

**STATE OF MICHIGAN  
IN THE SUPREME COURT**

Appeal from the Court of Appeals  
Meter, PJ and Kelly and Fort Hood, JJ

GARY & KATHY HENRY, et al.,

Plaintiffs-Appellees,

v

THE DOW CHEMICAL COMPANY,

Defendant-Appellant.

Docket No. 136298

Court of Appeals Case No. 266433

Saginaw County Circuit Court

Case No. 03-47775-NZ

Hon. Leopold P. Borrello

**PLAINTIFFS-APPELLEES' BRIEF ON APPEAL**

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## **STATEMENT OF JURISDICTION**

On October 21, 2005, the Saginaw County Circuit Court, the Honorable Leopold P. Borrello, entered an Opinion and Order Granting Class Certification. On December 7, 2005, the Court of Appeals granted Dow's application for leave to appeal and stayed further proceedings. On January 24, 2008, the Court of Appeals issued an unpublished Per Curiam opinion affirming Judge Borrello's Opinion and Order Granting Class Certification. The Court of Appeals denied Dow's motion for reconsideration on March 13, 2008. On November 5, 2008, this Court granted Dow's application for leave to appeal the January 24, 2008 judgment of the Court of Appeals.

## **STATEMENT OF QUESTIONS PRESENTED**

Dow's Statement of Questions Presented accurately sets forth the issues to be briefed as reflected in this Court's November 5, 2008 Order.

## **INTRODUCTION / SUMMARY OF ARGUMENT**

In Appellant's Brief on Appeal, Dow's continued efforts to avoid class certification in this case boil down to two basic arguments: (1) that the trial court blindly certified this case without any analysis; and (2) that class certification in a case involving environmental contamination must be denied unless the plaintiffs can prove, at the class certification stage, physical intrusion of the contaminant in similar concentrations on each piece of property affected. These arguments are a gross mischaracterization of the facts underlying the trial court's decision and of the law of the State of Michigan.

Dow first claims that the trial court certified this case as a class action based on nothing more than the allegations in Plaintiffs' complaint. Dow accuses Judge Borrello of substituting Plaintiffs' "say-so" for his own independent, rigorous analysis of whether Plaintiffs satisfied the class action requirements set forth in MCR 3.501. Dow's contentions are manifestly untrue and reflect an egregious mischaracterization of the record. Plaintiffs' request for certification of this case as a class action included presentation to the trial court of an extensive evidentiary record that included the affidavit testimony of Andrew W. Hogarth, Chief of Remediation and Redevelopment Division of the Michigan Department of Environmental Quality ("MDEQ"), expert affidavit testimony of Dr. John A. Kilpatrick, numerous published materials and pronouncements from the MDEQ, and other evidence. Judge Borrello presided over a two day hearing in which both Dow and Plaintiffs were given a full and fair opportunity to present their positions on the question of class certification. After carefully considering this voluminous factual and legal record, Judge Borrello ultimately set forth a reasoned and supported opinion in favor of class certification. Far from accepting Plaintiffs' say-so, this record clearly establishes that Judge Borrello engaged in a rigorous analysis into whether Plaintiffs had demonstrated that the action satisfies all of the prerequisites of MCR 3.501. Dow's shameless claim that Judge

Borrello and the Court of Appeals have permitted this case to proceed as a class action based on nothing more than Plaintiffs' designation of such in their pleadings is not only ridiculous, it is an insult to the integrity of the trial court and the Court of Appeals.

Dow then focuses its attack on the correctness of the trial court's finding that the many common legal and factual issues presented in this case predominate over the non-common issues. Dow claims that a finding of predominance cannot exist in this case because, according to Dow: (a) the legal element of "injury" cannot be established on a class-wide basis; and (b) varying levels of dioxin contamination exist in the class area. Dow's challenge to the trial court's predominance determination is clearly misplaced.

First, Dow incorrectly asserts that the legal element of "injury" associated with Plaintiffs' tort claims requires actual physical intrusion of dioxin on each parcel of property in the class area. That is not the law in Michigan.

Moreover, even if the legal element of "injury" implicates some individual issues, those issues are clearly subordinate to the many common legal and factual issues that predominate in this case. Individualized fact-finding, if any, will concern the *amount* of damage, not the *existence* of damage (*i.e.*, the fact of injury or impact). Contrary to Dow's claim, members of the class have suffered (and continue to suffer) a common injury that can be demonstrated with generalized proof. This common injury naturally and proximately flows from Dow's pervasive contamination of the Tittabawassee River, its sediment and flood plain (*i.e.*, class area) soils. Dow's contamination has triggered state-promulgated restrictions and limitations that affect all flood plain residents' use and enjoyment of their property and has caused decreased property values throughout the class area.

Second, the unremarkable fact that soil sample test results in the class area reflect varying levels of dioxin contamination is non-dispositive of any issue on class certification. In the end, Dow cannot avoid the critical findings and conclusions that support class certification in this case, which the EPA and MDEQ summarized, in part, as follows: “***Dow Chemical, Midland, Michigan***” is the “***Primary Source***” of “***Pervasive***” dioxin contamination “***throughout the lower 24 miles of the Tittabawassee River and floodplain.***” The MDEQ has also advised flood plain residents that Dow’s pervasive dioxin contamination in the Tittabawassee River, its sediment and flood plain soils is a “***reservoir of contamination that continues to be a source [of further contamination] as it migrates.***” This and other record evidence clearly establishes the cohesiveness of the class necessary for maintenance of this case as a class action.

After considering an extensive factual and legal record and conducting a rigorous analysis into whether Plaintiffs had demonstrated that the action satisfies all the prerequisites of MCR 3.501, the trial court properly exercised its discretion and correctly certified this case as a class action. Judge Borrello’s certification decision is consistent with Michigan law and supported by the overwhelming weight of environmental pollution class action case law from across the country (including case law from the federal courts applying Michigan law) that involve similar negligence and nuisance claims for property damage. Based on its examination of this extensive record, the Court of Appeals correctly held that the trial court’s class certification decision was not clearly erroneous. This Court should affirm and permit this action to be maintained as a class action pursuant to MCR 3.501.

## COUNTER-STATEMENT OF PROCEDURAL BACKGROUND

Plaintiffs filed this lawsuit on March 25, 2003. As required by MCR 3.501(B)(1), Plaintiffs filed a timely motion for class certification and supporting memorandum on June 23, 2003 (*i.e.*, within 91 days after the filing of the complaint). Dow then requested and was granted leave by the trial court to undertake discovery for the ostensible and limited purpose of responding to Plaintiffs' motion for class certification. Over the next 8 months, Dow received verified interrogatory answers from 158 Plaintiffs and 15,000 pages of documents from Plaintiffs. Dow also deposed 49 Plaintiffs, 2 expert witnesses identified by Plaintiffs and 1 third-party witness. During this period of time, the trial court intervened and reminded Dow that discovery at this juncture of the proceedings was limited to matters relevant to the Court's findings pursuant to MCR 3.501. *See* Opinion and Order (11/07/2003) Denying Defendant's Motion for Discovery (0974b). Dow has never produced a single document to Plaintiffs or had any of its personnel under oath for a deposition.<sup>1</sup> Such discovery is currently stayed and awaits Dow in the trial court when the case proceeds to merits discovery.

On February 27, 2004, Dow filed its opposition brief to Plaintiffs' motion for class certification. As in its submission to this Court, Dow impermissibly sought to have the trial court look well beyond the pleadings and evaluate numerous pages of merits-based contentions, including purported expert testimony put forward by Dow on the merits of the underlying claims, all of which are irrelevant (or non-dispositive) to the threshold determination of class certification under MCR 3.501.

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<sup>1</sup> Dow's statement that "[t]he **parties** conducted extensive discovery in connection with the motion [for class certification]" is simply untrue.

On March 19, 2004, Plaintiffs filed their reply memorandum in support of class certification.<sup>2</sup> Plaintiffs demonstrated that Dow's merits-based arguments were not only irrelevant to a determination of class certification, but were also directly refuted by the detailed allegations in Plaintiffs' Complaint,<sup>3</sup> which Plaintiffs supported with affidavit testimony of Andrew W. Hogarth,<sup>4</sup> Chief of Remediation and Redevelopment Division of the Michigan Department of Environmental Quality ("MDEQ"), expert affidavit testimony of Dr. John A. Kilpatrick, published materials and pronouncements from the MDEQ, and other evidence. Plaintiffs also demonstrated that Dow's legal arguments fared no better. Plaintiffs outlined for the trial court a series of decisions (representing the clear trend in jurisprudence) that certified environmental pollution cases involving facts and legal arguments nearly identical to those in this case.

On June 3, 2004, just days before the trial court's scheduled class certification hearing, this Court granted Dow's application for leave to appeal the Circuit Court's order denying summary disposition as to Plaintiffs' medical monitoring claim. This Court also stayed all further proceedings in the trial court until further order of the Court. On July 13, 2005, this Court held that Plaintiffs' cause of action for medical monitoring could not be sustained under Michigan law. *Henry v Dow Chemical Co*, 473 Mich 63, 102; 701 NW2d 684 (2005).

On remand to the trial court, Judge Borrello (in light of the time since class certification briefing was originally completed) requested any supplemental briefing on class certification from Plaintiffs by September 2, 2005 and any response from Dow by September 13, 2005. Both

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<sup>2</sup> A copy of Plaintiffs' Reply Memorandum in Support of Motion for Class Certification (with attachments) is contained in Plaintiffs' Appendix at 0044b-0976b.

<sup>3</sup> A copy of Plaintiffs' Third Amended Complaint is contained in Plaintiffs' Appendix at 0001b.

<sup>4</sup> A copy of Mr. Hogarth's sworn statement is contained in Plaintiffs' Appendix at 0800b.

parties submitted supplemental briefing.<sup>5</sup> A two-day hearing on class certification took place on September 15 and 16, 2005.<sup>6</sup> Dow declined the trial court's invitation to present any evidentiary proof at the class certification hearing. Instead, the trial court heard legal argument from the parties in connection with a controverted factual record. At the hearing, both sides were given a full and fair opportunity to present their arguments and respond to a multitude of focused questions from Judge Borrello regarding the determinations he was being asked to make under MCR 3.501. At the conclusion of the hearing, Judge Borrello granted the parties leave to supplement the record even further prior to issuance of his decision. Plaintiffs submitted a short supplement to the record on October 5, 2005, to address certain questions from the trial court and concerns from Dow regarding Plaintiffs' proposed class definition.<sup>7</sup> Dow responded to Plaintiffs' supplemental submission on October 14, 2005.

Although the trial court initially intended to issue its decision on October 11, 2005, Judge Borrello advised the parties by letter dated October 4, 2005 that the transcript of the proceeding of September 15 and 16, 2005, would not be ready until October 7, 2005. Judge Borrello further stated: "Since the Court would want an opportunity to review the transcript carefully, I have adjourned the issuance of my decision until Friday, October 21, 2005, at 11:00 a.m."<sup>8</sup>

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<sup>5</sup> A copy of Plaintiffs' Supplemental Brief in Support of Motion for Class Certification (with attachments) is contained in Plaintiffs' Appendix at 0876b.

<sup>6</sup> A copy of the transcript of the two-day hearing is contained in Dow's Appendix at 680a (09/15/2005) and 0722a (09/16/2005).

<sup>7</sup> A copy of Plaintiffs' Supplement to Record of September 15-16, 2005 Hearing (with attachments) is contained in Plaintiffs' Appendix at 0909b.

<sup>8</sup> A copy of the Circuit Court's October 4, 2005, letter to counsel is contained in Plaintiffs' Appendix at 0976b.

On October, 21, 2005, the trial court issued its Opinion and Order Granting Class Certification.<sup>9</sup> Prior to reading his decision, Judge Borrello complimented the attorneys on their representation of their respective clients and for their very thorough job of assisting the Court and focusing on the issues and appropriate law. *See* Transcript (10/21/05) at 4:5-11 (0755a) (“Before I give the opinion of the Court, I want to compliment the attorneys for their very good representation of their respective clients and especially by assisting me and focusing on the issues and doing a very thorough job of citing the proper -- the appropriate law that applies, and I want to thank the attorneys for a job well done.”).<sup>10</sup> The trial court’s Opinion and Order Granting Class Certification identifies the appropriate standard of review, analyzes each requirement of MCR 3.501(A)(1) and concludes that Plaintiffs met their burden of proof for class certification. As required by MCR 3.501(B)(3)(c), the trial court also set forth a description of the class in its Order.

On November 14, 2005, Dow filed an emergency application for leave to appeal with the Court of Appeals and requested a stay of further proceedings. On December 7, 2005, the Court of Appeals granted Dow’s application for leave to appeal and stayed further proceedings pending resolution of the appeal or further order of the Court. On January 12, 2006, Plaintiffs sought partial relief from the Court’s stay Order and requested the opportunity to proceed with certain non-class, merits discovery during the pendency of Dow’s appeal. In a split decision, the Court of Appeals denied Plaintiffs’ motion for partial relief from the Court’s stay of proceedings. On May 7, 2007, the Court of Appeals heard oral argument from the parties on Dow’s appeal.

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<sup>9</sup> A copy of the Circuit Court’s Opinion and Order Granting Class Certification is contained in Dow’s Appendix at 0767a.

<sup>10</sup> A copy of the transcript of the ruling on class certification is contained in Dow’s Appendix at 0752a.

On January 24, 2008, the Court of Appeals issued a Per Curiam opinion affirming the trial court's class certification decision, holding that the trial court did not clearly err in certifying the class.<sup>11</sup> Dow's motion for reconsideration was denied on March 13, 2008. Dow filed its application for leave to appeal to this Court on April 24, 2008. Plaintiffs responded on May 18, 2008, and Dow filed its reply brief on June 19, 2008. On November 5, 2008, this Court granted Dow's application for leave to appeal and specified the issues to be briefed.

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<sup>11</sup> A copy of the Court of Appeals' Per Curiam Order is contained in Dow's Appendix at 0888a.

## COUNTER-STATEMENT OF FACTS

The following is a summary overview of the relevant and controlling factual record before the Circuit Court upon which Judge Borrello's Opinion and Order Granting Class Certification rests. A more detailed statement of facts with supporting citations to the record is set forth at (1) pages 1 – 19 of Plaintiffs' Reply Memorandum in Support of Class Certification (0051b-0069b); (2) page 2 of Plaintiffs' Supplemental Brief in Support of Motion for Class Certification (0878b); and (3) pages 2 – 5 of Plaintiffs' Supplement to Record of September 15-16, 2005 Hearing (0910b-0913b) — all of which are incorporated herein by reference. Certain aspects of this record are summarized in the Court of Appeals' Per Curiam Order as well as in this Court's prior decision concerning Plaintiffs' medical monitoring claim.

Dow has maintained a plant on the banks of the Tittabawassee River in Midland, Michigan for over a century. The plant has produced a host of products, including, to name only a few, styrene, butadiene, picric acid, mustard gas, Saran Wrap, Styrofoam, Agent Orange, and various pesticides including Chlorpyrifos, Dursban and 2, 4, 5-trichlorophenol. *Henry*, 473 Mich at 69; Michigan Department of Community Health Pilot Exposure Investigation – Health Consultation, July 8, 2005 (0785a); Third Amended Class Action Complaint and Jury Demand (“Third Amended Complaint”), para. 116-154 (0017b-0027b).

According to published reports from the MDEQ, Dow's operations in Midland have harmed the local environment. In 2000, General Motors Corporation was testing soil samples in an area near the Tittabawassee River and the Saginaw River when it discovered the presence of dioxin, a hazardous chemical proven to cause a variety of health problems such as cancer, liver disease, and birth defects. Hogarth Affidavit, para. 4 (0802b); Third Amended Complaint, para. 136 (0023b). By Spring 2001, the MDEQ had confirmed the presence of dioxin in the soil of the Tittabawassee flood plain at levels that substantially exceed Michigan's cleanup standard of 90

parts per trillion (ppt) for direct residential contact. In fact, the MDEQ found as much as 7,300 ppt of dioxin in the flood plain. The MDEQ's testing further revealed that Dow is the principal source of the dioxin in the Tittabawassee flood plain. *Henry*, 473 Mich at 69, 105-06; Hogarth Affidavit, para. 13 (0804b-0805b); Michigan Department of Environmental Quality, Remediation and Redevelopment Division, *Final Report, Phase II Tittabawassee/Saginaw River Dioxin Flood Plain Sampling Study*, June 2003, ("MDEQ Final Phase II Report, June 2003") p. 42 (0237b); Third Amended Complaint, paras. 3 (00006b), 117 (0018b), 136-154 (0023b-0027b).

"Dioxin" is the term used to identify a number of similar toxic chemicals. Dioxin is a known human carcinogen. Exposure to dioxin can cause cancer, liver disease, birth defects, miscarriages, and reproductive damage, as well as other illnesses. Children are more significantly affected by dioxin than adults. Dioxin does not break down easily, either in the environment or in the human body. Once dioxin is released into the environment, it stays in the environment for an extremely long time. When dioxin gets into a person's body, it stays indefinitely in a person's blood and body fat. Because dioxin stays in the body for such a long time, the adverse effects of dioxin exposure may not be immediate. *Henry*, 473 Mich at 106; MDEQ Final Phase II Report, June 2003, p. 42 (0237b); MDEQ "Dioxins Fact Sheet" (0767b-0768b); Third Amended Complaint, paras. 118-154 (0018b-0027b). A pilot study of the Tittabawassee River flood plain community conducted by the Michigan Department of Community Health found that fifty to eighty percent of the people tested have dioxin levels that put them in the 75<sup>th</sup> to the 95<sup>th</sup> percentile compared to the national average for their age and gender. *Henry*, 473 Mich at 106-07; ATSDR Pilot Investigation, July 8, 2005, p. 7 *et seq.* (0797a).

As set forth in the sworn statement of Andrew W. Hogarth, the chief of remediation and redevelopment for the MDEQ, the MDEQ's involvement with dioxin in the property in the flood plain began with a Phase I investigation, which found a pervasive distribution of dioxin contaminated soil on flood plain properties. To more clearly define the geographic area impacted by this pervasive distribution of dioxin and to allow the MDEQ to communicate with affected residents and property owners, the MDEQ hired a survey firm to prepare a flood plain map and developed the estimated 100-year flood plain contour of the Tittabawassee River. *See* Hogarth Affidavit, paras. 1-17 (0801b-0805b); Per Curiam Order of Court of Appeals at 11-12 (0898a-0899a).

Relying on the survey and map, the MDEQ began communicating with the residents of the Tittabawassee 100-year flood plain in early 2002. Hogarth Affidavit, paras. 1-17 (0801b-0805b).<sup>12</sup> The MDEQ notified these residents that they live in an area contaminated with dioxin, that dioxin exposure constitutes a serious and real threat to their health and welfare, and that, as a result, residents of the flood plain must take measures to protect themselves and their children from the harmful consequences of dioxin exposure. MDEQ *Information Bulletin, Tittabawassee/Saginaw River Flood Plain*, February 2002 (0148b-0149b); MDEQ "Dioxins Fact Sheet" (0767b-0768b); Third Amended Complaint, paras. 2 (0006b), 124-154 (0020b-0027b). The MDEQ expounded on the nature and extent of the dioxin contamination in several mailings to flood plain residents. The MDEQ has advised flood plain residents that routine activities, such as flower gardening and lawn work, could further increase their risk of dioxin exposure. Flood plain residents are also advised that they should not allow their children to play in the soil

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<sup>12</sup> Exemplars of the MDEQ's written communications to flood plain residents are contained in Plaintiffs' Appendix at 0767b-0768b; 0123b-0124b; 0148b-0149b; 0142b-0145b; 0136b-0139b; 0127b-0133b; 0152b; 0155b-0156b; 0159b-0160b.

to avoid further contamination. Hogarth Affidavit, paras. 9-11, 15 (0803b-0805b); MDEQ Information Bulletins Dated February 2002 (0148b-0149b), August 2002 (0142b-0145b), June 2003 (0136b-0139b), and March 2004 (0127b-0133b); MDEQ “Dioxins Fact Sheet” (0767b-0768b); Third Amended Complaint, para. 141-149 (0024b-0026b).

The MDEQ also communicated to flood plain residents that the Tittabawassee River sediments and flood plain soils “are a reservoir of contamination that continues to be a source as it migrates.” MDEQ Information Bulletin #4, March 2004 (0127b-0133b).

Environmental soil samples taken in June, 2004 from several locations within the flood plain downstream of Dow confirmed the MDEQ’s finding of pervasive contamination in this geographic area. As set forth in a written report dated March 2005, Dow’s own consultant confirmed that one hundred percent (100%) of the various sample sites it tested within the flood plain downstream of Dow had dioxin contamination that exceeded Michigan’s direct residential contact standard of 90 ppt. *See Ecological Risk Assessment, Support Sampling, Prepared for Dow Chemical Company, March, 2005 (0900b-0908b).* Even more shocking, seventy-five percent (75%) of these soil samples had ppt levels ranging from 1359 to 8920 ppt or between 15 times and almost 100 times the residential contact standard. *Id.*

The EPA and MDEQ have summarized their extensive record, findings and conclusions concerning the pervasive presence of dioxin contamination in the flood plain, confirming as follows: ***“Dow Chemical, Midland, Michigan” is the “Primary Source” of “Pervasive” dioxin contamination “throughout the lower 24 miles of the Tittabawassee River and floodplain.”*** EPA / MDEQ PowerPoint Presentation, Slide #5 (1040b). *See also* MDEQ Final Phase II Report, June, 2003, p. 42 (0237b) (“The Phase II study identified that elevated dioxin concentrations were pervasive in Tittabawassee River 100-year flood plain soil downstream of

Midland. . . . The Dow Chemical Company manufacturing facility (Dow) in Midland is the principal source of dioxin contamination in the Tittabawassee River sediments and the Tittabawassee River flood plain soils.”).

As a result of Dow’s pervasive dioxin contamination throughout the Tittabawassee River and its flood plain, class members have been injured and suffered property damages, including the loss in value of property and the loss of use and enjoyment of property. Through fate and transport modeling and further analysis / extrapolation of existing and future testing of soil samples in the class area, Plaintiffs can readily establish that all members of the class have a common injury that can be demonstrated through generalized proof. Plaintiffs also intend to show at trial that the impact of Dow’s contamination on flood plain property values can and should be determined on a class-wide basis through a mass appraisal model. Kilpatrick Affidavit (0809b-0831b). As explained by Plaintiffs’ expert, Dr. Kilpatrick, the class action model is not only the best way to manage the estimation of losses in this case, the overwhelming weight of prevailing valuation methodology and the Uniform Standards of Professional Appraisal Practice make it difficult, if not impossible, to consider this valuation problem without resorting, at least *de facto*, to a mass-appraisal model. *Id.*

## STANDARD OF REVIEW

A trial court's order on class certification is reviewed for clear error. *See Hill v City of Warren*, 469 Mich 964, 964; 671 NW2d 534 (2003) (holding that trial court's class certification decision was not "clearly erroneous"); *Hill v City of Warren*, 276 Mich App 299, 310; 740 NW2d 706 (2007) ("A trial court's ruling regarding certification of a class is reviewed for clear error, meaning that the ruling will be found clearly erroneous only where there is no evidence to support it or there is evidence but this Court is nevertheless left with a definite and firm conviction that a mistake has been made."). *See also* MCR 2.613(C) ("Review of Findings by Trial Court. Findings of fact by the trial court may not be set aside unless clearly erroneous.").

## ARGUMENT

The purpose of MCR 3.501, like its federal counterpart Rule 23, is the efficient resolution of claims or liabilities of many individuals in a single action, the elimination of repetitious litigation and possibly inconsistent adjudications involving common questions, related events, or requests for similar relief, and the establishment of an effective procedure for those whose economic position is such that it is unrealistic to expect them to seek to vindicate their rights in separate lawsuits. 7A Wright, Miller & Kane, *Federal Practice and Procedure: Civil 2d* § 1754 (2d ed. 1986). *See also* Schwarzer, *Structuring Multiclaime Litigation: Should Rule 23 Be Revised*, 94 Mich L Rev 1250, 1250-55 (1996). Class actions serve an important function in our system of justice. In addition to promoting judicial economy and efficiency, class actions seek to “vindicate the rights of individuals who otherwise might not consider it worth the candle to embark on litigation in which the optimum result might be more than consumed by the cost.” *Deposit Guaranty National Bank v Roper*, 445 US 326, 338 (1980). *See also* *Oakwood Homeowners Ass’n, Inc v Ford Motor Co*, 77 Mich App 197, 215; 258 NW2d 475 (1977) (rejecting rule that, if applied, “would work ‘the possible debilitation and blunting of the instrument (i.e., the class action) so useful to everyday, average citizens lost and bewildered in the jungle of giants’”); *In re MBTE Products Liability Litigation*, 241 FRD 185, 194 (SDNY, 2007) (“For these reasons, courts are to give Rule 23 a liberal rather than a restrictive construction, adopting a standard of flexibility in application which will in the particular case best serve the ends of justice for the affected parties and promote judicial efficiency.”).

Dow asks this Court to ignore these important policy considerations as well as the plain language of the Michigan class action rule itself, and erect significant and unjustified barriers to litigants, including Plaintiffs here, seeking to invoke the class action mechanism in this State.

Dow further seeks to have this Court strip this State's trial courts of their broad discretion in deciding whether to certify a class and how best to manage their dockets.

Dow's alarmist plea that class certification in this case will mark the dawn of a new generation of class action abuse in this State is pure hyperbole. This Court should not indulge Dow's efforts to mischaracterize, overstate and overcomplicate what are straightforward claims based on a common set of facts and legal theories that are ideally suited for class action treatment under MCR 3.501. The trial court acted within its broad discretion and followed established case law when it certified an objectively identifiable class of approximately 2,000 property owners as of a single date (February 1, 2002), in a local and narrowly-defined geographic location (the 100 year Flood Plain of the Tittabawassee River in Saginaw County, Michigan, as defined by reference to the MDEQ's study and investigation) to pursue nuisance and negligence claims against a single responsible party (Dow) that released specific carcinogenic toxins (dioxin) and caused damage to class members' property values. The Court of Appeals correctly held that the trial court did not clearly err in certifying the class. This Court should affirm and permit this action to be maintained as a class action pursuant to MCR 3.501.

**I. BEFORE CERTIFYING A CLASS UNDER MCR 3.501, THE TRIAL COURT PROPERLY EVALUATED PLAINTIFFS' MOTION FOR CLASS CERTIFICATION IN A MANNER CONSISTENT WITH BOTH ESTABLISHED MICHIGAN LAW AND THE "RIGOROUS ANALYSIS" REQUIREMENT FOR CLASS CERTIFICATION APPLIED IN THE FEDERAL COURTS.**

**A. THE "RIGOROUS ANALYSIS" REQUIREMENT FOR CLASS CERTIFICATION THAT IS APPLIED IN VARYING FORMS IN THE FEDERAL COURTS DOES NOT CONTROL STATE CLASS ACTIONS.**

This State's class action rule is set forth at MCR 3.501 and reflects an act by this Court, pursuant to authority granted by the Michigan Constitution, to establish a general rule of practice and procedure applicable to courts of this State. *See* Const 1963 art 6, § 5. The right of a litigant to employ the class action rule in appropriate circumstances is a procedural right only, ancillary

to the litigation of substantive claims. See *Comm'r of Ins v Arcilio*, 221 Mich App 54, 71; 561 NW2d 412 (1997).

The threshold issue identified by this Court in its Order granting Dow's application for leave to appeal is "whether the 'rigorous analysis' requirement for class certification that is applied in the federal courts also applies to state class actions, see *Gen Tel Co of the Southwest v Falcon*, 457 US 147, 161; 102 S Ct 2364; 72 L Ed 2d 740 (1982)." At its most basic level, Michigan courts are not bound by a federal case construing the federal rule on class actions when called upon to construe this State's class action rule. See *Abela v Gen Motors Corp*, 469 Mich 603, 606-07; 677 NW2d 325 (2004). Michigan law simply "adhere[s] to the rule that a State court is bound by the authoritative holdings of Federal courts upon Federal questions." *Schueler v Weintrob*, 360 Mich 621, 633; 105 NW2d 42 (1960). Whether a plaintiff can sue a defendant in a Michigan circuit court on behalf of himself and others similarly situated is purely a procedural question of state law governed by MCR 3.501. See *Grigg v Michigan Nat'l Bank*, 405 Mich 148, 166; 274 NW2d 752 (1979). Thus, while *Falcon* or other federal court decisions on class action practice or procedure may provide guidance, they are not binding on Michigan courts.<sup>13</sup>

Neither this Court nor any published opinion of the Court of Appeals has specifically considered whether the "rigorous analysis" requirement for class certification that is applied in the federal courts (albeit in varying forms and permutations depending on the federal circuit court of appeal in which the action is pending) should apply, and if so, in what form, to state

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<sup>13</sup> As another state Supreme Court observed when addressing federal cases interpreting a federal counterpart to its state class action rule: "A federal case interpreting a federal counterpart to a [state] rule of procedure may be persuasive, but it is not binding or controlling. Our reasoning for this rule is to avoid having our legal analysis of our Rules amount to nothing more than Pavlovian responses to federal decisional law." *In re West Virginia Rezulin Litig*, 214 W Va 52, 61; 585 SE2d 52 (2003).

class actions. Importantly, however, at the time of the trial court’s certification decision in this case and equally applicable today, the Court of Appeals appropriately identified in its published opinions the following salient points when evaluating a motion for class certification under MCR 3.501:

1. The burden is on the plaintiff to show that the requirements for class certification exist.
2. The trial court is required to accept the allegations made in support of the request for certification as true.<sup>14</sup>
3. The merits of the case are not examined.

*Neal v James*, 252 Mich App 12, 15; 651 NW2d 181 (2002); *Tinman v Blue Cross & Blue Shield of Michigan*, 264 Mich App 546, 562; 692 NW2d 58 (2005); *Hill v City of Warren*, 276 Mich App 299, 310; 740 NW2d 706 (2007).<sup>15</sup> See also 1A Michigan Pleading & Practice § 15:45 (2d ed) (same).

Although the Court of Appeals has not included the precise words “rigorous analysis” in its published opinions, the standard enunciated by the Court of Appeals for evaluating a motion for class certification under MCR 3.501 is entirely consistent with the standard for class certification under federal Rule 23 applied by federal courts in this State – which Dow conveniently ignores in its brief. For example, the United States District Court for the Eastern District of Michigan has described the “rigorous analysis” requirement identified by the Supreme

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<sup>14</sup> Although an obvious point, the Court of Appeals has made clear that “[t]his does not, however, require that the trial court ‘blindly rely on conclusory allegations’ that merely ‘parrot’ the requirements for class certifications.” *Jackson v Wal-Mart Stores, Inc*, unpublished opinion per curiam of the Court of Appeals, issued Nov 29, 2005; 2005 WL 3191394, at \*2 (Docket No. 258498). Judge Borrello was aware of this obvious point of clarification as the Court of Appeals’ decision in *Jackson* affirmed Judge Borrello’s class certification decision in that case.

<sup>15</sup> A published opinion of the Court of Appeals that has not been reversed or modified by this Court has precedential effect under the rule of stare decisis. See MCR 7.215(C)(2) & (J)(1). Judge Borrello properly followed published opinions of the Court of Appeals in his class certification decision.

Court in *Falcon* and other applicable authorities when evaluating a motion for class certification under federal Rule 23 as follows:

The Court must conduct a “rigorous analysis” into whether the movant has demonstrated that the action satisfies all of the prerequisites of Rule 23(a). Thus, a plaintiff must show that the action satisfies Rule 23(a)’s numerosity, commonality, typicality, and adequacy of representation requirements. A district court has broad discretion in determining whether to certify a class; yet, it must exercise that discretion within Rule 23’s framework. A district court may not inquire into the merits of the class representatives’ underlying claims, but should accept the complaint’s allegations as true. The district court, however, may only certify a class where “an adequate statement of the basic facts” demonstrates that each of Rule 23’s requirements are met. In making such a determination, a district court may draw reasonable inferences from the facts before it. Moreover, when in doubt as to whether to certify a class action, the district court should err in favor of allowing a class.

*Rankin v Rots*, 220 FRD 511, 517 (ED Mich, 2004) (internal citations omitted).

The United States District Court of the Western District of Michigan has similarly described the standard for evaluating a motion for class certification as follows:

The plaintiffs bear the burden of establishing the right to class certification. The court’s discretion in deciding whether to certify a class must be exercised within the framework of Rule 23. Before certifying a class, the court must conduct a “rigorous analysis” of whether Rule 23 prerequisites are met. In making its analysis, the court may not consider the merits of the case, but must accept the allegations of the complaint as true and resolve doubts in favor of the plaintiffs. The court may draw reasonable inferences from the facts before it.

*Bell v Caruso*, 2007 WL 3275067, at \*3 (WD Mich, Nov 5, 2007) (internal citations omitted).<sup>16</sup>

These Michigan federal district court decisions are predictably in accord with the federal court of appeals embracing Michigan, which has similarly stated:

Before certifying a class action, district courts must conduct a “rigorous analysis” into whether the movant has demonstrated that the action satisfies all of the prerequisites of Federal Rule of Civil Procedure

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<sup>16</sup> All unpublished opinions cited herein and not already included in Dow’s Appendix are included in Plaintiffs’ Appendix filed along with this brief.

23(a). . . . Thus, as a prerequisite to certification of a class action, plaintiffs must show that the action satisfies Federal Rule of Civil Procedure 23(a)'s numerosity, commonality, typicality, and adequacy of representation requirements. A district court has broad discretion in determining whether to certify a class; yet, it must exercise that discretion within Rule 23's framework. A district court may not inquire into the merits of the class representatives' underlying claims, but should accept the complaint's allegations as true. Nevertheless, a district court cannot certify a class action based on "its designation as such in the pleadings." Rather, the district court may only certify a class where "an adequate statement of the basic facts" demonstrates that each of Rule 23's requirements are met. Ordinarily, a district court must determine the permissibility of class certification based upon information other than that which is in the pleadings although it may do so based on the pleadings alone where they set forth sufficient facts. In making such a determination, a district court may draw reasonable inferences from the facts before it.

*Reeb v Ohio Dep't of Rehab*, 81 Fed Appx 550, 555 (CA 6, 2003) (internal citations omitted).  
*See also Rosiles-Perez v Superior Forestry Serv, Inc*, 250 FRD 332, 337 (MD Tenn, 2008) (outlining standard for evaluating motion for class certification under Rule 23 as explained by United States Supreme Court, Sixth Circuit Court of Appeals and other relevant authorities).

Thus, to the extent this Court concludes that some form of additional explanation is necessary to describe the appropriate standard for evaluating a motion for class certification in this State and is persuaded to adopt an articulation of the "rigorous analysis" requirement applied in the federal courts to state class actions, this Court need look no further than these decisions for guidance. These cases strike the correct balance among the competing tensions present in current federal jurisprudence on resolving motions for class certification under federal Rule 23. These cases also appropriately preserve the integrity of a trial court's discretion to resolve a procedural motion for class certification and determine how best to manage its docket.<sup>17</sup>

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<sup>17</sup> In the present situation, if this Court were persuaded to look to federal law for guidance, it should find these decisions from the federal district courts in Michigan and Sixth Circuit to be particularly persuasive given the frequency in which these courts deal with issues of Michigan law and its citizens. *Cf Schueler*, 360 Mich at 49 ("We choose to follow the holding of the sixth circuit court of appeals which is the circuit court most familiar with Michigan law.").

**B. THE TRIAL COURT ENGAGED IN A RIGOROUS ANALYSIS PRIOR TO CONCLUDING THAT PLAINTIFFS MET THEIR BURDEN OF PROVING THAT THE CONDITIONS FOR CERTIFICATION FOUND IN MCR 3.501 WERE SATISFIED.**

After considering extensive briefing by the parties and actively participating in a two-day hearing during which the requirements of MCR 3.501 were comprehensively addressed both in the presentation of the parties and in the parties' responses to the court's multitude of focused questions (and thereafter delaying a decision until he could thoroughly review the hearing transcript), Judge Borrello issued a reasoned and supported opinion in favor of class certification. Judge Borrello's class certification decision is consistent with Michigan law and supported by the overwhelming weight of environmental pollution class certification case law from across the country. The Court of Appeals agreed; holding that the trial court's class certification decision was not clearly erroneous.

Dow repeatedly claims that the trial court and the Court of Appeals have permitted this case to proceed as a class action based on nothing more than the allegations in Plaintiffs' complaint. Dow suggests that Plaintiffs' mere designation of this case as a class action in their pleadings controlled, and that neither Judge Borrello nor the Court of Appeals engaged in any independent analysis of whether Plaintiffs satisfied the requirements necessary for this suit to be maintained as a class action. As the record clearly establishes, Dow's contentions are manifestly untrue and reflect an egregious mischaracterization of the record. As noted above, Plaintiffs' request for class certification included presentation to the trial court of an extensive evidentiary record that included the affidavit testimony of Andrew W. Hogarth, Chief of Remediation and Redevelopment Division of the MDEQ, expert affidavit testimony of Dr. John A. Kilpatrick, numerous published materials and pronouncements from the MDEQ, and other evidence. (0044b-0973b). This extensive evidentiary record, as well as the detailed substantive allegations

in Plaintiffs' Third Amended Complaint (0001b-0043b), provided a far more than sufficient factual showing to support class certification in this case.

Dow attempts to assign error to the following statement from Judge Borrello in his written opinion: "When evaluating a motion for class certification, the court is to accept the allegations of the plaintiff in support of the motion as true. The merits of the case are not examined." Dow chastises Judge Borrello for his citation to a federal district court case as support for this proposition. Upon examination, it is clear that no error is present here. In fact, the proposition stated by Judge Borrello as a portion of the appropriate standard for evaluating a motion for class certification is directly from a firmly established, published decision from the Court of Appeals, *Neal v James*, 252 Mich App 12, 15; 651 NW2d 181 (2002) ("When evaluating a motion for class certification, the trial court is required to accept the allegations made in support of the request for certification as true. The merits of the case are not examined."). Moreover, Judge Borrello was, of course, not saying that merely because Plaintiffs' *allege* compliance with the requirements of MCR 3.501, such requirements must therefore be deemed conclusively established for purposes of a trial court's class certification decision. Rather, Judge Borrello was simply indicating that he was properly declining Dow's invitation to delve into the merits and resolve conflicting evidence as part of a decision on class certification.<sup>18</sup>

While it may be appropriate in a particular case for a court to engage in a limited factual analysis and probe behind the pleadings (and consider, for example, discovery responses, affidavits and other evidence submitted by the parties) before coming to rest on a certification

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<sup>18</sup> As the Court of Appeals correctly observed, Dow's assertions and claimed proofs, including Dow's contentions concerning variant dioxin levels, among others, were contradicted by information Plaintiffs presented from the MDEQ and other sources. *See Per Curiam Order at 11 (0898a)*.

question (just as Judge Borrello did here), it is important to recall that a court “should not attempt to resolve factual disputes” and that at the point at which a trial court is called upon to make its threshold class certification decision, “the Court’s duty is to determine only if there is a sufficient factual showing to support the class sought to be certified.” *Rosiler-Perez*, 250 FRD at 337.

Dow also ignores the very next sentence in the trial court’s written decision, which sets forth the dispositive point: “The plaintiff bears the burden of proving that the class should be certified.” Thus, there can be no credible contention that Judge Borrello applied an inaccurate standard for evaluating Plaintiffs’ motion for class certification. Judge Borrello squarely placed the burden on Plaintiffs’ to prove, not just merely allege, that the action meets the conditions for certification found in MCR 3.501(A)(1). And the record clearly establishes that Plaintiffs met that burden here.

Dow directs this Court to the Court of Appeals unpublished decision in *Jackson v Wal-Mart Stores, Inc.* in support of its effort to assign error, but quotes only select portions of that Court’s opinion in identifying an appropriate standard for evaluating a motion for class certification. In *Jackson*, the Court of Appeals actually recites the same proposition stated by Judge Borrello in this case and included in the Court of Appeals prior published decision in *Neal*:

When evaluating a motion for class certification, the trial court may not examine the merits of the case. Rather, it must accept as true the allegations made in support of the request for certification. This does not, however, require that the trial court “blindly rely on conclusory allegations” that merely “parrot” the requirements for class certifications.

*Jackson v Wal-Mart Stores, Inc.*, unpublished opinion per curiam of the Court of Appeals, issued Nov 29, 2005; 2005 WL 3191394, at \*2 (Docket No. 258498).<sup>19</sup>

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<sup>19</sup> As noted above, the Court of Appeals’ unpublished decision in *Jackson* affirmed Judge Borrello’s class certification decision in that case.

In other respects, it is simply absurd on this record for Dow to claim that Judge Borrello failed to engage in a rigorous analysis before certifying this case as a class action. In Dow's view, Judge Borrello committed reversible error by not including in his written opinion specific discussion and analysis of each factual and legal contention advanced by the parties in their underlying (and voluminous) briefing and argument. Contrary to Dow's suggestion, no such requirement exists. In fact, the plain language of the Michigan Court Rules specifically provides: "Findings of fact and conclusions of law are unnecessary in decisions on motions unless findings are required by a particular rule. See, e.g., MCR 2.504 (B)."<sup>20</sup> See MCR 2.517(A)(4). The Court of Appeals has held that such findings are not required by Michigan's class action rule, MCR 3.501. See *Creech v WA Foote Mem'l Hosp, Inc*, 2004 WL 1258011, at \*7 (Mich App, June 8, 2004) ("findings and conclusions need not be recited when a court rules on a motion [for class certification] [when] arguments with respect to most of the factors were presented to the trial court").<sup>21</sup> See also *In re Cotton Institute*, 208 Mich App 180, 182-83; 526 NW2d 601 (1994) ("[T]he court technically was not required to make findings of fact and conclusions of law under the court rule, because that obligation does not apply to decisions on motions. In any event, a trial court's findings are sufficient under MCR 2.517(A) if it appears

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<sup>20</sup> Compare MCR 2.504 (B)(2) ("If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in MCR 2.517.") with MCR 3.501 (B)(3) ("Action by Court. . . . (b) The court may allow the action to be maintained as a class action, may deny the motion, or may order that a ruling be postponed pending discovery or other preliminary procedures. (c) In an order certifying a class action, the court shall set forth a description of the class. . . ."). The plain language of the Michigan class action rule also differs in this regard from federal Rule 23, which contains specific reference to the trial court making "findings" and requires more content in a trial court's certification order than required by the Michigan class action rule. Compare MCR 3.501(A) & (B)(3)(c) with FRCP 23(b)(3) & (c)(1).

<sup>21</sup> The leading commentators on class action issues are in accord. See Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* (2005), §7:9 n.4 (A "[c]ourt need not hold [an] evidentiary hearing or make findings of fact [for class certification], particularly when all counsel have been given opportunity to be heard on the issue."); *id.* at §13:52 ("[F]indings of fact . . . do not have to be extensive. Specific findings on each of the major class criteria are not required [and the trial court is not required] to make findings on each and every criteria listed in the statute.").

that the trial court was aware of the factual issues and has applied the law correctly.”) (internal citations omitted); *Michigan Nat’l Bank v Metro Institutional Food Serv, Inc*, 198 Mich App 236, 241; 497 NW2d 225 (1993) (“[T]he trial court need not detail its findings as to each specific factor considered [because] decisions on motions do not require findings of fact.”); *DeVoe v CA Hull, Inc*, 169 Mich App 569, 576; 426 NW2d 709 (1988) (“Findings of fact are sufficient where it is manifest that the factfinder was aware of the factual issue[s] [and] that he resolved [them]” and therefore because the “trial judge was aware of the issues in the case and correctly applied the law . . . his opinion is not grounds for reversal.”).

After considering an extensive factual and legal record and conducting a rigorous analysis by any measure into whether Plaintiffs had demonstrated that the action satisfies all the prerequisites of MCR 3.501, Judge Borrello issued a “reasoned and supported opinion in favor of class certification”<sup>22</sup> that identified the appropriate standard of review, analyzed each requirement of MCR 3.501 (A)(1) and determined that Plaintiffs met their burden of proof, describing why each factor supported class certification. As required by MCR 3.501(B)(3)(c), Judge Borrello also set forth a description of the class in his Order. Nothing more is required. Dow’s attempt to manufacture error in the trial court’s Order is inconsistent with the requirements of Michigan law, and has been properly rejected by the Court of Appeals.

## **II. THE TRIAL COURT CORRECTLY FOUND THAT THE MANY COMMON LEGAL AND FACTUAL ISSUES PRESENTED IN THIS CASE PREDOMINATE OVER THE NON-COMMON ISSUES.**

MCR 3.501(A)(1)(b) prescribes that, to certify a class action, there must be “questions of law or fact common to the members of the class that predominate over questions affecting only

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<sup>22</sup> See Justice Meter’s underlying opinion from the Court of Appeals concurring in part and dissenting in part at page 1 (0901a) (“The circuit court set forth a reasoned and supported opinion in favor of class certification, and its decision is not clearly erroneous.”).

individual members.” The Court of Appeals has consistently explained factor (A)(1)(b) as follows: “The common question factor is concerned with whether there is a common issue the resolution of which will advance the litigation. It requires that the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, must predominate over those issues that are subject only to individualized proof.” *Zine v Chrysler Corp*, 236 Mich App 261, 289; 600 NW2d 384 (1999) (internal quotations and citations omitted). *See also Neal*, 252 Mich App at 16-17 (same). The Court of Appeals has also appropriately emphasized: “Still, there is no requirement in the rule that all questions necessary for ultimate resolution be common to the members of the class.” *See A&M Supply Co v Microsoft Corp*, 252 Mich App 580, 599; 654 NW2d 572 (2002).<sup>23</sup> As long as class members’ claims share a legal theory and core of allegations, the existence of factual differences between their claims is not fatal to certification. *Hill*, 276 Mich App at 312-13. Individualized fact-finding concerning the extent of class members’ damages does not preclude certification where there is a predominating common question of whether a defendant is liable at all for damages caused by its conduct. *Id.*

As discussed below, Plaintiffs satisfied their burden of proving that common questions of law and fact predominate over questions affecting only individual members. Because Dow has only challenged in its brief the requirement that common questions predominate, the other requirements set forth in MCR 3.501(A)(1) are conceded by Dow for purposes of this appeal.

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<sup>23</sup> The Court in *A&M Supply Co* ultimately focused its inquiry on the question of “whether the common issues that determine liability predominate,” stating that the plaintiff in that case “had to provide some basis for the trial court to conclude that all members of the class had a common injury that could be demonstrated with generalized proof, rather than evidence unique to each class member.” *A&M Supply Co*, 252 Mich App at 599-600. *See also Tinman v Blue Cross & Blue Shield of Michigan*, 264 Mich App 546, 563-64; 692 NW2d 58 (2005) (same). There is no requirement in the plain language of MCR 3.501(A)(1)(b) that the common questions of law or fact that predominate must relate to the legal element of “injury.” To the extent the Court of Appeals has injected that concept as a requirement for maintenance of a class action in all cases, such injection is likely erroneous, but ultimately harmless in this case because Plaintiffs have clearly met their burden of providing the trial court with an appropriate basis to conclude that all members of the class have a common injury that can be demonstrated with generalized proof.

See *Mitcham v City of Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959) (“Failure to brief a question on appeal is tantamount to abandoning it.”); *Cont’l Nat’l Bank v Gustin*, 297 Mich 134, 149; 297 NW 214 (1941) (holding that matters set forth in appellant’s statement of questions involved, but not argued, are deemed abandoned); *Alderman v Shiawassee County Sheriff*, 66 Mich App 649, 651; 239 NW2d 696 (1976) (holding that issue of class certification not argued by appellant in their appeal considered abandoned). Although invited by this Court to brief the other requirements of MCR 3.501(A)(1), Dow has chosen not to do so – and appropriately so given that there is no plausible argument that these requirements can be credibly challenged.<sup>24</sup> Thus, Plaintiffs appropriately confine their argument herein to establishing that the trial court and Court of Appeals properly concluded that Plaintiffs satisfied the requirement that common questions predominate to support class certification in this case.

**A. PLAINTIFFS ESTABLISHED THAT A CORE SET OF COMMON FACTUAL AND LEGAL QUESTIONS PREDOMINATE IN THIS CASE.**

The common factual and legal issues in this case, which together predominate over any individual issues, include:

1. Whether and to what extent the Tittabawassee River, its flood plain and the class area (*i.e.*, properties within the 100 year flood plain of the Tittabawassee River in Saginaw County) are contaminated with dioxin;
2. Whether and to what extent Dow is the source of dioxin contamination in the Tittabawassee River, its flood plain and the class area;
3. Whether and to what extent Dow is legally responsible for dioxin contamination in the Tittabawassee River, its flood plain and the class area, which implicates significant class-wide questions concerning, among others:

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<sup>24</sup> To the extent this Court still deems it necessary or appropriate to evaluate in some fashion the other requirements for class certification set forth in MCR 3.501(A)(1), those requirements were briefed by Plaintiffs in both the trial court, see Plaintiffs’ Reply Memorandum in Support of Class Certification at 21-52 (0071b-0102b) and the Court of Appeals, see Plaintiffs—Appellees’ Brief at 16-49 (1000b-1033b), which Plaintiffs incorporate herein by reference. Again, however, in its application for leave to appeal and most recent brief to this Court, Dow has only pursued a specific challenge to the class action requirement that common issues predominate.

- a. the appropriate standard(s) of care Dow owed in connection with its generation, storage and disposal of waste containing dioxin at its Midland facility,
  - b. whether and to what extent Dow owed a duty of care to property owners in the class area, and
  - c. whether and to what extent Dow breached its duty of care to property owners in the class area;
4. Whether and to what extent dioxin contamination in the Tittabawassee River, its flood plain and the class area threatens human health and the environment (*i.e.*, the toxicity of dioxin and the level at which dioxin is unsafe);
  5. Whether and to what extent dioxin contamination in the Tittabawassee River, its flood plain and the class area has unreasonably interfered with public health, safety, peace, comfort or the convenience of the public;
  6. Whether and to what extent dioxin contamination in the Tittabawassee River, its flood plain and the class area has unreasonably interfered with the use and enjoyment of properties in the class area; and
  7. Whether and to what extent dioxin contamination in the Tittabawassee River, its flood plain and the class area has impaired property values in the class area.

These issues obviously raise a multitude of common factual and legal questions that are subject to generalized proof across all members of the class. Any individualized differences between class members or their properties are not enough to overshadow these predominating factual and legal questions. Accordingly, the trial court correctly held that Plaintiffs satisfied their burden of proving that “there are questions of law or fact common to members of the class that predominate over questions affecting only individual members,” MCR 3.501(A)(1)(b).<sup>25</sup>

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<sup>25</sup> Judge Borrello also appropriately drew upon his predominance determination in further holding that maintenance of the lawsuit as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice. For instance, Judge Borrello specifically found that to deny a class action in this case would result in up to 2,000 individual claims being filed in the Circuit Court and that such a result would impede the convenient administration of justice. Judge Borrello also found that a class action would assure legal assistance to members of the class and achieve economy of time, effort and expense. Judge Borrello further concluded that the action would be manageable as a class action based on the “almost identical evidence” that would be required to establish liability, causation and damages. *See* Order at 4 (0770a) (citing *Sterling*).

Judge Borrello’s predominance holding is supported by the overwhelming weight of environmental pollution class action decisions from across the country (including case law from the federal courts applying Michigan law) that involve similar negligence and nuisance claims for property damage.

For example, the Sixth Circuit’s recent decision in *Olden v LaFarge Corp*, 383 F3d 495 (CA 6, 2004), supports class certification in this case and directly refutes Dow’s argument that Plaintiffs’ negligence and nuisance claims cannot proceed as a class action. The Sixth Circuit in *Olden* affirmed the trial court’s class certification decision in an environmental pollution case that included negligence and nuisance claims under Michigan law brought on behalf of a class of 3,600 property owners seeking to recover damages for interference with the use and enjoyment of their property and diminution in the market value of this property caused by defendant’s emission of hazardous toxins from its plant. *Id.* at 496-98, 508-10. The defendant argued that common issues did not predominate because individual issues related to establishing causation would overwhelm the case because toxins were dispersed to properties in varying concentrations and allegedly caused widely varying property damages. *Id.* at 508. The court rejected defendant’s argument and explained that both negligence and nuisance claims under Michigan law can be determined for the entire class on the basis of generalized proof, including the “significant harm” component of a nuisance claim under Michigan law.<sup>26</sup> *Id.* at 508-09 & n.5. The court further stated that once liability has been established, defendant would be able to contest “the degree of harm” in the damages phase, and that, in any event, it was “premature” to address defendant’s merits-based arguments at the class certification stage. *Id.*

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<sup>26</sup> Both Dow’s position regarding nuisance (including its “significant harm” component) and Plaintiffs’ rebuttal of that position were covered in the briefs and were discussed extensively in the class certification argument. *See, e.g.*, Transcript (9/15/05) at 148:19 – 158:17 (0717a-0720a); Transcript (9/16/05) at 23:15 – 29:24 (0728a-0729a).

Likewise, the Sixth Circuit's decision in *Sterling v Velsicol Chemical Corp*, 855 F2d 1188 (CA 6, 1988) supports the trial court's class certification decision in this case. In fact, the Seventh Circuit recently cited with approval the Sixth Circuit's decision in *Sterling*, noting that it correctly recognized the appropriateness of class action treatment in environmental pollution cases. See *Mejdrech v Met-Coil Systems Corp*, 319 F3d 910 (CA 7, 2003).

*Sterling* involved a landfill for by-products from the production of chlorinated hydrocarbon pesticides. The defendant disposed of 300,000 55-gallon steel drums containing ultrahazardous liquid chemical waste and hundreds of fiber board cartons containing ultrahazardous dry chemical waste in the landfill. Certain of these waste chemicals migrated to surrounding drinking water wells and the users of these wells were advised to stop using them for any purpose. In relevant part, the complaint "sought relief . . . for loss of value to their real property in the region affected by the chemicals." *Sterling*, 855 F2d at 1194.

The district court certified a class action under Rule 23(b)(3) and plaintiffs' counsel designated five representative plaintiffs to proceed to trial. After a bench trial, the district court found defendant liable on theories of strict liability, common law negligence, trespass and nuisance, and awarded damages for diminution of property value. *Id.* at 1194. The defendant appealed and complained, among other things, that the district court erred in certifying the class. The Sixth Circuit affirmed certification of the class action. *Id.* at 1196-97. In so ruling, the Court said:

[T]he problem of individualization of issues often is cited as a justification for denying class action treatment in mass tort accidents. While some courts have adopted this justification in refusing to certify such accidents as class actions, numerous other courts have recognized the increasingly insistent need for a more efficient method of disposing of a large number of lawsuits arising out of a single disaster or a single course of conduct.

The Court continued:

In mass tort accidents, the factual and legal issues of a defendant's liability do not differ dramatically from one plaintiff to the next. No matter how individualized the issue of damages may be, these issues may be reserved for individual treatment with the question of liability tried as a class action. Consequently, the mere fact that questions peculiar to each individual member of the class remain after the common questions of the defendant's liability have been resolved does not dictate the conclusion that a class action is impermissible.

*Id.* (internal citations and quotations omitted).

In *Stanley v United States Steel Co*, 2006 WL 724569 (ED Mich, March 17, 2006), the United States District Court for the Eastern District of Michigan certified a class asserting nuisance claims and alleging pollution-related property damage. The defendant made the same arguments that Dow makes here, including that there were individual differences among class members, that there were other sources of contamination, and that causation could not be proven on a class-wide basis. The court rejected those arguments and certified the class, stating that “the paramount issue concerns whether a plant’s emissions are substantially interfering with the local residents’ use and enjoyment of their real and personal property.” *Id.* at \*7. The court added that the defendant’s assertion “that it is not the sole polluter . . . does not mean it is not liable for tortious conduct.” *Id.* at \*7 & n.7.

Holdings from other recent environmental pollution cases arising under similar facts also clearly support the trial court’s conclusion that common factual and legal issues predominate in this case. See *Mejdreck v Lockformer Co*, 2002 WL 1838141, at \*6 (ND Ill, Aug 12, 2002), *aff’d sub nom. Mejdrech v Met-Coil Systems Corp*, 319 F3d 910 (CA 7, 2003) (“[I]ssues are considered to predominate when there is a common nucleus of operative fact among all the class members. [T]he common question of whether Defendants contaminated the area in question is not only shared by all proposed class members, but predominates over any [individual] differences . . . .”); *Bentley v Honeywell International, Inc*, 223 FRD 471, 480, 487 (SD Ohio,

2004) (“[A] finding of commonality will likely satisfy a finding of predominance, and issues are considered to predominate when there is a common nucleus of operative fact among the class members.”) (internal citations omitted); *Muniz v Rexnord Corp*, 2005 WL 1243428, at \*4 (ND Ill, Feb 10, 2005) (holding that predominance requirement was satisfied where “Plaintiffs have alleged that the Defendants engaged in a single course of conduct, disposal of hazardous chemicals, that has created a common nucleus of facts for the class. While some individualized questions exist, they do not prevent class certification.”); *LeClercq v Lockformer Co*, 2001 WL 199840, at \*5-7 (ND Ill, Feb 28, 2001) (“Plaintiffs have alleged that Defendants have engaged in a common course of conduct over the years that has contaminated the water source that the putative class members use. It is the same conduct that allegedly caused the injury to all of the Plaintiffs. . . . In this case, the[se] common issues predominate.”); *Cook v Rockwell International Corp*, 151 FRD 378, 388-89 (D Colo, 1993) (“[P]laintiffs have demonstrated that this case presents many common issues of law and fact, including . . . whether defendants exercised reasonable care to prevent the release of hazardous radioactive and nonradioactive materials from Rocky Flats; what materials were released, in what quantities; what caused the releases; what precautions to avoid emissions were taken; whether the geographic dispersion of the releases in the surrounding area was reasonably foreseeable; and whether defendants engaged in intentional, reckless, willful, or wanton conduct. These common issues represent the core of plaintiffs’ action against defendants . . . . Therefore, I find that, as concerns the property class, a common nucleus of operative facts exists and that the common questions of law and fact predominate over those issues requiring individualized proof.”).

During the pendency of Dow’s current appeal of the trial court’s class certification decision (November, 2005 to present), courts from across the country have continued to follow

this well-established body of case law and certified environmental pollution class actions involving claims for negligence and nuisance, which further underscores the correctness of the trial court's decision in this case. Among these cases, and of particular note, is the recent class certification decision in a strikingly similar dioxin contamination case brought on behalf of a class of property owners in a river's 100-year flood plain against an upstream manufacturing facility to recover, among other things, damage to class members' property values caused by the presence of dioxin contamination in the class area. *Carter v Monsanto Co*, unpublished opinion of the Circuit Court of Putnam County, West Virginia, issued Jan 7, 2008, available at 2008 WL 1693652 (Docket No. 00-C-300).<sup>27</sup> This case readily disposes of Dow's bold (and clearly erroneous) claim that no court has certified a class in an environmental contamination case involving a river system on facts analogous to those here. Because of the striking similarity between the facts and legal issues in *Carter* and those in the present case, the *Carter* court's well-reasoned certification decision is also particularly instructive in demonstrating the correctness of Judge Borrello's class certification decision in the present case.

In *Carter*, the proposed class was comprised of owners of real property within the 100-year flood plain of a river system located downstream of a manufacturing facility's waste disposal landfill. Plaintiff alleged that dioxin-contaminated sediment migrated from the landfill into the river systems and onto his property that lies in the flood plain. Plaintiff further alleged that other properties in the flood plain downstream of the landfill also contain dioxin-contaminated sediment. Plaintiff testified that he was unable to use and enjoy his property as a result of his concern about dioxin contamination. Among other things, plaintiff sought to

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<sup>27</sup> The Defendants in *Carter* petitioned West Virginia's highest court to accept a writ of prohibition that challenged the adequacy of the Court's Class Certification Order. The Supreme Court refused to accept the writ on May 22, 2008. On June 3, 2008, the Defendants moved the trial court to de-certify the class, which the trial court denied on September 3, 2008.

recover damages in the form of diminished property values under common law concepts of negligence and nuisance. Plaintiff supported the substantive allegations in his complaint with the report and testimony of an engineering expert who delineated the 100-year flood plain / class area and concluded that dioxin-contaminated sediment from the river likely contaminated the 100-year flood plain. Plaintiff also submitted an expert report and testimony of a licensed real estate appraiser who testified that he could use a “mass appraisal” model to calculate – on a class-wide basis – the diminished value of real property in the flood plain / class area as a result of the presence of dioxin contamination. *Id.* at 2-7.

The court in *Carter* applied a standard for evaluating a motion for class certification consistent with the standard employed by Judge Borrello in the present case and analogous to the standard employed by the federal courts in Michigan identified above. For example, the court explained that in resolving a motion for class certification it is “required to perform a ‘thorough analysis’ in determining whether the prerequisites to class certification exist.” *Id.* at 8. The court emphasized that it assumes the substantive allegations of the plaintiffs’ Complaint as true (which the court ultimately found to be supported by “reasonable basis in fact” based on the record before the court). *Id.* at 7. The court observed that in ruling on a motion for class certification it must be careful not to weigh the merits of the plaintiffs’ claims or usurp the function of the jury in resolving the ultimate merits of plaintiffs’ underlying claims because those are issues that may be addressed subsequently by the court in motions for summary judgment or by a jury at trial.<sup>28</sup> *Id.* at 4. The court further stated that “any question as to whether a case

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<sup>28</sup> The importance of this observation cannot be overstated. As noted above and correctly emphasized by the Court of Appeals, Dow’s assertions and claimed proofs, including Dow’s contentions concerning variant dioxin levels in the class area, among others, are contradicted by information Plaintiffs presented to the trial court from the MDEQ and other sources in support of their motion for class certification. It was not Judge Borrello’s role to resolve those disputed factual issues when ruling on Plaintiffs’ motion for class certification. Plaintiffs have a constitutional right under Michigan law to have those disputed factual issues determined by a jury, and not the Circuit Court upon a motion for class certification or by the Court of Appeals or this Court in an appeal from an order granting class certification. *See* Const 1963 art 1, § 14; *Phillips v Mirac, Inc*, 470 Mich 415, 427-29; 685 NW2d 174 (2004).

should proceed as a class in a doubtful case should be resolved in favor of allowing class certification.” *Id.* at 9.

The court in *Carter* found that all the prerequisites for class certification were satisfied and set forth a particularly instructive analysis of the predominance requirement and response to the defendant’s primary argument (just like that made by Dow in the present case) that property-specific contamination and damages issues preclude certification. *Id.* at 9-12. After first identifying a series of common factual and legal issues (very similar to the common issues identified by Plaintiffs in the present case), the court specifically found that the common issues pertaining to defendant’s liability were not only common, but predominated over individual issues. As part of its analysis, the court emphasized the following points: (1) the predominance test does not demand that common issues be dispositive; (2) predominance is not based on the amount of time needed to adjudicate common issues versus individual ones; (3) predominance is not based on a scale-balancing test of the number of issues suitable for either common or individual treatment; and (4) *a single common overriding issue will satisfy the predominance requirement even when the suit involves numerous individual issues.* *Id.* at 21-22 (emphasis in original). The court also noted that its Supreme Court, elaborating on these points, provided the following salient advice (which is equally fitting to the case before this Court given Dow’s arguments):

The bigger the class, the greater the likelihood that the defendant will argue that there is no common problem across the system. Defendants will argue that each plaintiff’s case is different.

Defendants attempting to avoid class certification will, almost exclusively, overwhelm a circuit judge with the differences between each class member’s case. It is akin to a judge being asked to look at a forest of oak trees and being told the difference between each tree: each tree has a different height, a different color, a different number of leaves, a unique number of branches, a wide variation in the number and size of tree rings, and so on.

The test for the judge, though, is to step back and look at the similarities in class members. Step back and see the forest. No matter the

number of branches or leaves, a collection of oak trees has enough similarities to be called a “class” of oak trees.

*Id.* at 22.

In making its finding that plaintiffs satisfied the predominance requirement for class certification, the court in *Carter* explained that the pivotal issue in the litigation is whether and to what extent dioxins originally created at defendant’s manufacturing facility and disposed of in the landfill subsequently migrated into the river system and onto properties located in the 100-year flood plain downstream of the landfill. *Id.* The court noted that this pivotal issue of liability arises out of the same nucleus of operative facts for each class member and that each class member would be relying upon the same evidence to show the negligent conduct of the defendant. *Id.* at 23. The court supported its predominance determination with reference to the Sixth Circuit’s environmental pollution, class certification decision in *Olden v LaFarge Corp*, discussed *supra*, which affirmed the trial court’s certification of similar claims for nuisance and negligence under Michigan law. *Id.* at 22-24. Given the strikingly similar facts and legal issues, the court’s certification decision in *Carter* poignantly illustrates the correctness of Judge Borrello’s decision to permit this case to proceed as a class action.<sup>29</sup>

**B. DOW’S OPPOSITION TO THE TRIAL COURT’S FINDING THAT COMMON QUESTIONS OF FACT AND LAW PREDOMINATE IS SERIOUSLY FLAWED.**

Dow claims that a finding of predominance cannot exist in this case because, according to Dow: (1) the legal element of “injury” cannot be established on a class-wide basis; and (2) varying levels of dioxin contamination exist in the class area. Dow’s challenge to the trial

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<sup>29</sup> Other recent environmental pollution class certification decisions involving similar claims for negligence and nuisance include: *Leib v Rex Energy Operating Corp*, 2008 WL 5377792 (SD Ill, Dec 19, 2008); *Collins v Olin Corp*, 248 FRD 95 (D Conn, 2008); *In re MBTE Products Liability Litigation*, 241 FRD 185 (SDNY, 2007); *In re MBTE Products Liability Litigation*, 241 FRD 435 (SDNY, 2007); *Doyle v Fluor Corp*, 199 SW3d 784 (Mo App, 2006). Judge Borrello’s class certification decision fits comfortably within this established body of law.

court's predominance determination is clearly misplaced. As explained above, a vast body of case law (applying Michigan law and analogous law from across the country, including a nearly identical dioxin contamination suit by property owners in a river's 100-year flood plain) fully supports the trial court's certification of Plaintiffs' negligence and nuisance claims in this case. And, as discussed below, Dow's remaining arguments are seriously flawed.

First, Dow incorrectly argues that the legal element of "injury" associated with Plaintiffs' tort claims requires actual physical intrusion of dioxin on each parcel of property in the class area. That is not the law in Michigan. Michigan courts have long held that physical invasion of property is not necessary for a cause of action based on nuisance. *Hadfield v Oakland Co Drain Comm'r*, 430 Mich 139, 151; 422 NW2d 205 (1988); *Whittemore v Baxter Laundry Co*, 181 Mich 564, 565-66; 148 NW 437 (1914); *see also* Prosser & Keeton, Torts (5th ed) § 87, p 622. That is the law of trespass, not nuisance. *See Adkins v Thomas Solvent Co*, 440 Mich 293, 301; 487 NW2d 715 (1992). This Court in *Adkins* did nothing to abrogate this principle. Though the opinion in *Adkins* is lengthy, the holdings are straightforward: Trespass and nuisance are different, separately viable torts. Trespass requires a physical invasion; nuisance does not. Nuisance requires a substantial and unreasonable interference with a property owner's use and enjoyment of his land. The *Adkins* court distinguishes between the injury – *i.e.*, the interference with use and enjoyment – and the damage – *i.e.*, the property's diminution in value. Having laid this groundwork, the *Adkins* court reaches its central holding: no cause of action for nuisance exists "where damage and injury are both predicated on *unfounded fear* of third parties that depreciates property values." *Id.* at 312 (emphasis added).

The facts in *Adkins* underscore the difference between the alleged injury in that case and Plaintiffs' injury here. In *Adkins*, experts for both parties agreed that the plaintiffs' properties

“were not and would never be subject to ground water contamination emanating from the defendants’ property.” *Id.* at 297 (emphasis added). The *plaintiffs’* expert, in fact, admitted that “a ground water divide separated the flow of ground water” and that no contamination from the defendant’s facility could possibly reach the plaintiffs’ properties. *Id.* Here, on the other hand, class members own property in a river’s flood plain. There is no barrier between Plaintiffs’ property and Dow’s contamination. Dioxin from Dow’s facility, discharged into the river and attached to the sediment, has been deposited on properties throughout the class area, and threatens to be deposited on all flood plain properties now and repeatedly in the future, through predicted flooding and the transport of contaminated sediment by air and other means. In *Adkins*, there was no threatened or actual interference with the plaintiffs’ use and enjoyment of their properties. Here, there has been actual interference with the use and enjoyment of properties, as evidenced by the currently existing state-promulgated restrictions and limitations on the properties lying within the 100-year flood plain. Both these presently existing restrictions and the present threat of further physical invasion of cancer-causing chemicals substantially and unreasonably interfere with the class members’ use and enjoyment of their property.<sup>30</sup>

Contrary to Dow’s suggestion, *Adkins* provides no basis to deny Plaintiffs the right to pursue their nuisance claim – regardless of the level of contamination on any individual property – unless Dow can prove what it has never even suggested: that contamination of properties in the class area is impossible and that Plaintiffs’ injuries and damages are based on the unfounded fears of third parties.

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<sup>30</sup> Moreover, the *Adkins* court specifically stated that it was not addressing the effect of unreasonable fears on property values “as an element of damages,” where a legitimate basis for liability exists. *Adkins*, 440 Mich at 306.

Not only can the injury to owners of properties in the class area be established on a class-wide basis, it is most clearly established on a class-wide basis. The following facts, none of which is affected by variations among individual property owners, establish the injury: Dow has polluted the Tittabawassee River and its sediments with dioxin; the governments of the United States and the State of Michigan have determined that the kind of pollutants Dow has released into the environment are hazardous to human health, and indeed cause cancer; the Tittabawassee River has flooded and will repeatedly flood again; these floods and other transport processes have resulted in pervasive dioxin contamination throughout the class area, and they will continue to do so; through chemical analysis (*i.e.*, “fingerprinting”) of the dioxins found in the Tittabawassee River, its sediment and the flood plain, Dow has been identified as the principal source of pervasive dioxin contamination throughout the class area; and the resulting threat to human health requires that persons who own property in the class area restrict their use and enjoyment of their properties. The evidence supporting these class-wide facts will focus on Dow’s activities, contaminant levels and flooding patterns in the Tittabawassee River, and common models concerning fate and transport of contaminants from Dow’s facility.

These facts, proved in common, will establish Plaintiffs’ nuisance claims. In fact, “[t]here are countless ways to interfere with the use and enjoyment of land including interference with the physical condition of the land itself, disturbance in the comfort or conveniences of the occupant including his peace of mind, and threat of future injury that is a present menace and interference with enjoyment.” *Adkins*, 440 Mich at 303; *Olden*, 383 F3d at 509 & n 5. In particular, nuisance can be established by showing a “threatening or impending danger” to “property rights or health.” *Adkins*, 440 Mich at 303. And public nuisance, which is “unreasonable interference with a right common to the general public,” includes “conduct that

significantly interferes with public health, safety, peace, comfort, or convenience.” *Olden v LaFarge Corp*, 203 FRD 254, 266 (ED Mich, 2001), *aff’d* 383 F3d 495 (CA 6, 2004).

The injury is the same for all properties in the class area because Dow’s contamination, deposited in river sediments, threatens every property in the class area. The injury is not some speculative injury Plaintiffs dreamed up to recover damages from Dow. The injury, unfortunately, is genuine, well founded, and objectively reasonable, and it can be proven on a class-wide basis.

The damages that result from Dow’s interference with the use and enjoyment of properties in the class area are clear. As a result of the injury to those properties, the pool of property buyers is smaller, and the amounts those buyers are willing to pay for property in the class area is less. A reasonable, informed buyer looking at two adjacent properties in the class area, one of which already has a dioxin test above 90 ppt and one of which does not yet have such a test, will likely make little distinction between the two. In fact, a reasonable buyer, once informed about the contamination and threatened contamination throughout the class area, would be unlikely to purchase such property at all or would purchase only at a heavily discounted price. In short, Dow has injured every property in the class area, and that injury can best be proved on a class-wide basis.

Beyond reference to the vast body of environmental pollution class certification case law involving similar claims discussed above, certification of Plaintiffs’ nuisance claim is also supported by the Court of Appeals’ certification decision in *Oakwood Homeowners Ass’n, Inc v Ford Motor Co*, 77 Mich App 197; 258 NW2d 475 (1977). In *Oakwood*, the Court affirmed certification of a class action brought on behalf of a group of property owners in a geographically compact area asserting a claim for nuisance based on air pollution emanating from adjacent

industrial facilities. *Id.* The Court emphasized that for common questions to predominate, there does not need to exist a complete identity of facts relating to all class members. *Id.* at 206-07. The relevant inquiry is whether “a common nucleus of operative facts is present.” *Id.* at 209-10. The Court found that common class questions exist and indeed predominate as to the issue of Defendants’ liability for its discharges into the air of certain gases and particulate matter as well as to the issue of whether such discharges create a condition to such an extent as to substantially impair the comfort or enjoyment of class members’ adjacent premises. *Id.* The Court readily concluded that “[t]hese are questions ably suited for class resolution which would assuredly require needless duplication of proofs if each plaintiff were required to prosecute his claim apart from the rest.” *Id.* at 310.<sup>31</sup> *Oakwood*’s certification of a nuisance claim under Michigan law further undermines Dow’s challenge to certification in the present case.

With respect to Plaintiffs’ negligence claim, Dow relies on this Court’s earlier decision in this case declining to recognize a claim for medical monitoring for the proposition that Plaintiffs must all individually prove actual physical invasion of their property with dioxin to state a claim for negligence. Once again, Dow misapplies a holding of a Michigan opinion in a manner inconsistent with the opinion itself, and with established Michigan law. In its earlier decision in this case, this Court merely stated that “it has always been implicit” in the familiar four-part test for a negligence claim (duty, breach, causation and damages) “that in order to prevail, a plaintiff

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<sup>31</sup> The Court of Appeals in *Oakwood* concluded its decision affirming the trial court’s certification decision with words equally applicable to Judge Borrello and the situation presented in the case now before this Court:

In closing, we commend the lower court for its willingness to grapple with the countless challenges generated by a suit of this kind. A jurist wedded to the tired procedures of the past might not have been as willing as the judge below to open the courthouse doors and resolve the taxing issues raised by the instant litigation. But then again, a judge of lesser stock is not the type of public servant that our increasingly litigious citizens demand and deserve.

77 Mich App at 221.

must also demonstrate an actual *injury* to person or property.” *Henry*, 473 Mich at 74 (emphasis in original). But an “*injury* to . . . property” is not the same thing as requiring Plaintiffs in this case to prove an actual physical intrusion of dioxin on each parcel of property in the class area to state a claim for negligence. Dow’s suggestion otherwise is nonsense. In this case, the pervasive presence of dangerous levels of dioxin contamination throughout the class area is the common injury to the class. This pervasive dioxin contamination throughout the class area has triggered state-promulgated restrictions and limitations on all flood plain residents’ use and enjoyment of their property and thereby caused decreased property values throughout the class area. This common injury exists by virtue of either actual physical invasion of dioxin on each class members’ property and/or an objectively reasonable threat of such contamination (or additional contamination) by virtue of its proximity to the pervasive presence of dioxin contamination all around it and the absence of any natural or other barriers to prevent its further dissemination throughout the flood plain area.

At the class certification stage, it was more than enough for Plaintiffs to direct the trial court to record evidence of pervasive dioxin contamination throughout the class area, a geographic area specifically defined by reference to the MDEQ’s study and investigation. (*See, e.g.*, 0801b-0805b; 1040b; 0237b; 0127b-0133b). *See also* Per Curiam Order of the Court of Appeals at 11-12 (0898a-0899a). The record evidence included at least one study confirming that one hundred percent (100%) of the various sample sites tested within the flood plain downstream of Dow had dioxin contamination that exceeded Michigan’s direct residential contact standard of 90 ppt. (*See* 0900b-0908b). And, the EPA and MDEQ summarized their factual investigation and findings as follows: **“Dow Chemical, Midland, Michigan” is the “Primary Source” of “Pervasive” dioxin contamination “throughout the lower 24 miles of the**

***Tittabawassee River and floodplain.***” (1040b). (See also 0237b (“The Phase II study identified that elevated dioxin concentrations were pervasive in Tittabawassee River 100-year flood plain soil downstream of Midland. . . . The Dow Chemical Company manufacturing facility (Dow) in Midland is the principal source of dioxin contamination in the Tittabawassee River sediments and the Tittabawassee River flood plain soils.”)).

Moreover, the results of other sampling tests in the class area upon which Dow relies cannot defeat class certification. Importantly, even a soil sample test result that reveals (as of the time the sample was taken) a negligible level of dioxin contamination at that specific sample site does not mean that the property owner’s entire parcel is not contaminated or that even the same sample site will not in the future become contaminated as Dow’s “reservoir of [dioxin] contamination” (0128b) continues to migrate as a result of flooding and/or other transport processes. Dow has no evidence that it is actually impossible for any floodplain property to become contaminated with Dow’s dioxin or that Plaintiffs’ claims are based on objectively unreasonable or unfounded fears of actual or threatened contamination. The soil sample test results included in the record at class certification revealed only that the nature, extent and scope of dioxin contamination in the class area will be the subject of extensive merits discovery and conflicting expert testimony. Such issues are not appropriately resolved on a motion for class certification.

It should also be noted that the reliability and accuracy of sampling data will surely be a feature of merits discovery in this case. For example, Dow has been sued in the Circuit Court of Saginaw County in a whistleblower lawsuit brought by a former Dow engineer who claims she was demoted after raising concerns that Dow knowingly submitted bad data about dioxin contamination levels from certain samples taken of soil and water conditions around the

Tittabawassee River to state regulators. *See Priscilla Denney, Ph.D. v Dow Chemical Co*, Circuit Court of Saginaw County, Case No. 07-66367 (1132b-1147b).

If at some point during merits discovery reliable and verified data confirms the existence of properties in the class area that do not have dioxin contamination, are not reasonably threatened by such contamination or have not been impacted by the presence of such contamination, the class definition may be subject to some modification. But such a determination is entirely premature at this stage and remains vested with the trial court to decide in the first instance if such a record is developed during merits discovery. *See Cook*, 151 FRD at 381 (“This power to change the class certification decision has encouraged many courts to be quite liberal in certifying a class when that decision is made at an early stage, noting that the action always can be decertified or the class description altered if later events suggest that it is appropriate to do so.”).

Moreover, even if the legal element of “injury” implicates some individual issues, those issues are clearly subordinate to the many common legal and factual issues that predominate in this case, *see supra*. Individualized fact-finding, if any, will concern the *amount* of damage, not the *existence* of damage (*i.e.*, the fact of injury or impact). The common question of whether Dow is liable *at all* for damage caused by its pervasive contamination of the class area with dioxin predominates over any individual issues. Contrary to Dow’s claim, members of the class have suffered (and continue to suffer) a common injury that can be demonstrated with generalized proof. This common injury naturally and proximately flows from Dow’s pervasive contamination of the Tittabawassee River, its sediment and flood plain (*i.e.*, class area) soils. Such contamination has triggered state-promulgated restrictions and limitations on all flood plain

residents' use and enjoyment of their property and caused decreased property values throughout the class area.

Dow's remaining insistence that varying contamination levels in the class area defeat class certification is also clearly misplaced. For example, in *LeClercq*, the defendants, like Dow, argued that the propriety of relief "turns on a condition of the individual circumstances of each class member" and that "individualized issues regarding causation and damages predominate." *LeClercq*, 2001 WL 199840, at \*4, \*6. The defendants emphasized that the data submitted by plaintiffs reflected "widely varying amounts of TCE and other chemicals in the putative class members' wells ranging from amounts in excess of federal drinking water standards to no detectable contamination. *Id.* at \*4. The court found that defendants' argument "stray[ed] too far into evaluating the merits of Plaintiffs' case," and that, in any event, "the most appropriate and efficient way to proceed at this juncture is to certify a class for injunctive relief and liability issues but reserve the determination of monetary damages, if needed, for individualized treatment." *Id.* at \*\*4-7. *See also Olden*, 383 F3d at 496-98, 508-10 (same).

Ultimately, the trial court correctly rejected Dow's arguments and properly concluded that the many common factual and legal issues predominate over any individual issues in this case. The Court of Appeals correctly held that the trial court did not clearly err in its predominance analysis. This Court should affirm.

## CONCLUSION

The mere fact that Dow is able to identify a few decisions denying class certification in the environmental pollution context does not mean the trial court committed reversible error in certifying this case.<sup>32</sup> Judge Borrello's certification decision is consistent with Michigan law and supported by the overwhelming weight of environmental pollution class action case law from across the country (including case law from the federal courts applying Michigan law) that involve similar negligence and nuisance claims for property damage. Dow's arguments present no valid basis for reversal and merely reflect Dow's ongoing effort to misrepresent the record, misstate the law, and mischaracterize the nature, extent and scope of its pervasive contamination of the Tittabawassee River, its flood plain and the class area in the hopes of avoiding responsibility for the egregious harm it has inflicted on this community.

The trial court properly certified this case as a class action pursuant to MCR 3.501. The Court of Appeals correctly held that the trial court did not clearly err in certifying the class. Plaintiffs respectfully request that this Court affirm and permit this case to proceed further as a class action.

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<sup>32</sup> As set forth in considerable detail in Plaintiffs' underlying briefing to the Court of Appeals, the environmental cases relied upon by Dow represent a clear minority view, have been discredited by other courts and/or are clearly distinguishable. *See* Pltfs' Brief to Ct App at 36-40 (1020b-1024b).

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Respectfully submitted,



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