

173 FERC ¶ 61,217
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: James P. Danly, Chairman;
Neil Chatterjee and Richard Glick.

Boyce Hydro Power, LLC

Project Nos. 10809-050
10810-056
2785-102

ORDER TO SHOW CAUSE AND NOTICE OF PROPOSED PENALTY

(Issued December 9, 2020)

1. Pursuant to Rule 209(a)(2) of the Commission's Rules of Practice and Procedure,¹ the Commission finds that Boyce Hydro Power, LLC (Boyce Hydro or Respondent), licensee for the Secord (P-10809), Smallwood (P-10810), and Sanford (P-2785) Projects (collectively, the Boyce Projects) violated numerous FERC staff orders and license provisions addressing safety of project facilities and surrounding communities. More specifically, following catastrophic failures of two of its dams, Boyce Hydro failed to begin a required forensic study of the dam failures and ignored staff's orders to conduct engineering safety studies and to file certain required reports to ensure homes and other buildings surrounding the Boyce Projects were not at risk of further damage. Accordingly, the Commission directs Boyce Hydro to show cause why it should not be assessed a civil penalty of \$15 million for violation of Standard Article 4 of the Boyce Projects' licenses, section 12.4(b) of the Commission's regulations,² and section 31(a) of the Federal Power Act (FPA).³
2. Pursuant to Rule 213(a) of the Commission's Rules of Practice and Procedure,⁴ the Commission directs Respondent to file an answer with the Commission within 30 days of the date of this order. Office of Enforcement staff (Enforcement staff) may reply

¹ 18 C.F.R. § 385.209(a)(2) (2020).

² 18 C.F.R. § 12.4(b) (2020).

³ 16 U.S.C. § 803(c) (2018).

⁴ 18 C.F.R. § 385.213(a) (2020).

to Respondent's answer within 30 days of the filing of the answer. The Commission will consider these pleadings as part of its review of this proceeding.

3. As discussed below, Boyce Hydro's disregard of FERC staff's dam safety orders put the safety of the communities surrounding its projects at risk. While the Commission proposes to penalize Boyce Hydro in this proceeding, it will not compound the harm to those communities. Accordingly, the Commission will take steps to ensure that any penalty assessed against Boyce Hydro does not threaten recovery by community members who were harmed by the dam breaches and floods.⁵

I. Background

A. The Boyce Projects and Edenville Dam

4. The Boyce Projects are located on the Tittabawassee River in Gladwin and Midland counties, Michigan. The Secord Project⁶ is the most upstream of the Boyce Projects. The Smallwood Project⁷ is located approximately seven river miles downstream from the Secord Project. Boyce Hydro's now-unlicensed Edenville Project (formerly FERC Project Number 10808),⁸ is located approximately 13 river miles downstream of the Smallwood Project, at the confluence of the Tittabawassee and Tobacco Rivers. The Sanford Project⁹ (the most downstream of the Boyce Projects) is located approximately 11 river miles downstream of Edenville Dam.

⁵ See *infra* P 45.

⁶ *Wolverine Power Corporation*, 85 FERC ¶ 61,064 (1998). The 1.2-megawatt (MW) Secord Project consists of the Secord Dam which has three sections totaling about 2,085 feet in length and a maximum height of 55 feet and creates the 1,100-acre Secord reservoir.

⁷ *Wolverine Power Corporation*, 85 FERC ¶ 61,065 (1998). The 1.2 MW Smallwood Project consists of the Smallwood Dam which has three sections totaling about 1,095 feet in length and a maximum height of 38 feet and creates the 6,000-acre Smallwood reservoir.

⁸ See *Boyce Hydro Power, LLC.*, 164 FERC ¶ 61,178 (2018) (Edenville Revocation Order), *reh'g denied*, 166 FERC ¶ 61,029 (2019).

⁹ *Wolverine Power Corporation*, 41 FERC ¶ 62,192 (1987), *amended by*, 85 FERC ¶ 61,066 (1998). The 3.3 MW Sanford Project consists of an approximately 26-foot-high and 1,600-foot-long Sanford Dam, which breached on May 19, 2020. Prior to the breach,

5. The three Boyce Projects and the former Edenville Project are closely-linked to each other, sharing common ownership and hydrology. Indeed, the Commission issued the operative licenses for all four projects on the same day,¹⁰ noting that it intended to coordinate treatment of these four “hydrologically-related” projects in the future.¹¹

6. The four projects also are linked by Boyce Hydro’s troubled compliance history. Its compliance failures at the formerly-licensed Edenville Project were particularly egregious, as Boyce Hydro ignored FERC staff’s dam safety requirements for 14 years. Consequently, on September 10, 2018, the Commission revoked the license for the Edenville Project.¹² Jurisdiction over the facilities of the Edenville Project passed from the Commission to the State of Michigan upon revocation of the license.

B. May 19, 2020 Flood and Aftermath

7. On May 19, 2020, the Tittabawassee and Tobacco Rivers flooded. According to reports that Boyce Hydro provided to the Commission’s Division of Dam Safety and Inspections (D2SI) - Chicago Regional Engineer, the floodwaters breached the Edenville Dam at approximately 5:45 pm EDT on May 19, 2020. The downstream Sanford Dam breached after that. The Secord and Smallwood Dams were not breached.

8. The breaches and resulting flooding caused substantial damage to the surrounding communities, washing out major roads, destroying homes, and forcing the evacuation of

the dam created a 1,526-acre project reservoir.

¹⁰ See *Wolverine Power Corporation*, 85 FERC ¶ 61,063 (1998) (Edenville License Order); *Wolverine Power Corporation*, 85 FERC ¶ 61,066 (1998) (Order on Rehearing and Amending Sanford Project License Order); *Wolverine Power Corporation*, 85 FERC ¶ 61,064 (1998) (Secord License Order); *Wolverine Power Corporation*, 85 FERC ¶ 61,065 (1998) (Smallwood License Order).

¹¹ 85 FERC ¶ 61,066, at 61,239. See also 85 FERC ¶ 61,063, at 61,063 (“The four projects’ reservoirs occupy about 39 river miles on the Tittabawassee River, with the tailwater of each project being the headwater of the next downstream project.”).

¹² *Boyce Hydro Power, LLC*, 164 FERC ¶ 61,178 (2018), *reh’g denied*, 166 FERC ¶ 61,029 (2019). See also *Boyce Hydro Power, LLC*, 159 FERC ¶ 62,292 (2017) (compliance order detailing numerous violations at the Edenville Project).

ten thousand residents.¹³ In June 2020, the State of Michigan estimated that the economic harm from failure of the Boyce Hydro facilities exceeded \$190 million.¹⁴

9. Boyce Hydro filed a voluntary petition for bankruptcy protection on July 31, 2020.¹⁵

C. Dam Safety Orders Regarding Forensic Investigation

10. On May 20, 2020, the day after the dam breaches, FERC's Director of D2SI issued a letter order directing Boyce Hydro to "immediately begin formation of a fully Independent Forensic Investigation Team to focus on the Sanford Dam, Smallwood Dam, and Secord Dam."¹⁶ He said that FERC staff would "reach[] out to EGLE [(the Michigan Department of Environment, Great Lakes, and Energy)] regarding coordination for investigation of the Edenville Breach."¹⁷ He directed Boyce Hydro to "eFile a letter with the Commission which provides a copy of each proposed Forensic Investigation Team member's resume within 7 days from the date of this letter."¹⁸

11. On May 22, 2020, Boyce Hydro requested an extension of the filing deadline regarding the forensic investigation to May 29, 2020. The Director of D2SI granted that extension but admonished Boyce Hydro in a letter order that "no additional extensions will be granted."¹⁹

¹³ See Letter from Hon. Gretchen Whitmer to Hon. Donald Trump, at 2 (Jun. 15, 2020), available at <https://www.mlive.com/news/saginaw-bay-city/2020/06/gov-whitmer-formally-asks-president-trump-to-declare-mid-michigan-flooding-a-major-disaster.html> (last accessed Dec. 4, 2020).

¹⁴ See *id.* at 4.

¹⁵ See *In re Boyce Hydro, LLC et al.*, No. 20-21214 (Bankr. E.D. Mich. July 31, 2020).

¹⁶ Letter from Director of D2SI, to Boyce Hydro (May 20, 2020) (Docket Nos. P-2785, P-10809 & P-10810).

¹⁷ *Id.* at 2.

¹⁸ *Id.* at 2-3.

¹⁹ Letter from Director of D2SI to Boyce Hydro, at 3 (May 26, 2020) (Docket Nos. P-2785, P-10809 & P-10810).

12. Boyce Hydro did not submit any names for proposed team members until June 1, 2020, and it did not submit all names until June 10, 2020, nearly two weeks after the (extended) deadline.²⁰ FERC staff promptly approved the members of the proposed Forensic Team.²¹ In each of the letters, FERC staff directed Boyce Hydro to schedule an introductory meeting with the Forensic Team, Boyce Hydro, FERC staff, and EGLE to discuss the Forensic Team's work.

13. That meeting occurred on June 17, 2020, and during that meeting, FERC staff again explained to Boyce Hydro that the Forensic Team must analyze both the Edenville and Sanford Dam failures. In a June 22, 2020, letter order following up on that meeting, FERC staff directed Boyce Hydro to, “[a]s soon as possible, but not later than Thursday, June 25, 2020, you must confirm in writing the schedule for the Forensic Team being able to fully begin their work.”²²

14. Boyce Hydro did not submit the required written confirmation. Instead, it sent a letter on July 2, 2020, claiming that it “has received several questions from the Team regarding the appropriate scope of their investigation.”²³ Notwithstanding FERC staff's numerous instructions to include the Edenville Dam breach in the scope of the Forensic

²⁰ Letter from Boyce Hydro to Director of D2SI (June 1, 2020) (Docket Nos. P-2785, P-10809 & P-10810); Letter from Boyce Hydro to Director of D2SI (June 4, 2020) (Docket Nos. P-2785, P-10809 & P-10810); Letter from Boyce Hydro to Director of D2SI (June 8, 2020) (Docket Nos. P-2785, P-10809 & P-10810). The Chicago Regional Engineer sent Boyce Hydro a letter on June 3, 2020, reminding it of the obligation, set out in the May 20, 2020 letter order, to “immediately begin formation of a fully Independent Forensic Investigating Team to focus on the Sanford Dam, Smallwood Dam, and Secord Dam” and asking for an immediate response with the qualification/resumes of the additional team members. *See* Letter from Chicago Regional Engineer to Boyce Hydro (June 3, 2020) (Docket Nos. P-2785, P-10809 & P-10810).

²¹ *See* Letter from Director of D2SI Approving Additional Member of the Forensic Investigation Team (June 5, 2020) (Docket Nos. P-2785, P-10809 & P-10810); Letter from Director of D2SI Approving Additional Member of the Forensic Investigation Team (June 9, 2020) (Docket Nos. P-2785, P-10809 & P-10810); Letter from Director of D2SI Approving Additional Member of the Forensic Investigation Team (June 11, 2020) (Docket Nos. P-2785, P-10809 & P-10810).

²² Letter from Director of D2SI to Boyce Hydro (June 22, 2020) (Docket Nos. P-2785, P-10809 & P-10810).

²³ Letter from Boyce Hydro to Kimberly D. Bose, at 2 (July 2, 2020) (Docket Nos. P-2785, P-10809 & P-10810).

Team's work, the letter asked FERC staff to "confirm that the scope of the Team's forensic analysis for purposes of complying with FERC's May 20 Letter does not include the cause or causes of the Edenville Dam breach given the fact that FERC does not regulate that former dam as of September, 2018."²⁴ The letter also observed that "without in any way attempting to prejudge the outcome of the Team's forensic analysis, BHP [(Boyce Hydro)] believes that it is fairly evident that the root cause of the Sanford Dam failure was the Edenville Dam failure."²⁵

15. FERC staff responded in a July 8, 2020 letter order, explaining again the thorough nature of the required investigation.²⁶ Staff explained that Boyce Hydro had more than sufficient time to resolve contractual arrangements and that delays in starting the post-failure analyses were unacceptable. Accordingly, FERC staff ordered Boyce Hydro to file within three business days "documentation that Boyce has fully executed contracts with the [Forensic] Team," specifically requiring that "[t]he contracts must authorize the [Forensic] Team to start immediately on a scope of work consistent with the May 20, Order, the June 17, 2020 introductory meeting discussion, and this Order."²⁷ Staff also notified Boyce Hydro that the Commission might take further enforcement action, potentially including assessing civil penalties, if Boyce Hydro failed to comply with the order.

16. Boyce Hydro has not responded to the July 8, 2020, letter order or filed the required documentation.

²⁴ *Id.* at 2-3.

²⁵ *Id.* at 4. Boyce Hydro has described in Federal District Court filings the "choreographed water ballet" necessary to manage flows and reservoir levels in the four projects, recognizing that "the operation of any one of these four dams will . . . inevitably influence the operation of the others." Defs' Resp. in Opp'n To Pls' Mot. To Remand at 13, *EGLE v. Mueller*, No. 1:20-cv-528 (W.D. Mich. June 15, 2020), ECF No. 14. Given the Commission's past coordinated treatment of the four projects and Boyce Hydro's recognition that their linked hydrology necessitates a "water ballet," it is not clear why there would be any confusion regarding why study of the Edenville Dam failure necessarily is intertwined with study of the three jurisdictional Boyce Projects.

²⁶ Letter from Director of D2SI to Boyce Hydro (July 8, 2020) (Docket Nos. P-2785, P-10809 & P-10810).

²⁷ *Id.* at 2.

17. On August 7, 2020, FERC contracted directly with the approved members of the Forensic Team to conduct the independent forensic investigation.

D. Orders Regarding Dam Safety Inspections and Reports

18. In the May 20, 2020 letter order, FERC's Director of D2SI also directed Boyce Hydro to immediately perform dam safety inspections of the Sanford, Secord, and Smallwood Dams. He ordered Boyce Hydro to orally report the result of those inspections to the FERC Chicago Regional Engineer as soon as they were complete and to submit written reports within three weeks (by June 10, 2020).²⁸

19. Boyce Hydro filed the required inspection reports for the Smallwood and Secord Dams, but it has not filed an inspection report for the Sanford Dam.²⁹

20. On July 15, 2020, the Chicago Regional Engineer sent Boyce Hydro a letter identifying deficiencies with the Smallwood Dam inspection report and ordering it to submit a supplemental report by August 14, 2020.³⁰ On July 21, 2020, the Chicago Regional Engineer sent Boyce Hydro a similar letter regarding deficiencies with the Secord Dam inspection report, ordering it to submit a supplemental report by August 20, 2020.³¹

21. On August 18, 2020, the Director of FERC's Division of Hydropower Administration and Compliance (DHAC) sent Boyce Hydro a letter citing the outstanding Sanford Dam report and reminding it to submit supplemental dam safety reports for the Smallwood and Secord Dams.³² She noted that Boyce Hydro's "failure to comply with

²⁸ See May 20 Letter at 2.

²⁹ See Letter from Lee W. Mueller to John Zygaj (Jun. 30, 2020) (Docket No. P-10810) (transmitting Smallwood Emergency Inspection Report); Letter from Lee W. Mueller to John Zygaj (July 8, 2020) (Docket No. P-10809) (transmitting Secord Emergency Inspection Report).

³⁰ See Letter from Chicago Regional Engineer to Boyce Hydro (July 15, 2020) (Docket No. P-10810).

³¹ See Letter from Chicago Regional Engineer to Boyce Hydro (July 21, 2020) (Docket No. P-10809).

³² See Letter from Director of DHAC to Boyce Hydro, at 2-3 (Aug. 18, 2020) (Docket Nos. P-10809-45, *et al.*).

the [D2SI] directives has resulted in a prolonged state of drawdown and the reservoirs cannot be refilled until compliance is achieved.”³³

22. In that letter, the DHAC Director ordered Boyce Hydro to submit the overdue Sanford Dam safety report and the two supplemental dam safety reports within three days (by August 21, 2020).³⁴

23. Boyce Hydro did not file those dam safety reports. Instead, on September 21, 2020 (more than a month after the DHAC Director’s August 18, 2020 order) Boyce Hydro requested a stay of the outstanding obligations addressed by that order. The Commission denied that stay request on October 15, 2020.³⁵

E. Orders Regarding Debris Removal at Sanford Dam

24. On June 4, 2020, FERC’s Chicago Regional Engineer sent Boyce Hydro a letter reporting that “[a] significant amount of debris has accumulated at the Sanford Dam after the May 19, 2020 breach/failure of the upstream Edenville Dam” and ordering Boyce Hydro to remove that debris immediately.³⁶ He ordered Boyce Hydro to report on the status of debris removal by June 8, 2020.³⁷

25. Boyce Hydro has not submitted any report indicating that it has removed the debris.

26. On August 18, 2020, the DHAC Director sent a letter reminding Boyce Hydro of its obligation to remove the debris at Sanford Dam and ordered it to file within three days (by August 21, 2020) documentation demonstrating its efforts to remove the debris.³⁸

³³ *Id.*

³⁴ *Id.*

³⁵ *See Boyce Hydro Power, LLC*, 173 FERC ¶ 61,071, PP 17-21 (2020).

³⁶ Letter from Regional Engineer to Boyce Hydro (June 4, 2020) (Docket No. P-2785).

³⁷ *Id.*

³⁸ *See* Letter from Director of DHAC to Boyce Hydro, at 3 (Aug. 18, 2020) (Docket Nos. P-10809-45, *et al.*).

F. Dam Safety Orders Regarding Shoreline Study

27. On June 4, 2020, FERC's Chicago Regional Engineer sent a letter order to Boyce Hydro stating that emptying of the Sanford reservoir due to the dam breach may make residences and structures along the shoreline unstable and that the shoreline itself may be subject to additional erosion due to increased speed of the river.³⁹ Accordingly, he directed Boyce Hydro to "have a Professional Engineer survey the shoreline for these conditions and develop a report as soon as possible" and to undertake stabilization measures for residences or structures in jeopardy.⁴⁰ Boyce Hydro did not respond and has provided no evidence that it had hired a Professional Engineer to study the shoreline to evaluate whether erosion might cause additional damage.

28. On July 1, 2020, the DHAC Director issued a letter order informing Boyce Hydro that it was in violation of Part 12 of the Commission's regulations for failing to comply with the Chicago Regional Engineer's order.⁴¹ She clarified the Chicago Regional Engineer's order by directing Boyce Hydro to file that survey and analysis immediately, and she reminded Boyce Hydro that the Commission might take further enforcement action, potentially including assessing civil penalties, if Boyce Hydro failed to comply.⁴²

29. Boyce Hydro has provided no evidence that it engaged a professional engineer to conduct the ordered survey and analysis, and it has not filed anything with the Commission on this directive.

II. Violations and remedies

A. Failure to Follow Dam Safety Orders re Forensic Investigation

30. Standard Article 4 of the licenses for the Secord, Smallwood, and Sanford Projects states, in pertinent part:

The project, including its operation and maintenance, ... shall be subject to the inspection and supervision of the Regional Engineer, Federal Energy Regulatory Commission, in the region wherein the project is located, or of such other officer or agent as the Commission may designate, who shall be the authorized

³⁹ Letter from Chicago Regional Engineer to Boyce Hydro (June 4, 2020) (Docket No. P-2785).

⁴⁰ *Id.*

⁴¹ *See* Letter from Director of DHAC to Boyce Hydro (July 1, 2020) (Docket Nos. P-10809-45, *et al.*).

⁴² *Id.*

representative of the Commission for such purposes. The licensee shall cooperate fully with said representative and shall furnish him such information as he may require concerning the operation and maintenance of the project. The licensee shall comply with such rules and regulations of general or special applicability as the Commission may prescribe from time to time for the protection of life, health, or property.

31. Section 12.4(b) of the Commission's regulations states:

Supervisory authority of the Regional Engineer or other authorized representative.

(1) Any water power project and the construction, operation, maintenance, use, repair, or modification of any project works are subject to the inspection and the supervision of the Regional Engineer or any other authorized Commission representative for the purpose of: (i) Achieving or protecting the safety, stability, and integrity of the project works or the ability of any project work to function safely for its intended purposes, including navigation, water power development, or other beneficial public uses; or (ii) Otherwise protecting life, health, or property. (2) For the purposes set forth in paragraph (b)(1) of this section, a Regional Engineer or other authorized Commission representative may: (i) Test or inspect any water power project or project works or require that the applicant or licensee perform such tests or inspections or install monitoring instruments; (ii) Require an applicant or a licensee to submit reports or information, regarding: (A) The design, construction, operation, maintenance, use, repair, or modification of a water power project or project works; and (B) Any condition affecting the safety of a project or project works or any death or injury that occurs at, or might be attributable to, the water power project; (iii) Require an applicant or a licensee to modify: (A) Any emergency action plan filed under subpart C of this part; or (B) Any plan of corrective measures, including related schedules, submitted after the report of an independent consultant pursuant to § 12.37 or any other inspection report; (iv) Require an applicant or licensee to take any other action with respect to the design, construction, operation, maintenance, repair, use, or modification of the project or its works that is, in the judgment of the Regional Engineer or other authorized Commission representative, necessary or desirable; and (v) Establish the time for an applicant or licensee to provide a schedule for or to perform any actions specified in this paragraph.⁴³

32. On June 22, 2020, an authorized Commission representative (FERC's Director of Dam Safety and Inspections) ordered Boyce Hydro by June 25, 2020 to "confirm in

⁴³ 18 C.F.R. § 12.4(b) (2020).

writing the schedule for the Forensic Team being able to fully begin their work.”⁴⁴ Boyce Hydro has not responded; therefore, Boyce Hydro is in violation of Standard Article 4 of the licenses for the Boyce Projects and Section 12.4(b) of the Commission’s regulations.

33. On July 8, 2020, an authorized Commission representative (FERC’s Director of Dam Safety and Inspections) ordered Boyce Hydro within three business days (by July 13, 2020) to file “documentation that Boyce has fully executed contracts with the [Forensic] Team.”⁴⁵ The contracts must authorize the [Forensic] Team to start immediately on a scope of work consistent with the May 20, 2020 Order, the June 17, 2020 introductory meeting discussion, and this Order.”⁴⁶ Boyce Hydro did not file such documentation; therefore, Boyce Hydro is in violation of Standard Article 4 of the licenses for the Boyce Projects and Section 12.4(b) of the Commission’s regulations.

B. Failure to Follow Dam Safety Orders re Dam Safety Inspections and Reports

34. On May 20, 2020, an authorized Commission representative (FERC’s Director of Dam Safety and Inspections) ordered Boyce Hydro to immediately perform a dam safety inspection of the Sanford Dam, to orally report the result of that inspection to the Chicago Regional Engineer as soon as it was complete, and to submit a written report by June 10, 2020. On July 21, 2020, the Chicago Regional Engineer ordered Boyce Hydro to submit a supplemental dam safety report for Smallwood by August 14, 2020, and he later ordered Boyce Hydro to submit a supplemental dam safety report for Secord Dam by August 20, 2020.

35. Boyce Hydro has not filed any of the above required reports; therefore, Boyce Hydro is in violation of Standard Article 4 of the licenses for the Boyce Projects and Section 12.4(b) of the Commission’s regulations.

C. Failure to Follow Dam Safety Orders re Debris Removal at Sanford Dam

36. On June 4, 2020, an authorized Commission representative (FERC’s Chicago Regional Engineer) ordered Boyce Hydro to immediately remove debris that had

⁴⁴ Letter from Director of D2SI to Boyce Hydro (June 22, 2020) (Docket Nos. P-2785, P-10809 & P-10810).

⁴⁵ Letter from Director of D2SI to Boyce Hydro, at 2 (July 8, 2020) (Docket Nos. P-2785, P-10809 & P-10810).

⁴⁶ *Id.*

accumulated at the Sanford Dam and to report back on its efforts by June 8, 2020. Boyce Hydro has not filed any such report; therefore, Boyce Hydro is in violation of Standard Article 4 of the licenses for the Boyce Projects and Section 12.4(b) of the Commission's regulations.

D. Failure to Follow Regional Engineer's Shoreline Stability Order, as Clarified by DHAC Order

37. On July 1, 2020, the Director of DHAC issued a letter order clarifying the Chicago Regional Engineer's Part 12 dam safety order and directing Boyce Hydro to immediately file a Professional Engineer's survey and analysis of the Sanford Project shoreline. Boyce Hydro did not file any such survey or analysis; therefore, Boyce Hydro is in violation of Standard Article 4 of the licenses for the Boyce Projects and Section 12.4(b) of the Commission's regulations.

III. Potential Remedies

38. Section 31(c) of the FPA, 16 U.S.C. § 823b(c) (2018), states that "[a]ny licensee, permittee, or exemptee who violates or fails or refuses to comply with any rule or regulation under this subchapter, any term, or condition of a license, permit, or exemption under this subchapter . . . shall be subject to a civil penalty in an amount not to exceed \$10,000 for each day that such violation or failure or refusal continues." Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015,⁴⁷ that maximum penalty has been increased to \$23,331 per-day for each violation.⁴⁸

39. A total of 44 days elapsed from when Boyce Hydro was obligated to provide written confirmation of the Forensic Team's work schedule until when FERC executed contracts with the team to initiate that work itself. At \$23,331 per-day, the maximum civil penalty for this violation is \$1,026,564.

40. A total of 26 days elapsed from when Boyce Hydro was obligated to file documentation of executed contracts with the Forensic Team to when FERC executed contracts with the team to initiate that work itself. At \$23,331 per-day, the maximum civil penalty for this violation is \$606,606

41. A total of 183 days have elapsed since the deadline by which Boyce Hydro was obligated to submit the Sanford Dam Safety Report, a total of 118 days have elapsed since the deadline by which Boyce Hydro was obligated to submit the Second Supplemental Dam Safety Report, and a total of 112 days have elapsed since the deadline

⁴⁷ Sec. 701, Public Law 114-74, 129 Stat. 584, 599.

⁴⁸ 18 C.F.R. § 385.1602 (2020).

by which Boyce Hydro was obligated to submit the Smallwood Supplemental Dam Safety Report. Boyce Hydro has not complied with any of those deadlines, and the maximum civil penalty for this violation will be \$23,331 multiplied by the number of days that will elapse until the earlier of (a) Boyce Hydro's filing of each of the required reports or (b) issuance by the Commission of an order assessing a penalty.

42. A total of 185 days have elapsed since the deadline by which Boyce Hydro was obligated to submit a report on its efforts to remove debris that accumulated at the Sanford Dam. Boyce Hydro has not complied with that deadline, and the maximum civil penalty for this violation will be \$23,331 multiplied by the number of days that will elapse until the earlier of (a) Boyce Hydro's filing of the ordered report or (b) issuance by the Commission of an order assessing a penalty.

43. A total of 162 days have elapsed since the Director of DHAC ordered Boyce Hydro to immediately file a Professional Engineer's survey and analysis of the Sanford Project shoreline, and Boyce Hydro has not complied with that order. The maximum civil penalty for this violation will be \$23,331 multiplied by the number of days that will elapse until the earlier of (a) Boyce Hydro's filing of the ordered survey and analysis or (b) issuance by the Commission of an order assessing a penalty.

44. Taking into consideration the nature and seriousness of the violations and the efforts of Boyce Hydro to remedy the violations in a timely manner, as required by section 31(c) of the FPA, and the factors set out 18 C.F.R. § 385.1505 (2020)⁴⁹ the

⁴⁹ Section 385.1505 reads as follows:

a) In determining the amount of a proposed penalty, the Commission will consider the nature and seriousness of the violation, and the efforts of the licensee, exemptee, permittee or one who should possess appropriate authority but does not, to remedy the violation in a timely manner.

(b) In making its determination under paragraph (a), the Commission will consider the following factors: (1) Whether the person had actual knowledge of the violation; (2) Whether the person had constructive knowledge of the violation deemed to be possessed by a reasonable individual acting under similar circumstances; (3) Whether the person has a history of previous violations; (4) Whether the violation caused loss of life or injury to persons; (5) Whether economic benefits were derived because of the violation; (6) Whether the violation caused damage to property or the environment; (7) Whether the violation endangered persons, property or the environment; (8) Whether there were timely remedial efforts; (9) Whether

Commission proposes potential imposition of a civil penalty totaling \$15 million for the foregoing violations. The dam safety violations here chanced further failure of project works and shoreline, thereby putting surrounding communities at risk of additional flooding and other significant harm to human life, property, and the environment. The violations were serious, and Boyce Hydro failed to take any remedial efforts,⁵⁰ notwithstanding actual knowledge provided by Commission staff's numerous letters regarding the violations. By ignoring its dam safety obligations, Boyce Hydro elevated its own economic interests (*e.g.*, avoidance of professional fees) above the safety of its neighbors. Considering the foregoing factors and Boyce Hydro's lengthy history of non-compliance, the Commission concludes that a substantial civil penalty is justified.

45. But that is not the end of the analysis. There is a pending proposal before the Bankruptcy Court to allow creation of a settlement fund for victims of the dam breaches and flooding.⁵¹ The Commission does not intend to imperil any direct recovery of damages by such victims and will consider the impact on the bankruptcy proceeding when it decides whether to impose a civil penalty in this matter. In addition, the Commission will request to have any recovery of civil penalties given lower priority than the victims' recovery in the bankruptcy proceeding.

there were untimely remedial efforts; (10) Whether there were no remedial efforts; and (11) Whether there are any other pertinent considerations.

⁵⁰ On September 21, 2020, Boyce Hydro filed a motion with the Commission seeking to stay or delay the obligations to file dam safety inspection reports and to document removal of the Sanford Dam debris, claiming that it needed to get permission from the U.S. Bankruptcy Trustee and Bankruptcy Court before it could spend money to satisfy those obligations. The Commission denied that motion on October 15, 2020, specifically noting that the Bankruptcy Court already had authorized it to use funds, with the approval of the Bankruptcy Trustee, to fulfill license-related compliance obligations. *See Boyce Hydro Power*, 173 FERC ¶ 61,071 at PP 11 & 17-20.

⁵¹ *See Debtors' Motion to (I) Approve Compromise and Settlement Agreement; (II) Authorize and Direct the Debtor to Enter into and Perform Under Settlement Agreement; (III) Enjoin Certain Third-Party Claims as Needed to Effectuate the Settlement; and (IV) Grant Related Relief, In re Boyce Hydro, LLC, et al.*, Case No. 20-21214 (Bankr. E.D. Mich. Aug. 6, 2020), ECF No. 32.

IV. Conclusion

46. The Commission directs Respondent to respond to this order as set forth above.⁵² This order also is the notice of proposed penalty required pursuant to section 31 of the FPA.⁵³ In its answer to this order, Respondent has the option to choose between either (a) an administrative hearing before an Administrative Law Judge at the Commission prior to the assessment of a penalty under section 31(d)(2)(A), or (b) a prompt penalty assessment by the Commission under section 31(d)(3)(A). If Respondent elects an administrative hearing before an ALJ, the Commission will issue a hearing order unless it is determined that the matter can be resolved in a summary disposition. If Respondent elects a prompt penalty assessment, and if, after a review of the full record to be developed in this proceeding, the Commission finds a violation, the Commission will issue an order assessing a penalty. If such penalty is not paid within 60 days of assessment, the Commission will commence an action in a United States district court for an order affirming the penalty.⁵⁴

The Commission orders:

(A) Within 30 days of the date of this order, Respondent must file an answer in accordance with Rule 213 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213, showing cause why its violations of Standard Article 4 of the Boyce Projects' licenses, and section 12.4(b) of the Commission's regulations should not warrant an order requiring Respondent to be assessed a civil penalty totaling \$15 million, or a modification of that amount consistent with section 31(d)(4) of the FPA.

(B) In any answer, Respondent should address any matter, legal, factual or procedural, that it would urge in the Commission's consideration of this matter. To the extent that Respondent cites any material not already published in the above-cited dockets, Respondents are directed to file non-publicly one copy of such material on CD-ROM or DVD in the captioned docket and to serve a copy of same on Enforcement staff.

⁵² Under 18 C.F.R. § 385.213(c), Respondent must file an answer that provides a clear and concise statement regarding any disputed factual issues and any law upon which they rely. Respondent must also, to the extent practicable, admit or deny, specifically and in detail, each material allegation and set forth every defense relied upon. Failure to answer an order to show cause will be treated as a general denial and may be a basis for summary disposition under Rule 217. 18 C.F.R. § 385.213(e)(2) (2020).

⁵³ 16 U.S.C. § 823b(d).

⁵⁴ FPA section 31(d)(3)(B), 16 U.S.C. § 823b(d)(3)(B).

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(C) Pursuant to section 31(d)(1) of the FPA, within 30 days of the date of this order, Respondent may also make an election to have the procedures set forth in section 31(d)(3) of the FPA apply to this proceeding. Under that provision, if the Commission finds a violation, the Commission will issue a penalty assessment and, if not paid within 60 days of the order assessing penalties, the Commission will institute an action in the appropriate United States district court. Should Respondent fail to make a timely election under section 31(d)(1), the procedures of section 31(d)(2) will apply.

By the Commission. Commissioner Clements is not participating.

(S E A L)

Kimberly D. Bose,
Secretary.

Document Content(s)

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