up to a period of 40 years. The entity responsible for operating and maintaining the normal levels established by the circuit court, is the entity or “Delegated Authority” appointed by the county board of commissioners.

Midland County Circuit Court – Court Ordered Normal Levels of Four Lakes and Establishment of the Four Lakes Special Assessment District.

In late 2018, and in accordance with the Counties’ resolutions, a petition was filed in both the circuit courts of Midland and Gladwin counties. By order of the State Court Administrator, Midland County Judge Stephen Carras was assigned to hear both cases, including the case filed in the Gladwin County Circuit Court. The hearing was scheduled for May 3, 2019, and in accordance

¹² MCL 324.30707(4).

¹³ MCL 324.30711(1): “The county board may determine by resolution that the whole or a part of the cost of a project to establish and maintain a normal level for an inland lake shall be defrayed by special assessments against the following that are benefited by the project: privately owned parcels of land, political subdivisions of the state, and state owned lands under the jurisdiction and control of the department. If the county board determines that a special assessment district is to be established, the delegated authority shall compute the cost of the project and prepare a special assessment roll.”

¹⁴ MCL 324.30705.

with the notice requirements set forth in Part 307, all property owners within the proposed special assessment district, and political subdivisions (i.e., counties, villages, and townships) were provided a notice of the hearing. Affidavits of mailing were executed by the drain commissioners from both Counties. In addition, notice of the hearing was published in *The Gladwin County Record* newspaper on April 10th, 17th and 24th, 2019¹⁵; and published in *Midland Daily News*, April 11th, 18th and 25th, 2019¹⁶.

In preparation of the hearing, the counties commissioned Spicer Group, Inc., consulting engineers to prepare a lake level study. The “Four Lakes Lake Level Study” was issued in April 2019. The objective of the report was the establishment of normal levels for the Four Lakes. The report details conditions that existed at that time, and properties benefitting from the establishment of the normal levels.

On May 3, 2019 Judge Carras received information supporting the petition, the Four Lakes Lake Level Report, and testimony. After providing an opportunity for all those present at the hearing and taking into consideration the factors set forth in Part 307, on May 28, 2019, Judge Carras established the normal levels for each of the Four Lakes. The levels established for each of the Four Lakes was based on the historical water levels and conditions set forth in the FERC licenses. Judge Carras also approved the Four Lakes Special Assessment District. This was a final order, and anyone aggrieved by Judge Carras’ order had the right to appeal the decision within 21 days following the entry of the order. There were no appeals of this order.

In connection with the Four Lakes, Midland and Gladwin counties appointed the Four Lakes Task Force (“FLTF”) as its Part 307 “Delegated Authority.”

Four Lakes Task Force.

FLTF is a Michigan nonprofit IRS 501(c)(3) organization. The primary purpose of FLTF is to lessen the burden of local government in managing the lake levels of the dams, and to ensure the sustainable future for all Four Lakes for the benefit of property owners around the lakes, the environment, local business, recreational lake users and general economic welfare of Midland and Gladwin counties.

The FLTF board of directors is comprised of a representative from each of the Counties, and representatives from each of the lake associations representing the Four Lakes. As the Counties’ Part 307 Delegated Authority, FLTF represents the lake property owners within the Four Lakes Special Assessment District. FLTF was authorized to acquire, administer, construct, operate, maintain, repair and improve the dams as required to maintain the legal levels established by the Midland County Circuit Court. Specifically, FLTF is responsible for the following:

- Acquisition of lake level facilities:
 - Acquire the lake level control structures and facilities, including all bottomlands,

¹⁵ Affidavit of Publication, Mark Schaefer, The Gladwin County Record, Inc., April 24th, 2019.

¹⁶ Affidavit of Publication, Cathy Bott, Advertising Director, Midland Daily News, April 25th, 2019.

of the four dams

- Establish and maintain the rules and procedures for assessing properties within the Four Lakes Special Assessment District (SAD) established in accordance with Part 307 Circuit Court Lake Level Order
 - Arrange for sale of notes and/or bonds secured by the revenue assessed against and received from properties within the SAD
 - Implement interim financing to cover FLTF expenses until permanent financing is in place
- Restore, repair and improve the dams
- Implement the repairs or improvements required by the current condition of the dams
 - Maintain financial plan for dam maintenance and operations
- Oversee activities to satisfy requirements of Part 315, including:
- Submission of permits for dam repairs and maintenance
 - State dam safety inspection
 - Maintenance of Emergency Action Plans.

In 2019, FLTF sought to acquire the dams from Boyce Hydro Power (“Boyce”), and a purchase agreement was executed. Unfortunately, because of the catastrophic events of May 19, 2020 the purchase of the dams did not take place.

Four Lakes Special Assessment District; and Special Assessments.

The Four Lakes Special Assessment District (“SAD”), is a special purpose public body with an established boundary of waterfront properties along or near the four lakes, and backlot properties with dedicated (private easement) access. The original intent was for properties within the SAD to share financial responsibility by paying an annual assessment on the property’s tax bill. The SAD offered a method of financing the acquisition, operation, maintenance, repairs and improvements to the dams to ensure that they meet State of Michigan dam safety standards, in accordance with Part 315 “Dam Safety” of NREPA, MCL 324.31501 et seq. (“Part 315”).

The Part 307 Special Assessment process to return the Four Lakes to normal lake levels is not a tax. Rather, it is a specific levy to recover the costs of improvements that confers or preserve benefits, relieves a burden, or creates a special adaptability upon the land (not a person) within the Four Lakes Special Assessment District (SAD). It is not the present use of the property that determines the benefit it receives from an improvement, but its available use, including a use that may be rendered more feasible by the carrying out of a project in connection with the assessment is levied. A Part 307 special assessment is not based on the tax assessment of a particular property or whether a landowner chooses to use the benefit. Rather, the special assessment is based on an approved computation of costs and apportioned to each property based on benefits derived for that property.

Before a special assessment can be imposed, the Delegated Authority is required to prepare a computation of cost of the project(s). This also applies for operational costs. The special assessments are necessary in order to defray the costs set forth in the Computation of Cost (or “project costs”). Initially, it is the role of the Delegated Authority (i.e. “FLTF”) to prepare the Computation of Cost, apportion those costs and prepare an assessment roll. In addition, the Delegated Authority is responsible for providing notice to all property owners and public entities of a hearing to consider objections to the project costs and assessment roll, before presenting the project cost and assessment roll to the Midland and Gladwin County Board of Commissioners for its approval. Special assessment cannot be imposed without undertaking the procedures set forth in Part 307.

The Four lakes systems is complex based on its geographic reach, multiple communities, and diversity of water ways. Benefit factors in connection with the apportionment of costs will need to be developed and considered to apply uniformly across the properties within the special assessment district.

Dam Failures.

On December 31, 2019, FLTF and Boyce Trusts entered into a purchase agreement to acquire the dams, lake bottoms and related real estate of each lake. The first installment to purchase was scheduled for June 2020.

On May 17, 2020 storms brought heavy rainfall across the area. On the evening of May 19th an embankment failed on the Edenville Dam after the Tittabawassee River surpassed a height of 26.5 feet. Several hours later excess water from the Edenville Dam failure caused the Sanford Dam to breach. Thousands of homes, properties and businesses along the four lakes and downstream of the lakes were destroyed during this catastrophic flood event. President Trump declared it a national disaster.

Post-Dam Failure; Recovery.

After the dam failures, the purchase agreement with Boyce Trusts did not take place. Pursuant to Part 307, FLTF, as the legally delegated authority, began the process of recovery and restoration. In June 2020, the Counties authorized the condemnation and taking of the properties from Boyce Hydro. The Counties also appointed FLTF as its Delegated Authority for all federal and state coordination and funding in connection with the recovery and restoration of the Four Lakes. At this time, Boyce Hydro filed for bankruptcy protection. On December 7, 2020, Judge Daniel Opperman of the U.S. Bankruptcy Court for the Eastern District of Michigan approved a settlement in connection with the condemnation. On December 23, 2020, the circuit courts in both Midland and Gladwin counties entered a “Consent Judgment Vesting Title and Awarding Compensation.” More than 6,000 acres of former Boyce-owned properties were transferred to the counties.

In the immediate aftermath, the community focused on interim measures to recover and protect public safety. With funding assistance from the USDA Natural Resources Conservation

Services (NRCS), the State of Michigan, and private donations, the Four Lakes community has been stabilizing the dams, removing debris and repairing shoreline damage caused by the dam failures. This effort (which is ongoing), is estimated to cost \$50 million. In addition, the counties of Midland and Gladwin have taken the lead and moved forward with acquiring the dams, bottomlands, and flowage rights necessary to restore the Four Lakes. The present estimated cost to restore and repair all four dams is approximately \$300 Million.