STATE OF MICHIGAN
IN THE SUPREME COURT

HERON COVE ASSOCIATION, et al.

Appellants,

v

MIDLAND COUNTY BOARD OF COMMISSIONERS, and GLADWIN COUNTY BOARD OF COMMISSIONERS, and FOUR LAKES TASK FORCE,

Appellees.
/

Supreme Court No. 168165

COA No. 371649

Midland Circuit Court No. 24-2751-AA

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APPELLEES' MOTION TO EXPEDITE REVIEW OF APPELLANTS' APPLICATION FOR LEAVE TO APPEAL

RULING REQUESTED BY MAY 1, 2025

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Dated: March 3, 2025

INTRODUCTION

The Application before the Court affects the massive and necessary dam reconstruction project of the Edenville, Sanford, Smallwood, and Secord Dams that presently poses a risk to public safety. Currently, construction on four high-hazard dams remains suspended while Appellants seek application for leave to appeal of the findings of the lower courts' approving the lake-level special-assessment rolls. But the dams cannot remain in their current state indefinitely. Moreover, the optimum time for completing construction of the four dams (which requires the mobilization of contractors, the deployment of earth-moving equipment, and the supply of massive amounts of concrete and steel) is during the construction period between May and November. Appellees have a statutory duty to restore the lakes and lakes levels, and to operate and maintain the dams. See MCL 324.30702(3). They have already lost one construction season due to this appeal. Yet, without finality in this litigation, the Counties and their Delegated Authority (*i.e.*, the "Four Lakes Task Force" or "FLTF") cannot pursue the municipal financing needed to complete the final phases of construction. And an additional, upcoming construction season will be lost.

Time is of the essence. Accordingly, for those reasons and as further explained below, this case requires a prompt ruling from this Court. A ruling is therefore respectfully requested **by May 1, 2025**.[1]

ARGUMENT

I. This Court should expedite its consideration of this Appellants' application to avoid delay in the reconstruction of the dams.

Whether this Court denies this application leave to appeal or hears the case, time is of the essence. The lake-level capital-assessment roll and the five-year operation-and-maintenance roll

[1] Per MCR 7.311(E), Appellees affirm that this motion has been served via electronic service, which this Court's Internal Operating Procedures states is treated as personal service. MSC IOP 7.311(E)(4).

(collectively, the "lake-level assessment rolls") were approved over a year ago on February 6, 2024. The final cost of construction was based on the construction bids received and on which the computation of cost for the Project were established. In response to Appellants exercising their right to appeal first in the circuit court and then before the Court of Appeals, Appellees were required to suspend construction for the much of the 2024 construction season. Acknowledging that time is of the essence, the Court of Appeals expedited consideration of that appeal and, ultimately, issued a unanimous opinion on January 6, 2025.

The Counties concede Appellants have a right to seek further discretionary review before this Court. See MCR 7.305. But, to avoid significant project cost increases and the loss of another construction season, the Counties ask this Court to expedite its consideration of Appellants' application and to issue a decision **on or before May 1, 2025**. See, e.g., MCR 7.311(E); MSC IOP 7.305(C)(11); MSC IOP 7.311(E)(2).

A. Expedited review is necessary to serve the purposes of Part 307, which—among other things—mandate that the Counties maintain the court-ordered lake levels.

First, expedited review is necessary to accomplish the purposes of Part 307. That statute mandates that the Counties maintain the court-ordered lake levels. Yet while reconstruction of the dams remains stalled, fulfilling that duty is impossible. And the damaged dams remain a potential safety hazard that should be urgently addressed through the Counties' approved efforts.

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, to best preserve the natural resources of the state, and ***best preserve and protect the value of property around the lake***. MCL 324.30701(h) (emphasis added); see also *In re Van Ettan Lake*, 149 Mich App 517, 525; 386 NW2d 572 (1986) ("[T]he purpose of [Part 307] is to provide for the control and maintenance of inland lake levels for the benefit and welfare of the public."). Part 307 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. *Id*. at 525. In addition, 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, and for the special assessment district to authorize the issuance of municipal bonds, notes and lake level orders in anticipation of special assessments. MCL 324.307011; MCL 324.30705. Under Part 307, the Appellants have a duty to maintain the lake levels that were established by the Midland Circuit Court. MCL 324.30702(3); see also *Citizens for Higgins Lake Legal Levels v Roscommon Cty Bd of Comm*, 341 Mich App 161; 182 NW2d 841 (2022) ("[O]nce a court has determined the 'normal level' of an inland lake, it 'shall' be maintained" by the county and mandamus may be appropriate to compel compliance). In other words, the Counties *must* maintain those levels, but they are presently unable to do so. *Id*.

Appellants appealed under what the Legislature intended to be a streamlined process. Under Part 307, "[a]ll proceedings relating to the making, levying, and collection of special assessments authorized by this part and the issuance of bonds, notes, or lake level orders in anticipation of the collection of the special assessments shall conform as nearly as possible to the proceedings for levying special assessments and issuing special assessment bonds ***as set forth in the drain code of 1956, 156 PA 40, MCL 280.1 to 280.630***." MCL 324.30705(3) (emphasis added). In other words, the delegated authority is required to follow the Michigan Drain Code when levying lake-level special assessments. But Part 307 "provides *a less elaborate mechanism* for review." *In re Project Costs & Special Assessment Roll for Chappel Dam*, 282 Mich App 142, 147; 762 NW2d 192 (2009) (emphasis added).

Part 307 guarantees notice and an opportunity to be heard before the determination of a special assessment roll but not a full trial. *Id*. at 145–51 (holding that the drain commissioner's

decision requiring landowners in a special assessment district to pay 95% of dam repair costs was reviewable under Part 307 and did not call for the use of the review procedures set forth in the drain code of 1956, 156 PA 40, MCL 280.1 to 280.630). Yet the role of the trial court in lake level appeal proceedings is limited to reviewing the record for competent, material, and substantial evidence supporting the delegated authority's decision. *Id*. at 151. For purposes of Part 307, a sufficient hearing is one that (1) allows the circuit court to ensure that the Counties have considered the varying public interests in reaching its policy decision, and (2) protects the public against arbitrary governmental action. *Id*. at 151.

Moreover, Part 307 moves promptly to finality in light of the sensitive nature of such projects. Section 30714(4) of Part 307 provides that the special assessment roll "shall be final and conclusive unless appealed in a court within 15 days after county board approval," signifying the Legislature's intent that lake-level proceedings (like proceedings under the drain code) require expeditious resolution. MCL 324.30714(4); See *Eyde v Charter Twp of Lansing, Drainage Bd*, 109 Mich App 641, 647–48; 311 NW2d 438 (1981) ("[o]nce it is established that a drain is necessary to the public health, it is essential that it be financed and constructed as quickly as possible). For example, in the *In re Chappel Dam*, the Michigan Court of Appeals held that the trial court's decision to shorten the time for brief and hearings, was permissible. *Id*. at 150. As with drain projects under the Michigan Drain Code, there is the recognized need for a speedy resolution of the matter before the Court because legal delays on a valid lake-level project will only create additional costs and result in a higher assessment for the property owners.

B. Without expedited consideration, the Counties will lose yet another construction season.

Without question, the application for leave to appeal will throw a wrench in the Appellees' ability to operate, maintain, repair, and reconstruct four high-hazard dams if not processed

promptly by this Court. Moreover, both the Midland Circuit Court and Court of Appeals have upheld both the five-year lake-level operation and maintenance special-assessment roll and the capital improvement special-assessment roll against Appellants' disproportionality and due-process arguments. Thus, "good cause" exists for several reasons.

First, delay in this process inherently delays repair and reconstruction of the dams as required by the State. All four dams, in their current state, are high-hazard potential dams. That means that each dam is located in an area where failure may cause significant danger to loss of life downstream. See MCL 324.31503(11). Each of the dams has ongoing inspection and maintenance concerns. (See, e.g., **Ex. A**, EGLE Letter; and **Ex B**, GEI, Engineering Consultants) And the Michigan Department of Environment Great Lakes and Energy ("EGLE"), the State's agency responsible for dam safety, has required FLTF pursue the repairs and reconstruction of the dams expeditiously and to operate and maintain the dams in a safe manner consistent with current industry standard practices given these safety concerns and potential consequences. (*Id.*) While the dams are safter than they were, they are not as safe as the would be once constructed in accordance with their permitted design.

Second, funding both the day-to-day operation and maintenance of the dams as well as the needed capital improvements is critical. The primary source of revenue needed for the day-to-day operation and maintenance is the lake-level special assessments. Similarly, the lake-level special assessments are the primary source of funding needed to fund the repairs and reconstruction. Construction bids have been received and project costs were approved. Any delay will significantly increase repair and construction costs for all involved, including the Appellants. Appellants object to the approved Lake-Level Capital Improvement special-assessment roll precisely because it requires properties benefitting from the lakes to support a portion of the repairs

and reconstruction costs. But, in this case, their appeal is counterproductive because it adds to the overall cost burden of dam repair and construction project, and further threatens the funding required to operate and maintain the Four Lakes dam system. Appellants' appeal has already required complete suspension of the repairs and reconstruction of all four high-hazard dams.

Yet there is more. Already, because of the loss of most of the 2024 construction period, it is expected to cost property owners in the Four Lakes Special-Assessment District ("FLSAD") between $10,000,000 to $20,000,000 in increased construction costs and untold millions more if financing (*i.e.*, municipal bonds) of the projects is delayed past June 2025. In other words, no one wins. Neither FLTF (acting in the interests of all 8,170 properties in the FLSAD) nor the owners of approximately 7,580 non-appealing properties in the FLSAD want to see costs added to this project. Not even Appellants and its small minority of objecting homeowners representing less than 500 properties in the FLSAD want that. As costs rise due to the contractual and practical impacts of delay, all parties will lose. FLTF (on behalf of the FLSAD) cannot finance the final phase of dam construction until conclusion of this litigation and will need to restructure existing contracts for the reconstruction if it is not concluded within the next few months. Thus, expediting consideration of the Appellants' application is in everyone's interest. (**Ex C**, Affidavit David Kepler, FLTF President.)

Third, expediting consideration of this case also supports the purpose of the Part 307, MCL 324.30701, *et seq*. That declared purpose is to provide for the control and maintenance of inland lake levels for the benefit and welfare of the public; to best preserve the natural resources of the state; and best preserve and protect the value of property around the lake. MCL 324.30701(h); see also *In re Van Ettan Lake*, 149 Mich App at 526. Part 307 authorizes counties to make policy decisions on the levels of their inland lakes, and to build and finance dams as necessary to maintain

the desired lake levels. *Id*. at 525. And it authorizes the establishment of a special-assessment district to defray the costs in connection with administration, operation, maintenance and improvement of lake-level structures, and for the special-assessment district to authorize the issuance of municipal bonds, notes and lake-level orders in anticipation of special assessments. MCL 324.307011; MCL 324.30705. The Counties here have followed that process, giving the challenged special assessment a presumption of validity, which has now been upheld *twice* as valid on appeal. Thus, allowing this appeal to effectively hold up the operation, maintenance, and repair of the dams while driving up the approved costs associated with this project undermines those statutory purposes.

Finally, Appellants would not be harmed in any way by expediting consideration of this matter. There is no voluminous trial-court record—this matter is a *second* appeal, so the record was combed long ago. Nor are Appellees requesting an expedition of the briefing schedule. Rather, in recognition of the need for expedited review, Appellees promptly filed their answer to the application—within 13 calendar days (or less than half of the allotted 28 days for such a response). See MCR 7.305(D). This Court has inherent authority to control its docket. *Baynesan v Wayne State Univ*, 316 Mich App 643, 651; 894 NW2d 102 (2016), citing *Maldonado v Ford Motor Co*, 476 Mich 372, 376; 719 NW2d 809 (2006) ("[T]rial courts possess the inherent authority . . . to manage their own affairs so as to achieve the orderly and expeditious disposition of cases."). MCR 7.311(E) embodies that inherent authority, allowing the Court to expedite both briefing and oral argument in an appeal. See also MSC IOP 7.305(C)(11); MSC IOP 7.311(E)(1)-(4).

Because time is of the essence here, this Court should expedite the briefing and consideration of this application for leave to appeal. Specifically, all briefs on Appellants' application for leave to appeal will be filed by March 24, 2025. Given the necessity for urgent

action and the impact of this appeal upon a limited construction season, Appellees respectfully request that this Court issue a decision on Appellants' application by **May 1, 2025**.

CONCLUSION AND REQUEST FOR RELIEF

Given the gravity of the safety issues, financial impact, and public concerns involved in this matter, this Court should grant an expedited consideration of Appellants' application for leave to appeal. A decision on the application is respectfully requested by **May 1, 2025**.

Respectfully submitted,

CLARK HILL PLC

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Dated: March 3, 2025

EXHIBIT A

STATE OF MICHIGAN
DEPARTMENT OF
ENVIRONMENT, GREAT LAKES, AND ENERGY
LANSING

GRETCHEN WHITMER
GOVERNOR

LIESL EICHLER CLARK
DIRECTOR

June 30, 2021

CERTIFIED MAIL

Mr. David Kepler
Four Lakes Task Force
233 East Larkin Street, Suite 2
Midland, Michigan 48640

Dear Mr. Kepler:

SUBJECT: Four Lakes Task Force (FLTF) Dams
Secord Dam, Dam ID No. 547, Gladwin County
Smallwood Dam, Dam ID No. 548, Gladwin County
Edenville Dam, Dam ID No. 549, Gladwin County
Sanford Dam, Dam ID No. 550, Midland County

We have determined, based in part on a December 2020 consent judgement, that Midland and Gladwin Counties are the owner of four dams, Secord, Smallwood, Edenville, and Sanford Dams, located on the Tittabawassee River in Gladwin and Midland Counties. Upon issuance of a Federal Energy Regulatory Commission (FERC) order terminating licenses by implied surrender, effective May 27, 2021, Secord, Smallwood, and Sanford Dams reverted to regulatory authority of the State of Michigan. These dams are regulated by the Department of Environment, Great Lakes, and Energy (EGLE) under Part 307, Inland Lake Levels (Part 307) and Part 315, Dam Safety (Part 315), of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended (NREPA). We are writing to inform you of some of your key responsibilities, as delegated authority over the four dams, per the provisions of Parts 307 and 315. Part 307, Part 315, and its administrative rules can be found on our website at www.mi.gov/damsafety. We suggest you take time to review these documents.

These dams have been given ***high*** *hazard potential* ratings by EGLE. These ratings are an evaluation of the potential downstream consequences should the dam fail. It is not an evaluation of the dam's condition. A high hazard potential rating means that the dam located is in an area where a failure may cause significant environmental degradation, or where danger to individuals exists with the potential for loss of life. Listed below are some of the key items Part 315 requires of the owner of a regulated dam:

- Notification to EGLE and affected public safety officials of any circumstances that may affect the safety of the dam (Section 31520).

- Submission of periodic inspection reports conducted by a licensed engineer evaluating the dam's structural condition and hydraulic adequacy (Section 31518).

- Obtaining permits from EGLE, as required, to accomplish repairs and alterations of the dam (Section 31509).

- Developing and maintaining an up-to-date Emergency Action Plan (EAP) (Section 32523). The current EAP is out of date and should be updated immediately.

Owners of high hazard potential dams must submit dam safety inspection reports once every three years. It appears the last evaluation of your structures were performed in October 2020 and January 2021. Subsequently FLTF submitted Feasibility Studies on March 17, 2021 for each dam addressing deficiencies identified during these and previous inspections. Below is a brief discussion of the findings at each dam.

Secord Dam:

Secord Dam received minimal observed damage during the May 2020 flood event. However, there were several deficiencies that have persisted and require rehabilitation. Several critical safety improvements were completed this year to facilitate management of the dam in its current drawn down condition. Below is a summary of outstanding deficiencies that need to be addressed:

- The spillway has inadequate capacity to safely pass the ½ Probably Maximum Flood (PMF) as required by Part 315.
- Concrete components of the dam are showing signs of deterioration and are beyond their design life.
- The existing tainter gates are beyond their design life and exhibit signs of deterioration. The hoisting mechanisms are insufficiently sized for the range of design service loads and do not meet current industry design standards.
- The embankment dams are overly steep, have insufficient slope stability, and exhibit excessive amounts of seepage.
- Downstream energy dissipation and erosion protection is inadequate.

FLTF should continue to pursue improvements to the facility as outlined in the March 2021 Feasibility Study. Impoundment water levels shall be maintained at the current, drawn down level until the above referenced deficiencies are remedied.

Smallwood Dam:

Smallwood Dam experienced significant erosion during the May 2020 flood event but did not fail. Following the flood, emergency repairs were implemented to address erosion,

loss of riprap, repair of damaged retaining walls, sealing of holes in structures, and safety improvements to facilitate management of the dam in its current drawn down condition. There are several deficiencies that have persisted and require rehabilitation. Below is a summary of outstanding deficiencies that need to be addressed:

- The spillway has inadequate capacity to safely pass the ½ PMF as required by Part 315.
- Concrete components of the dam are showing signs of deterioration and are beyond their design life.
- The existing tainter gates are beyond their design life and exhibit signs of deterioration. The hoisting mechanisms are insufficiently sized for the range of design service loads and do not meet current industry design standards.
- Downstream energy dissipation and erosion protection are inadequate.

FLTF should continue to pursue improvements to the facility as outlined in the March 2021 Feasibility Study. Impoundment water levels shall be maintained at the current, drawn down level until the above referenced deficiencies are remedied.

Edenville Dam:

Edenville Dam was breached on May 19, 2020 after several days of intense rainfall. The damage to the dam was extensive with complete loss of the left embankment, left of the Tittabawassee spillway, damage to the remaining earthen embankments, damage to the Tobacco spillway structure and diversion of the Tobacco and Tittabawassee Rivers. The condition of the remaining dam structures following the failure continued to cause concern of a secondary failure due to limited hydraulic capacity of the Tobacco spillway and insufficient slope stability of the adjacent embankments. Due to the unresponsiveness of the former owner (Boyce Hydro, LLC.), EGLE Dam Safety issued an emergency order and initiated repairs to modify the Tobacco spillway, drawdown the impoundment, stabilize the remaining embankments, modify the Tittabawassee spillway, and restore the rivers to their pre-failure channels. EGLE, in partnership with FLTF and DTMB, has completed the drawdown of the Tobacco impoundment and lowering of the spillway crest. FLTF is moving forward with designs and construction contracting to finish stabilization of the Tobacco spillway, modification of the Tittabawassee spillway, stabilization of the remaining embankments, and diversion of the Tittabawassee River, to fulfill the requirements of the emergency order. This work shall be completed as expeditiously as possible under the current emergency permit (WRP026173).

In addition to the emergency work, FLTF has presented feasibility level plans for reconstruction of the Edenville Dam in accordance with current and anticipated state regulations and industry standard practices. FLTF should continue to pursue these efforts according to the Feasibility Study and apply for permits according local, state and federal laws. However, if FLTF determines that reconstruction of the Edenville Dam isn't feasible in a reasonable timeframe, a plan to address remaining concerns with long-term dam safety and stability and ongoing natural resource impacts will need to be developed and

implemented. The plan would need to consider such alternatives as additional stabilization and restoration measures or removal of the dam and restoration of impacted reaches of the river channels.

Sanford Dam:

Sanford Dam failed on May 19, 2020 following the failure of the Edenville Dam. The damage to the dam was extensive with complete loss of the right embankment and fuse plug spillway. The current route of the Tittabawassee River through the breach section is causing continued head-cutting through the native substrate and downgrading of the upstream river reaches. Due to the ongoing concerns with impacts to infrastructure and elevated sediment transport downstream impacting natural resources, FLTF is proposing emergency stabilization work at the dam. FLTF should continue to pursue these stabilization measures and apply for permits according to local, state and federal laws. EGLE has expressed its intent to expedite the Joint Permit Application review process, upon receipt of said application.

In addition to the emergency work, FLTF has presented feasibility level plans for reconstruction of the Sanford Dam in accordance with current and anticipated state regulations and industry standard practices. FLTF should continue to pursue these efforts according to the Feasibility Study and apply for permits according local, state and federal laws. However, if FLTF determines that reconstruction of the Sanford Dam isn't feasible in a reasonable timeframe, a plan to address remaining concerns with long-term dam safety and stability and ongoing natural resource impacts will need to be developed and implemented. The plan would need to consider such alternatives as additional stabilization and restoration measures or removal of the dam and restoration of impacted reaches of the river channel.

Interim Operations:

During this period of recovery and restoration of the dams, FLTF shall continue to operate and maintain the dams in a safe manner consistent current industry standard practices. FLTF should develop an Operation, Maintenance and Surveillance Plan which outlines operational procedures (if any) and type, frequency and reporting of monitoring and maintenance at each dam. Emergency action plans are required to be developed for each dam in coordination with the County Emergency Managers. These plans must be submitted to EGLE for review and should be reviewed annually FLTF and updated accordingly as modifications are made to the dams.

As high hazard dams, inspection reports are required every three years according to Part 315. Throughout 2020, the four dams underwent several inspections and in 2021 thorough engineering investigations and analyses were completed as part of the Feasibility Study. These reports satisfy the inspection requirement and the next inspection will be due by December 31, 2024.

If you have objections to our determination of ownership, you think that the dam may not meet the size criteria for regulation by Part 315, or you have any questions, please contact this office. Ms. Amira Oun, Dam Safety Unit, WRD, is assigned your area of the state. She may be reached at 517-230-5866 or OunA@Michigan.gov. Mr. Dan DeVaun, P.E., Dam Safety Unit, WRD, provides assistance for major projects. He may be reached at 989-370-1528 or DeVaunD@Michigan.gov; or you may contact me.

Sincerely,

Luke Trumble, P.E., Supervisor
Dam Safety Unit
Water Resources Division
517-256-4458

cc: Ms. Karrie Hulme, Gladwin County Clerk
Ms. Bridgette Gransden, Midland County Administrator
Mr. Bob North, Gladwin County Emergency Management
Ms. Jenifier Boyer, Midland County Emergency Management
Ms. Teresa Seidel, EGLE
Mr. Jerrod Sanders, EGLE
Ms. Amy Lounds, EGLE
Ms. Amira Oun, EGLE
Mr. Dan DeVaun, P.E., EGLE

EXHIBIT B

May 7, 2024
Project No. 2002879

VIA EMAIL: dave@keplertcp.com

Mr. David Kepler
Four Lakes Task Force
233 E. Larkin
Midland, MI 48642

Re: Dam Safety Risks to FLTF Dams In the Case of Immediate Construction Suspension
Four Lakes Task Force
Midland and Gladwin Counties, Michigan

Dear Mr. Kepler:

We understand that there is a concern from the State of Michigan Treasury Department, your primary source of funding, regarding the direction of the Four Lakes Task Force's efforts to reconstruct Secord, Smallwood, Edenville and Sanford Dams on the Tittabawassee River following the failure of Edenville and Sanford Dams and subsequent catastrophic events in 2020.

As the engineers responsible for the design, construction oversight and safety for the reconstruction of the dams, GEI stresses the critical, and potentially catastrophic consequences of suspending construction any time soon. It is imperative that reconstruction of the dams be continued to at least the safe stopping points we've identified, if stopping becomes necessary.

The failures in 2020 were life-changing to the residents of the local communities, devastating to the environment and catastrophic to the economy. *If construction were to be suspended now, a repeat failure is imminent and would again put the lives of the residents, the environmental quality and rebuilding economy at risk.*

Background

Secord Dam and Smallwood Dam did not fail during the 2020 flood event, but they did sustain damage that required stabilization repairs. Edenville Dam failed, causing the subsequent cascading breach failure of the Sanford Dam, both of which caused the devastation downstream and required significantly more stabilization work to simply control the amount of sediment being transported down the river negatively impacting the environment. In addition to those stabilization repairs which are completed, additional improvements were deemed necessary to allow for the continued safe operation of these dams under the State of Michigan's EGLE Part 315 Dam Safety statute.

To address the Part 315 requirements, reconstruction designs were completed and permitted to meet dam safety standards, and all four dams are currently in various stages of on-going re-construction to achieve the goals of the reconstruction design.

Without completion of the improvements currently underway, *these dams do not meet the minimum Dam Safety requirements set forth by EGLE and pose an unacceptable risk of failure and potential life loss.*

Secord Dam Safety Risks

Secord Dam has a partially completed auxiliary spillway, which combined with the primary spillway is designed to accommodate flood flows up to the ½ Probable Maximum Flood (PMF), which is equivalent to a ~3,500-year flood event. Without the auxiliary and primary spillways, Secord Dam cannot pass enough water to meet the requirements set forth by EGLE and meet the minimum risk mitigation requirements. The spillway chute slab anchors are yet to be installed, which resist uplift pressures under the slabs. In a flood event, if the spillway slabs were to move because the anchors are not yet tying them down, the walls and embankment slopes would become unstable leading to a catastrophic failure of Secord Dam resulting in a flood wave travelling downstream and potential consequential life loss.

The primary spillway is also under construction with only one of the primary spillway bays open to flow. Bay 1 has a downstream cofferdam and is partially demolished in preparation for a new concrete apron slab and bifurcation walls. If flow were to be passed through this bay, it would compromise the partially completed works and could lead to a failure of the primary spillway.

If left unattended in its current condition without a completed auxiliary spillway and partially demolished primary spillway, Secord Dam can only pass a 2-year flood without overtopping and risking failure.

Smallwood Dam Safety Risks

Flows at Smallwood Dam are currently being passed with a siphon system, which requires continuous operations, monitoring and maintenance. This bypass is in place to facilitate construction on the primary spillway bays, which are under demolition now. Bay 1 is protected by a temporary cofferdam structure designed to retain up to a 100-year return period flood event and would be at risk of failing should it overtop with a partially demolished barrel arch section causing the cofferdam supports to be overstressed. If the cofferdam fails, an uncontrolled release of the reservoir and failure of the dam, cascading failure of downstream dams and consequential life loss is at risk.

The new auxiliary spillway is installed and operational, which can pass flows up to a 500-year return period flood event but was not designed to pass sustained flows as it is riprap-lined. Flood events that activate the auxiliary spillway will require immediate maintenance.

Edenville Dam Safety Risks

Currently there are two outstanding risks to the Edenville Dam. The first is the temporary I-wall that was installed in the breach channel, east of the Tittabawassee spillway. This structure is intended to prevent flood flows from flowing through the breach channel formed during the flood. However, this wall will

overtop during a ~200-year return period flood event, and could fail, as it is not designed as a spillway. The second risk is the Tobacco right embankment. Currently the toe of the right embankment is being excavated to construct the new toe drain system, which results in an over-steepening of the downstream slope. In addition, active dewatering is needed for this excavation. If construction were to be ceased including shutting off the dewatering system, there is a risk the over-steepened slope could fail, particularly if there was a flood event that surcharged the reservoir.

Sanford Dam Safety Risks

Sanford Dam has a current temporary breach to pass river flow and a cofferdam sufficient to retain a 10-year return period flood event from entry into the new spillway work area. The temporary breach requires monitoring and ongoing maintenance to prevent uncontrolled erosion and sediment entry into the Tittabawassee River. Inside the cofferdam, the excavation is deep and is currently maintained by a critical dewatering system that if not maintained and fails will expose the project to catastrophic conditions and will require major rehabilitation. When the cofferdam overtops, significant erosion and structural damage to the excavations and cofferdams is expected and, if not immediately inspected and repaired, will put the cofferdams at risk of failure during future high flow events. If the cofferdam fails, the breach through the excavation adjacent to the spillway will become the new and uncontrolled river channel causing a large sediment load to be released into the Tittabawassee river and again, catastrophic conditions and will require major rehabilitation.

Closing

In summary, it would pose a high risk of dam failure and potential consequential life loss at one or more of the dams if FLTF were directed to suspended construction before the dams are at a safer stopping point. Now is not the time. If you have any questions, please feel free to contact me at cgrundeman@geiconsultants.com or (231) 330-5870.

Sincerely,

GEI Consultants of Michigan, P.C.

Carlin Grundemann, P.E.
Dam Safety Engineer

William H. Walton, P.E.
Engineer of Record, Senior Vice President

CG/WHW:lje
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EXHIBIT C

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF MIDLAND

HERON COVE ASSOCIATION, et al,

Appellants,

v.

MIDLAND COUNTY BOARD OF COMMISSIONERS, and GLADWIN COUNTY BOARD OF COMMISSIONERS, and FOUR LAKES TASK FORCE,

Appellees.
_____/

Case No. 24-2751-AA

Hon. Stephen P. Carras

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Keith T. Brown (84193)
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AFFIDAVIT OF DAVID E. KEPLER REGARDING THE FOUR LAKES TASK FORCE AND FOUR LAKES LAKE LEVEL PROJECT

STATE OF MICHIGAN)
)ss
COUNTY OF MIDLAND)

David Kepler, being first duly sworn, deposes and says:

1. I am over the age of eighteen and have personal knowledge of the facts stated in this Affidavit. If sworn as a witness, I am competent to testify to these facts.

2. The Four Lakes Task Force ("FLTF") is a Michigan non-profit IRS 501(c)(3) organization.

3. The FLTF board of directors is comprised of representatives from Midland and Gladwin counties, and property owners from Smallwood Lake, Secord Lake, Wixom Lake and Sanford Lake (the "Four Lakes").

4. The Four Lakes are located in Midland and Gladwin counties created by the impoundment of the Tittabawassee and Tobacco Rivers by dams previously owned and operated by Boyce Hydro Power, LLC and owned by BHP LLC's affiliated limited liability companies. (collectively "Boyce Hydro")

5. The FLTF is organized exclusively for charitable, educational and scientific purposes as described in Section 501(c)(3) of the Internal Revenue Code (the "Code"), including lessening the burdens of government by serving as the county delegated authority under Part 307 "Inland Lake Levels" of the Michigan Natural Resources and Environmental Protection Act, MCL 324.30701 et seq. ("Part 307") for the purpose of maintaining the inland lake water levels and dams of the Four Lakes, so as to preserve the environment, promote the welfare and safety of the public, and enhance the recreational and health benefits arising from the Four Lakes; and, to conduct all activities incidental or necessary to accomplishing the foregoing purposes or as otherwise permitted by Section 501(c)(3) of the Internal Revenue Code.

6. In 2019, the Midland and Gladwin county board of commissioners, and in accordance with Part 307 petitioned the Midland and Gladwin Circuit Court to establish the normal (or legal) levels for Wixom, Sanford, Smallwood and Secord Lakes and to establish the Four Lakes Special Assessment District ("FLSAD") to defray all costs associated with the acquisition, design, construction, improvement, repair, replacement, operation and maintenance of the four dams.

7. On May 28, 2019 following notice to all property owners within the proposed FLSAD and hearing, the Midland County Circuit Court entered an order establishing the lake levels for the Four Lakes and approved confirmed the boundaries of the FLSAD.

8. The FLSAD is a special purpose public body established in accordance with the Lake Level Order and provisions of Part 307 and is comprised of 8,170 parcels, with 6,278 parcels having direct waterfront access and 1,892 parcels having deeded private access to the waterfront (backlots).

9. The primary source of funding the acquisition, operation, maintenance, repair, replacement and improvement of all four dams was from special assessments to all the waterfront properties and backlot properties with dedicated lake access easements within the FLSAD.

10. On May 19, 2020 the Edenville dam failed, which in turn resulted in the failure of the Sanford Lake dam, the loss of both lakes, and catastrophic flooding in Midland and Gladwin counties.

11. In June 2020, the counties of Midland and Gladwin appointed the FLTF as the lead local agency in coordinating the funding, administration, design, improvement, repairs and replacement of the dams, including funding with Federal, State and local agencies.

12. In June 2020, the counties of Midland and Gladwin adopted resolutions to condemn the properties under the control of the prior owner (i.e. Boyce Hydro Power) in order to maintain the lake levels in accordance with Part 307.

13. FLTF obtained grants from both the federal and state of Michigan in excess of $200,000,000 to assist in the design, permitting and construction of the Lake Level Project.

14. All four high hazard dams are in dire need of repairs and improvements, and in the case of the Edenville (Wixom Lake) dam and Sanford Dam, require replacement in order to comply with state of Michigan's dam safety requirements ("Lake Level Project").

15. In accordance with its authority and utilizing federal and state grants, FLTF proceeded to design, obtain necessary permits and construct the Lake Level Project which, due to the complexity and state dam safety requirements, was to be completed in phases over multiple years.

16. The total cost of the Lake Level Project with contingency is $399,700,000.

17. After receiving bids and computing the final costs of the project, FLTF prepared a capital special assessment roll levying approximately 55% of the costs (or $217,700,000) of the project to the property owners in the Four Lakes Special Assessment District in order to "defray" the capital costs of the Lake Level Project.

18. The plan of financing called for spreading the lake level capital special assessments via annual installments not to exceed 40 years.

19. In addition, FLTF prepared a separate operation and maintenance special assessment roll for the years 2025 through 2029 to cover the expenses required to administer, operate and maintain the Four Lakes system during construction.

20. Until the Court's final determination of Appellants' appeal, FLTF cannot proceed with financing and completion of the final phase of the Lake Level Project and the current construction affecting each of the Four Lakes will be suspended over the next several months, resulting in significantly higher construction costs due to missed construction seasons, delayed financing, legal fees and additional staff costs.

21. Final bids for the construction phase that includes Edenville (Wixom Lake) dam were received and accepted on January 24, 2024 and are valid for 60 days, with an anticipated start date of May, 2024.

22. The table below is the timing of suspensions, and while the construction contracts contemplate that the project phases can be suspended, the consequences are that there will be increase costs and delayed construction schedules:

Dam	Suspension Date and Description
Secord	**June 2024** Shortly after the completion of the auxiliary spillway
Smallwood	**August 2024** After auxiliary spillway is complete and the low flow outlet is stabilized
Edenville	**May 2024** The final phase of the Edenville Dam, planned to start by May (pending permit), is now delayed until financing **September 2024** The completion of the current embankment improvement project
Sanford	**December 2024** Completion of the current east side work

23. A delay of the final phase of the Lake Level Project will increase costs.

I DECLARE THE ABOVE STATEMENTS TO BE TRUE TO THE BEST OF MY KNOWLEDGE, INFORMATION, AND BELIEF.

David E. Kepler II
President and Chairman, Four Lakes Task Force

Subscribed and sworn to before me
this 11th day of March, 2024.

_____, Notary Public
_____ County, Michigan
My Commission expires: _____
Acting in the county of _____

MICHELLE A MORRIS
NOTARY PUBLIC - STATE OF MICHIGAN
COUNTY OF GRATIOT
My Commission Expires December 29, 2029
Acting in the County of Midland