

173 FERC ¶ 61,071  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Boyce Hydro Power, LLC

Project Nos. 2785-100  
10809-048  
10810-054

ORDER DENYING STAY  
AND REQUEST FOR EXTENSION OF TIME

(Issued October 15, 2020)

1. On September 21, 2020, Boyce Hydro Power, LLC (Boyce Hydro), licensee for the Secord, Smallwood, and Sanford Hydroelectric Projects filed a motion for stay, and in the alternative a request for an extension of time, with respect to orders issued by the Commission's Division of Dam Safety and Inspections (D2SI) and Division of Hydropower Administration and Compliance (DHAC) requiring Boyce Hydro to comply with dam safety directives and perform environmental surveys under the Endangered Species Act (ESA).<sup>1</sup> Boyce Hydro also asks the Commission to refrain from enforcement action. For the reasons discussed below, we deny Boyce Hydro's requests.

**I. Background**

2. Boyce Hydro owns and operates the Commission-licensed Secord, Smallwood, and Sanford Hydroelectric Projects, as well as the unlicensed Edenville Dam,<sup>2</sup> all on the Tittabawassee River in Gladwin and Midland counties, Michigan. On the morning of May 19, 2020, high inflows in the Tittabawassee River from heavy rainfall resulted in the

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<sup>1</sup> *Wolverine Power Corp.*, 85 FERC ¶ 61,064 (1998) (Secord Project No. 10809); *Wolverine Power Corp.*, 85 FERC ¶ 61,065 (1998) (Smallwood Project No. 10810); *Wolverine Power Corp.*, 41 FERC ¶ 62,192 (1987); *Wolverine Power Corp.*, 85 FERC ¶ 61,066 (1998) (Sanford Project No. 2785).

<sup>2</sup> The Edenville Dam was formerly a project work of Commission-license Project No. 10808. The license was revoked due to a lengthy history of non-compliance with dam safety and other requirements, and the dam is now under the jurisdiction of the State of Michigan. See *Boyce Hydro Power, LLC*, 164 FERC ¶ 61,178 (2018).

breaching and failure of the Edenville Dam. Following the failure of the Edenville Dam, the right embankment at the jurisdictional Sanford Dam was also breached during the high flows.

3. Following the high flow event, D2SI and DHAC issued several orders requiring Boyce Hydro to carry out dam safety and environmental protection measures at the Secord, Smallwood, and Sanford Projects.

**A. D2SI Dam Safety Orders**

*Order to Conduct Dam Safety Inspections and Prepare Reports*

4. On May 20, 2020, the Director of D2SI issued an order requiring Boyce Hydro to fully draw down the reservoirs behind the Secord, Smallwood, and Sanford Dams and to perform dam safety inspections of the dams both immediately and again within three days after the flood flows receded.<sup>3</sup> The letter also directed Boyce Hydro to immediately communicate the results of each inspection to the D2SI Chicago Regional Engineer and to file with the Commission inspection reports within three days of when the inspections were performed. On May 26, 2020, the Director of D2SI confirmed the requirement to drawdown the Secord and Smallwood Dams while ensuring a safe drawdown rate based on all project factors, including embankment stability, spillway gate operations, and debris issues.<sup>4</sup> The letter order prohibited Boyce Hydro from returning its reservoirs to normal levels and reiterated that it is Boyce Hydro's responsibility to provide justification, supported by an engineer's assessment, for a return to safe operations, which the Commission would review and, if appropriate, authorize raising the reservoir to normal levels.<sup>5</sup>

5. Boyce Hydro filed the required inspection reports for the Smallwood and Secord Dams on June 30 and July 9, respectively, but has not filed an inspection report for the Sanford Dam.<sup>6</sup>

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<sup>3</sup> Commission Director of D2SI May 20, 2020 Letter to Boyce Hydro at 2.

<sup>4</sup> Commission Director of D2SI May 26, 2020 Letter to Boyce Hydro at 1 (May 26 D2SI Letter Order).

<sup>5</sup> *Id.* at 2.

<sup>6</sup> Boyce Hydro, Smallwood Emergency Inspection Report, Project No. 10810 (filed June 30, 2020); Boyce Hydro, Secord Emergency Inspection Report, Project No. 10809 (filed July 9, 2020).

6. On July 15 and 21, 2020, the D2SI Chicago Regional Engineer sent Boyce Hydro letter orders identifying deficiencies with the inspection reports for the Smallwood Dam and Secord Dam, and ordering Boyce Hydro to submit supplemental reports by August 14, 2020.<sup>7</sup>

7. On August 18, 2020, the Director of DHAC sent Boyce Hydro a letter order citing the outstanding Sanford Dam reports and reminding it to submit supplemental dam safety reports for the Smallwood and Secord Dams.<sup>8</sup> The August 18 letter order noted that Boyce Hydro's "failure to comply with the Division of Dam Safety and Inspections (D2SI) directives has resulted in a prolonged state of drawdown and the reservoirs cannot be refilled until compliance is achieved."<sup>9</sup> The DHAC Director ordered Boyce Hydro to submit the overdue Sanford Dam inspection report and the two supplemental inspection reports within three days, by August 21, 2020.<sup>10</sup> In addition, the letter order provided notice under section 31 of the Federal Power Act (FPA), that Boyce Hydro was in non-compliance, which could lead to an enforcement proceeding and civil penalties or license revocation.<sup>11</sup>

*Order to Remove Debris from the Sanford Dam*

8. On June 4, 2020, the D2SI Chicago Regional Engineer ordered Boyce Hydro to remove the debris that had accumulated at the Sanford Dam and confirm removal by June 8, 2020.<sup>12</sup> On July 1, 2020, the Director of DHAC issued a letter summarizing Boyce Hydro's failure to respond to the Commission's safety directives, including the

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<sup>7</sup> Commission D2SI Chicago Regional Engineer, Letter, Project No. 10810 (issued July 15, 2020); Commission D2SI Chicago Regional Engineer, Letter, Project No. 10809 (issued July 21, 2020). The letters noted that flood flows had fully receded and reservoir elevations were at or below normal levels by May 20 for the Smallwood Project and May 22 for the Secord Project and the required inspection did not occur until June 8, 2020, at least 17 days after the projects could have been inspected.

<sup>8</sup> Commission Director of DHAC August 18, 2020 Letter to Boyce Hydro at 2-3 (August 18 DHAC Letter Order).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 3 (citing 18 C.F.R. § 385.1602(b)).

<sup>12</sup> Commission D2SI Chicago Regional Engineer June 4, 2020 Letter to Boyce Hydro, Project No. 2785.

failure to remove debris at the Sanford Dam.<sup>13</sup> Because Boyce Hydro had still not provided the required documentation of its efforts to remove debris at the Sanford Dam, the August 18 DHAC Letter Order required Boyce Hydro to submit, within three days, documentation that the debris had been removed.<sup>14</sup> The letter again warned that non-compliance might lead to enforcement action. Boyce Hydro has not submitted the required documentation.

**B. DHAC Order to Consult with Resource Agencies**

9. In addition to discussing dam safety issues, the May 26, 2020 D2SI Letter Order directed Boyce Hydro to coordinate with the Michigan Department of the Environment, Great Lakes, and Energy (Michigan EGLE) regarding the drawdown, and with the Michigan Department of Natural Resources (Michigan DNR) regarding mussel surveys and to provide the Commission a copy of any correspondence issued to or received from these parties.<sup>15</sup> The letter also indicated that any federally listed species protected under ESA must be considered during these drawdowns.<sup>16</sup>

10. On July 1, 2020, Commission staff requested concurrence from the U.S. Fish and Wildlife Service (FWS) to use emergency consultation under section 7 of the ESA.<sup>17</sup> The letter stated that the ESA-listed snuffbox mussels had the potential to exist within the Tittabawassee River and at the Secord, Smallwood, and Sanford reservoirs due to information Commission staff received about the presence of mussels within Wixom Lake, near Edenville Dam.<sup>18</sup> Accordingly, the letter concluded, the drawdown of the reservoirs had the potential to adversely affect the snuffbox mussels.<sup>19</sup> On July 8, 2020, FWS provided recommendations under emergency consultation, including a mussel survey by a qualified biologist in the uppermost riverine portion of the reservoirs and the

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<sup>13</sup> Commission Director of DHAC July 1, 2020 Letter Order to Boyce Hydro at 2.

<sup>14</sup> August 18 DHAC Letter Order at 3.

<sup>15</sup> May 26 D2SI Letter Order at 2.

<sup>16</sup> *Id.*

<sup>17</sup> Commission Director of DHAC July 1, 2020 Letter to FWS.

<sup>18</sup> *Id.* at 2.

<sup>19</sup> *Id.*

tailwaters of the projects.<sup>20</sup> On July 30, 2020, the Director of DHAC ordered Boyce Hydro to consult with and propose a survey plan to the FWS and Michigan DNR and file the survey plan with the Commission.<sup>21</sup> On August 12, 2020, Boyce Hydro requested a 10-day extension of time (i.e., by August 24) to consult with the resource agencies and prepare the stranded mussel survey plan, which staff granted in the August 18 DHAC Letter Order.<sup>22</sup>

11. Boyce Hydro initiated voluntarily Chapter 11 bankruptcy proceedings on July 31, 2020.<sup>23</sup> As noted in the August 18 DHAC Letter Order, the U.S. Bankruptcy Court issued an order on August 7, 2020 authorizing Boyce Hydro to use funds, budgeted with the approval of the bankruptcy trustee, which included professional fees to be incurred to fulfill license-related compliance obligations.<sup>24</sup>

## II. Boyce Hydro's Requests for Stay and Extension of Time

12. Boyce Hydro requests that the Commission grant a stay of the requirement to prepare dam safety inspection reports, remove debris from Sanford Dam, and conduct environmental surveys under the ESA.<sup>25</sup> Boyce Hydro requests that the Commission grant a stay of the compliance requirements until the U.S. Bankruptcy Court approves

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<sup>20</sup> FWS July 8, 2020 Letter. On July 10, 2020, Boyce Hydro objected to the FWS recommendation, arguing that FWS had not provided a known occurrence of snuffbox mussel within the reservoirs, and that FWS had not provided adequate evidence to support the requirements to conduct mussel surveys. Boyce Hydro July 10, 2020 Letter.

<sup>21</sup> Commission Director of DHAC July 30, 2020 Letter to Boyce Hydro.

<sup>22</sup> Boyce Hydro August 12, 2020 Letter.

<sup>23</sup> *In re Boyce Hydro, LLC et al.*, Case No. 20-21214 (Bankr. E.D. Mich. July 31, 2020)

<sup>24</sup> August 18 DHAC Letter, at 2; *see In re Boyce Hydro, LLC, et al.*, Case No. 20-21214, First Day Interim Order Authorizing Use of Cash Collateral and Scheduling Final Hearing, Case No. 20-21214, ECF No. 48 (Bankr. E.D. Mich. Aug. 7, 2020).

<sup>25</sup> Boyce Hydro acknowledges that each of the deadlines for which it now seeks extensions was addressed by DHAC Order sent to Boyce Hydro nearly two months ago. *See* Boyce Hydro September 21, 2020 Stay Request at 1 (“Each of these FERC communications were identified in the letter order issued to [Boyce Hydro Power, LLC] on August 18, 2020, entitled, ‘Extension of Time Request for Endangered Species Act Consultation and Outstanding Dam Safety Directives.’”).

Boyce Hydro's reorganization and settlement plan and pending the resolution of two state condemnation proceedings initiated by Midland and Gladwin Counties and the Four Lakes Task Force for the Secord, Sanford, and Smallwood Projects.

13. Boyce Hydro asserts that, as a result of its bankruptcy filing, its access to capital resources to comply with its license obligations are dependent upon the U.S. Bankruptcy Trustee and Court approval.<sup>26</sup> Further, Boyce Hydro maintains that any budget it proposes to the court will be subject to extensive scrutiny and possible rejection due to the costs associated with the repairs necessary at the Secord and Smallwood Dams.<sup>27</sup> Boyce Hydro asserts that the estimated costs for the mussel surveys are higher than it budgeted for due to the requirement to retain qualified biologists.<sup>28</sup> It states that it "recently conferred with its bankruptcy counsels and learned that neither the appointed bankruptcy trustee, nor the U.S. Bankruptcy Court is likely to approve any regulatory compliance-related expenditure item identified in a proposed [Boyce Hydro's] quarterly dam operations budget."<sup>29</sup>

14. In the alternative, Boyce Hydro requests a 90-day extension of time to comply with its outstanding obligations. It also asks that the Commission refrain from imposing any penalties and interest pursuant to section 31 of the FPA for noncompliance with Commission orders until the requested stay is lifted or the requested extensions of time elapse.

### III. Discussion

15. In acting on stay requests, the Commission applies the standard set forth in the Administrative Procedure Act; that is, a stay will be granted if the Commission finds that justice so requires.<sup>30</sup> Under this standard, the Commission considers whether the moving party will suffer irreparable injury without a stay, whether issuance of a stay will substantially harm other parties, and whether a stay is in the public interest.<sup>31</sup> If the party

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<sup>26</sup> Boyce Hydro September 21, 2020 Stay request at 12.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 13.

<sup>29</sup> *Id.*

<sup>30</sup> 5 U.S.C. § 705; see *Constitution Pipeline Co., LLC*, 154 FERC ¶ 61,092 (2016); *Duke Energy Carolinas, LLC*, 124 FERC ¶ 61,254 (2008).

<sup>31</sup> *Pub. Util. Dist. No. 1 of Pend Oreille Cty.*, 113 FERC ¶ 61,166, at P 6 (2005).

requesting the stay is unable to demonstrate that it will suffer irreparable harm absent a stay, we need not examine other factors.<sup>32</sup>

16. In *Wisconsin Gas Co. v. FERC*, the D.C. Circuit recognized that, although the concept of irreparable harm does not readily lend itself to definition, courts have developed well-known principles to guide a determination, which include that “the injury must be both certain and great[,] it must be actual and not theoretical,” and injunctive relief will not be granted with respect to “something merely feared as liable to occur at some indefinite time.”<sup>33</sup> The D.C. Circuit stated:

Implicit in each of these principles is the further requirement that the movant substantiate the claim that irreparable injury is “likely” to occur. See *Washington Metropolitan Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d at 843 n. 3. Bare allegations of what is likely to occur are of no value since the court must decide whether the harm will *in fact* occur. The movant must provide proof that the harm has occurred in the past and is likely to occur again, or proof indicating that the harm is certain to occur in the near future. Further, the movant must show that the alleged harm will directly result from the action which the movant seeks to enjoin.<sup>34</sup>

17. Boyce Hydro has not met the standard for a stay. It has not demonstrated that potential harm to it is certain and great and actual and not theoretical. As the Commission has previously explained, the Commission will not grant a request for a stay to relieve a licensee of its failure to comply with its license, as Boyce Hydro seeks here, nor will we stay a license to give a licensee time to assess the financial feasibility of the project.<sup>35</sup>

18. Commission staff’s letter orders have established Boyce Hydro’s obligations and explained their importance. Now Boyce Hydro seeks a stay for an indefinite—and potentially significant—period of time to complete the inspections, remove debris from the Sanford Dam, and perform the required environmental surveys. The bankruptcy and

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<sup>32</sup> See, e.g., *Algonquin Gas Transmission, LLC*, 156 FERC ¶ 61,111, at P 9 (2016).

<sup>33</sup> 758 F.2d 669, 674 (D.C. Cir. 1985) (citation omitted).

<sup>34</sup> *Id.*

<sup>35</sup> See *R.L. Garry Corp.*, 62 FERC ¶ 61,266, 62,774-75 (1993).

state condemnation proceedings, until the conclusion of which Boyce Hydro wishes to defer compliance, could take an undetermined amount of time to complete.<sup>36</sup>

19. In this case, consideration of factors that Boyce Hydro does not address—whether issuance of a stay will substantially harm other parties, and whether a stay is in the public interest—dictate denial of the stay request. Boyce Hydro has long been out of compliance with its licenses and with Commission directives, placing public safety and the environment at serious risk. Granting a stay would exacerbate these hazards, far outweighing Boyce Hydro's unconvincing effort to persuade us that its financial concerns should excuse its failure to meet its obligations.

20. As to the requested extensions, Commission staff has been flexible in granting numerous extensions of time to Boyce Hydro with respect to compliance with the dam safety directives and environmental surveys. Despite this flexibility, Boyce Hydro continues to ask for more time, even asking to indefinitely delay important measures. However, because the directives are necessary to protect public safety and the environment, we do not find persuasive Boyce Hydro's justification for requesting additional time to comply with the outstanding orders and directives for the Secord, Smallwood, and Sanford Projects. As licensee for these three projects, Boyce Hydro must continue to comply with the license conditions at its projects to ensure public safety and environmental protection. Further, pending litigation does not relieve the licensee of its obligations to comply with license conditions and requirements.<sup>37</sup> For the same reasons, the Commission will not grant a 90-day extension of time to Boyce Hydro to complete the outstanding dam safety directives and environmental surveys.

21. Last, Boyce Hydro's request for the Commission to refrain from pursuing penalties under section 31 of the FPA until its requested stay is lifted or extension of time elapses is premature and is dismissed. We see no reason to provide such a guarantee. Boyce Hydro remains in noncompliance and should promptly comply with all outstanding D2SI and DHAC directives or risk of enforcement action.

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<sup>36</sup> Boyce Hydro's assertions as to whether the U.S. Bankruptcy Court would approve particular expenses are no more than speculation and, in any case, would not convince us to allow Boyce Hydro to further delay compliance with its regulatory obligations.

<sup>37</sup> See *Boyce Hydro Power, LLC*, 159 FERC ¶ 62,292, at P 28 (2017).



Project No. 2785, et al.

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The Commission orders:

(A) Boyce Hydro's September 21, 2020 request for stay of the requirement to prepare supplemental dam safety reports, remove debris at the Sanford Dam, and complete environmental survey, as required in the May 20, June 4, July 15, July 21, July 30, and August 18, 2020 Orders, is denied.

(B) Boyce Hydro's September 21, 2020 request for an extension of time to prepare supplemental dam safety reports, remove debris at the Sanford Dam and complete environmental surveys, as required in the May 20, June 4, July 15, July 21, July 30, and August 18, 2020 Orders, is denied.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.

Document Content(s)

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