

FOUR LAKES TASK FORCE
233 E. Larkin St. Suite 2
Midland, MI 48640
1-989-941-3005
fourlakes taskforce.org



July 7, 2020

Ms. Kimberly D. Bose
Secretary
Federal Energy Regulatory Commission
888 First Street NE
Washington, DC 20426

RE: Boyce Hydro Non-Compliance

Project Nos. 2785 (Sanford), 10809 (Secord), and 10810 (Smallwood)

Dear Secretary Bose:

As the “boots on the ground,” the Four Lakes Task Force (“FLTF”) submits this letter to respond to Boyce Hydro’s latest efforts to avoid its responsibilities to clean up the damage it caused from the May 19, 2020 breach of the Edenville and Federal Energy Regulatory Commission (“FERC” or “Commission”)–licensed Sanford dam, as well as its dilatory efforts to repair the damaged dams. In particular, this letter responds to the July 2 letter from Boyce Hydro to FERC, and it asks FERC to take several critical actions.

As is abundantly clear to the affected communities in Midland and Gladwin Counties, Michigan, we have a major crisis and recovery effort in the community surrounding Wixom, Sanford, Smallwood and Secord Lakes (“Four Lakes”), the latter three of which are subject to FERC hydroproject licenses. We are victims of an operator who refuses to comply with Commission and State directives. Even worse, Boyce Hydro fails to provide adequate transparency on dam safety conditions, representing that it can quickly raise Secord and Sanford Lake levels without providing necessary information regarding the extent of repairs needed and how they will be financed. All of this while Boyce Hydro fails to spend money on or perform obvious and straightforward duties, such as debris clean-up.

To make matters worse, Boyce Hydro is actively clouding the post-disaster investigation process. Lee Mueller acknowledges in the July 2, 2020 Boyce Hydro letter to the Commission that he is speaking with the investigators, trying to steer the scope of the investigation. He even referenced, without quoting, positions of some of the members of the independent forensic team. It’s important to the community, and we believe FERC, that investigators are shown to be independent, particularly from the company that caused the underlying disaster. Boyce Hydro’s suggesting or inferring with investigation scope changes by framing them as questions to FERC risks tampering with the risks the public’s confidence in the investigation results.

Background: FLTF Purpose and Goals

In 2018, the County Board of Commissioners for Midland and Gladwin Counties appointed the FLTF as its Delegated Authority to pursue establishing legal levels for Wixom, Sanford, Smallwood and Secord Lakes (“Four Lakes”) in accordance with Part 307 “Inland Lake Levels” of the Michigan Natural Resources and Environmental Protection Act (“Part 307”), 1994 Public Act 451, as amended, MCL 324.20701, et seq. FLTF is a Michigan nonprofit and 501(c)(3) charitable organization, established to lessen the burden of government and to manage the lake levels for the public health, safety and welfare of property owners.

The counties established FLTF with the intent to move all four dams from private ownership to public ownership. FLTF, with the authority from Gladwin and Midland Counties, planned to acquire the dams on behalf of Midland and Gladwin Counties and improve and operate the dams with funds derived from special assessments on properties within the Four Lakes Special Assessment District. If practicable, FLTF envisioned utilizing the sale of hydroelectric power to offset operation and maintenance costs. In May 2019, the Midland County Circuit Court entered an order establishing the lake levels for the Four Lakes (which are aligned with the levels established by the FERC licenses) and approved a special assessment district comprised of over 8,500 parcels.

Before the May 19, 2020 failures of the Edenville and Sanford dams, FLTF focused on operating and maintaining the State legal (normal) levels for the Four Lakes, and working to acquire the four dams from Boyce Hydro. FLTF already owns parts of the lake bottoms of Sanford Lake, and the Midland County owns a portion of Wixom Lake.

On December 31, 2019, FLTF and Boyce Hydro executed an agreement proposing a multi-year process under which FLTF would help Boyce Hydro bring the projects into state and federal compliance, with Boyce Hydro ultimately transferring the properties and effective FERC licenses to FLTF by January 2022. Importantly, the parties agreed to delay certain key payment obligations until June 2020, but the purchase did not take place under the terms originally negotiated between the parties due to the May 19 failure of the Edenville and Sanford dams. Nevertheless, state legal lake levels are in place, and FLTF (as the Delegated Authority for Midland and Gladwin Counties) has the authority to acquire the dam and bottomland properties through condemnation. Both counties have adopted resolutions declaring necessity and have authorized the FLTF, on behalf of the counties, to proceed with steps to acquire the dams by condemnation.

The status quo is untenable. Even post-disaster, Boyce Hydro refuses to comply with FERC’s directives. Without obtaining access to Boyce Hydro property, local communities are stuck with Boyce Hydro as the owner and operator of the dams, with no visible progress on key short-term issues, such as bank stabilization and debris removal.

FLTF's Role Following the May 19 Disaster

Boyce Hydro refuses to recognize the severity of the damage it has caused, and it refuses to make the necessary steps to clean up the mess it created and to repair the dams to bring its projects back into compliance with FERC and state requirements, holding the local citizens hostage from its bad acts.

FLTF has tried to address a number of critical issues. For instance, we have engaged our own engineering firms and volunteers to perform erosion assessments and some mitigation, including debris removal on the lake bottoms we own. We also attend emergency response meetings and perform engineering studies on short and long-term reconstruction and repairs.

Boyce Hydro itself has asked FLTF to perform specific functions. Specifically, on May 23, 2020, Boyce Hydro asked FLTF to supply an engineer to support and monitor emergency repair on the Tobacco spillway of the Edenville Dam as it became unstable, and Boyce Hydro did not have access to any engineers. This is directly upstream of the bottom lands of Sanford. In similar fashion, it is our understanding that the Dam Safety Division of the Michigan Department of Environment, Great Lakes and Energy has received unsatisfactory reports and plans from Boyce Hydro on addressing this matter.

Request to Remove CEII Designation

Boyce Hydro has filed with the Commission its reports on the Smallwood and Secord projects as Critical Energy Infrastructure Information ("CEII"). Reports currently identified as containing CEII include the following list of documents submitted by Boyce Hydro and reports issued by FERC Staff:

- Boyce Hydro Power LLC 5/22/2020 Response to David E. Capka letter dated 5/20/2020 under P-2785, et al.
- Special Dam Safety Inspection Report No. 2 by the Chicago Regional Office for Boyce Hydro, LLC, Sanford Hydroelectric Project, inspected on 06/09/2020 under P-2785.
- Special Dam Safety Inspection Report No. 2 by the Chicago Regional Office for Boyce Hydro, LLC, Smallwood Hydroelectric Project, inspected on 06/10/2020 under P-10810.
- Special Dam Safety Inspection Report No. 2 by Chicago Regional Office for Boyce Hydro, LLC, Secord Hydroelectric Project, inspected on 06/10/2020 under P-10809.
- Project Safety-Related Submission to CRO of Boyce Hydro Power LLC submits Smallwood Emergency Inspection Report under P-10810, submitted 6/30/2020.

- Project Safety-Related Submission to CRO of Boyce Hydro Power LLC Revision 7 of Owner's Dam Safety Program under P-2785, et al. (dated 7/2/2020, filed 7/6/1010).
- Project Safety-Related Submission to CRO of Boyce Hydro Power LLC under P-2785-000, et al. Boyce Hydro Power, LLC submits its 12.10 Incident Report for the May 19, 2020 flood for Secord, Smallwood, and Sanford projects (dated 7/2/2020, filed 7/6/1010).

FLTF believes Boyce Hydro has taken this step intentionally to inhibit FLTF and public access to this important information regarding the status of its dams post-disaster.

FLTF has submitted a request that FERC grant it access to the CEII reports. This process can be lengthy. Such delays under the current circumstances could inhibit FLTF and the local community's ability to address the situation on the ground.

For these reasons, FLTF asks FERC staff to quickly review these reports and determine whether they warrant CEII treatment. At a minimum, FERC should provide non-CEII summaries, or release those aspects of the reports that are not CEII. The reality is that, with Boyce Hydro's absence, and no transparent reporting, the community must develop plans with very little data.

Response to Boyce Hydro July 2 Letter

On July 2, 2020, Boyce Hydro submitted to FERC a letter seeking "to obtain clarification regarding the scope of the forensic analysis required" by the May 20, 2020 letter from FERC Staff. FLTF herein responds to just a handful of key points.

The July 2 letter (page 2, par. 3) states that Boyce Hydro proposes to submit construction repair plans to FERC on or before July 16th, with the relatively simple construction repairs completed by mid-August. Once completed, according to Boyce Hydro, the Smallwood and Secord projects should be placed in operation once again.

As you are aware, FLTF has performed a substantial amount of diligence in preparation to acquire the Boyce Hydro assets and to implement the necessary improvements to bring all four dams up to current safety standards. Based on our work to date, the Boyce Hydro letter fails to address the following issues, some we assume should have been addressed in the reports:

1. Do the earth embankments of all four Boyce Hydro projects meet current design criteria? The embankments are homogenous, un-zoned earthen structures lacking an impervious core to reduce seepage. The embankments lack an internal drainage system and the side slopes are too steep.
2. The concrete barrel arch spillways at all four dams are at the end of their useful life. The Portland cement concrete lacks air entrainment and is highly susceptible

to weathering and freeze-thaw damage. The concrete surfaces exhibit spalling, exposed rebar and loss of material. FLTF is investigating major reconstruction of the spillways to safely extend the service life of the spillways. The first paragraph on page 2 of the Boyce Letter dismisses these issues as not designated for immediate action and should not be cause for delaying the resumption of normal operation. Has Boyce Hydro provided FERC data on this matter suggesting that this can be ignored?

3. The Secord dam has insufficient spillway capacity to pass the PMF. In April 2020, Boyce Hydro filed with the Commission a 50% design report developed by FTLF's engineers that presents plans to provide additional spillway capacity at Secord. This was before the May 2020 flood event which may necessitate a new PMF study which could result in a higher PMF – requiring additional spillway capacity at Secord and the other Boyce dams. Boyce Hydro yet to comment on any follow-up.
4. New PMF studies aside, the existing PMF studies at all four Boyce Hydro projects are inadequate. They fail to provide sufficient freeboard to protect the earth embankments from wave run-up and overtopping. FLTF has performed preliminary engineering studies which determined from 2 to 4 additional feet of freeboard would be required at the four dams. We do not know if Boyce Hydro is building this into its plan. Does FERC?
5. The last paragraph of page 3 of the July 2 Boyce Hydro letter claims the Sanford Dam has complied with FERC's PMF requirements since 2002, and the fuse plug's erodible material activated an intended effectuating-controlled release of the initial flood wave. As described above, Boyce Hydro's PMF study is likely inadequate, and it is not certain that the fuse plug performed as designed. This is why an independent investigation is needed.
6. The adequacy and execution of the Emergency Action Plans ("EAPs") for all four dams require thorough investigation. During the flood events lines of communication were not clear, erroneous evacuation orders were issued and local officials were essentially left on their own to deal with the situation. There were no engineers in the area or available. This cannot be allowed to happen again. Is there an expectation on Boyce that these plans are updated and when?
7. Since the May 19 dam failures, FLTF has been actively involved in securing the safety of the remaining dam structures, addressing environmental issues and working with property owners to protect against erosion damage. We are depending on FERC to protect the communities from further risks, and not hinder the proactive efforts of the FLTF.

For all of the reasons above, a thorough, independent forensic investigation must be performed for all four dams.

Conclusion: Requests to the Commission

As the Commission can see, the communities of Midland and Gladwin Counties face a devastating situation that Boyce Hydro fails to address. FLTF asks the Commission to take the following actions:

1. Please be definitive in your response to Boyce Hydro so we have a clear view if a visual inspection and accelerated permitted is going to be allowed to an operator with Boyce's Track Record, or even a new owner such as the FLTF.
2. Identify specific conditions precedent Boyce Hydro must meet to bring the Secord and Smallwood lake levels to their fullest, so we can plan around meeting those conditions, if Boyce Hydro does not.
3. Please state FERC views Boyce Hydro's ongoing accountability if he retains the licenses during or after any condemnation proceedings FLTF may instigate. (Meanwhile, FLTF intends to work with FERC staff to take the proper steps to obtain the licenses after successfully condemning hydroproject project areas and fixtures.)
4. Please provide a determination if these studies can be under CEII, as it seems that the primary threat here is Boyce is using CII as a shield as a tactic to delay his transparency to the community.

Sincerely,

FOUR LAKES TASK FORCE, in its capacity as,
Part 307 County Delegated Authority, Midland and
Gladwin Counties,

By: /s/ David E. Kepler
David E. Kepler
FLTF President