

162 FERC ¶ 61,007  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Kevin J. McIntyre, Chairman;  
Cheryl A. LaFleur, Neil Chatterjee,  
Robert F. Powelson, and Richard Glick.

Boyce Hydro Power, LLC

Project No. 10808-057

ORDER ON STAY

(Issued January 5, 2018)

1. On November 20, 2017, Commission staff issued an order requiring Boyce Hydro Power, LLC (Boyce) to cease generation at the Edenville Project No. 10808, based on the licensee's long-term failure to comply with dam safety and other requirements.<sup>1</sup> On December 1, 2017, Boyce filed an emergency motion for stay. This order denies the permanent stay request, but grants a temporary stay until March 1, 2018, unless further extended by the Commission's Office of Energy Projects, Division of Dam Safety and Inspection, Chicago Regional Engineer (Regional Engineer) based on ice conditions.

**I. Background**

2. The 4.8-megawatt Edenville Project is located on the Tobacco and Tittabawassee Rivers in Gladwin and Midland Counties, Michigan. The project includes a 6,600-foot-long dam, with maximum height of 54.5 feet, spanning both rivers, and the 2,600-acre Wixom Lake, which has a 49-mile shoreline at full pool.<sup>2</sup> The Commission's Office of Energy Projects, Division of Dam Safety and Inspections (Dam Safety Division) has determined that the failure of the project dam could result in the loss of human life and the destruction of property and infrastructure.<sup>3</sup>

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<sup>1</sup> *Boyce Hydro Power, LLC*, 161 FERC ¶ 62,119 (2017).

<sup>2</sup> *See Wolverine Power Corporation* (Boyce's predecessor), 85 FERC ¶ 61,063, at 61,205 (1998). The Commission issued a 30-year license for the project.

<sup>3</sup> *See Boyce Hydro Power, LLC*, 159 FERC ¶ 62,292, at PP 2, 7 (2017).

3. Boyce acquired the project in 2004.<sup>4</sup>

4. Standard Article 4 of the Edenville Project license states, in pertinent part, that the project “shall be subject to the inspection and supervision of the Regional Engineer, Federal Energy Regulatory Commission, in the region wherein the project is located.” Part 12 of the Commission’s regulations – Safety of Water Power Projects and Project Works – confirms that “[a]ny water power project and the construction, operation, maintenance, use, repair, or modification of any project works are subject to the supervision of the Regional Engineer or any other authorized Commission representative” for the purpose of “achieving or protecting the safety, stability, and integrity of the project works or the ability of any project work to function safely . . . or . . . [o]therwise protecting life, health, or property.”<sup>5</sup> The Regional Engineer may require a licensee to take any “action with respect to the design, construction, operation, maintenance, repair, use, or modification of its project works that is . . . necessary or desirable.”<sup>6</sup> The Regional Engineer’s orders are immediately effective and remain in effect until rescinded or amended by the Regional Engineer, or stayed, amended, or rescinded by the Commission.<sup>7</sup>

5. The Commission’s Dam Safety Guidelines require that, if the failure of project works would present a threat to human life or would cause significant property damage, the project works must be designed to either withstand overtopping or the loading condition that would occur during a flood up to the probable maximum flood, or to the point where a failure would no longer constitute a hazard to downstream life and/or property. In the alternative, the capacity of the spillway must be adequate to prevent the reservoir from rising to an elevation that would endanger the safety of the project works.<sup>8</sup> Given that failure of the Edenville Dam could pose a significant risk to the Village of

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<sup>4</sup> Wolverine transferred the project to Synex Michigan, LLC, in 2004. *See Wolverine Power Corporation and Synex Michigan, LLC*, 107 FERC ¶ 62,266 (2004). In 2007, Synex Michigan, LLC in 2007 changed its name to Boyce. *See Notice of Change in Licensee’s Name* (filed July 12, 2007).

<sup>5</sup> 18 C.F.R. § 12.4(b)(1)(i) and (ii) (2017).

<sup>6</sup> *Id.* § 12.4(b)(iv).

<sup>7</sup> *Id.* § 12.4(c)(2)(i) and (ii).

<sup>8</sup> <https://www.ferc.gov/industries/hydropower/safety/guidelines/eng-guide.asp/chap2-pdf>. The probable maximum flood is the flood that may be expected from the most severe combination of critical meteorologic and hydrologic conditions that are reasonably possible in the drainage basin under study. *Id.*

Sanford, Northwood University, the City of Midland, and other downstream areas,<sup>9</sup> the dam must meet this design standard.

6. Since acquiring the project in 2004, Boyce has repeatedly failed to comply with requests by the Regional Engineer and other Commission staff to develop and implement plans and schedules to address the fact that the project spillways are not adequate to pass the probable maximum flood, thereby creating a grave danger to the public.<sup>10</sup>

7. In addition, Boyce has engaged in unauthorized construction and earth-moving without obtaining the approval of the Chicago Regional Engineer,<sup>11</sup> has failed to file and implement a public safety plan necessary to protect recreational users of project facilities,<sup>12</sup> has failed to construct required recreation facilities and improperly restricted public access to project lands and waters,<sup>13</sup> has not retained ownership interests in project lands necessary to ensure that it can comply with Commission requirements,<sup>14</sup> and has failed to comply with the project's water quality monitoring plan.<sup>15</sup> Commission staff has had repeated discussions with the licensee and has issued numerous orders requiring compliance, to no avail.

8. On June 15, 2017, Commission staff issued a compliance order, detailing the licensee's failures to comply with its license and the Commission's safety requirements.<sup>16</sup> Staff informed Boyce that its primary concern was the licensee's longstanding failure to address the project's inadequate spillway capacity, and required Boyce to construct two auxiliary spillways as risk reduction measures, and to file a plan and schedule for additional modification needed to safely pass the project's full probable maximum

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<sup>9</sup> *Boyce Hydro Power, LLC*, 159 FERC ¶ 62,292 at P 7.

<sup>10</sup> *See id.* PP 9-16.

<sup>11</sup> *See id.* PP 47-81.

<sup>12</sup> *See id.* PP 82-86.

<sup>13</sup> *See id.* PP 88-114.

<sup>14</sup> *See id.* PP 116-129.

<sup>15</sup> *See id.* PP 130-145. However, Boyce has since come into compliance with its water quality monitoring plan as of July 2017.

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

flood.<sup>17</sup> The order noted Boyce's extensive violations and warned that the failure to comply with the order could result in an order to cease generation and subject the licensee to enforcement and civil penalties.<sup>18</sup>

9. Boyce did not come into compliance. Accordingly, on November 20, 2017, the Office of Energy Projects issued the order at issue here, requiring Boyce to cease generation until further order from the Commission and referring the matter to the Commission's Office of Enforcement for further investigation and action.

10. On December 1, 2017, Boyce filed an emergency motion for stay. On December 15, the Wixom Lake Association, an organization of property owners around, and recreational users of, Wixom Lake, filed a response opposing the motion.

11. On December 28, 2017, Boyce filed a supplement to its request for stay and its December 20, 2017 request for rehearing of the November 20, 2017 order, asserting that its inability to generate will impact project and personnel safety during extremely cold winter weather. Boyce states that during extremely cold winter weather, the project's Tainter gates are prone to freeze in place and the available methods to keep the gates operating are hazardous to operators. Boyce asserts that without allowing water to flow to the turbines during these extreme cold weather periods there is no safe method for controlling reservoir levels.

## **II. Discussion**

12. In acting on stay requests, the Commission applies the standard set forth in the Administrative Procedure Act,<sup>19</sup> i.e., the stay will be granted if the Commission finds that "justice so requires." Under this standard, the Commission considers a number of factors, such as whether the movant will suffer irreparable injury in the absence of a stay, whether the issuance of a stay would substantially harm other parties, and where the public interest lies.<sup>20</sup> If the party requesting the stay is unable to demonstrate that it will suffer irreparable harm absent a stay, we need not examine other factors.<sup>21</sup>

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<sup>17</sup> *Id.* P 146.

<sup>18</sup> *Id.* PP 148-49.

<sup>19</sup> 5 U.S.C. § 705 (2012).

<sup>20</sup> *Transcontinental Gas Pipeline, LLC*, 160 FERC ¶ 61,042, at P 5 (2017)

<sup>21</sup> *Id.* (citing *Algonquin Gas Transmission*, 156 FERC ¶ 61,111, at P 9 (2016)).

13. In order to meet the requirement of irreparable injury for a stay, the injury must be both certain and great, actual and not theoretical.<sup>22</sup> Economic loss alone does not constitute irreparable harm.<sup>23</sup> Yet Boyce cites only economic harm as the basis for its stay request, arguing that ceasing generation would seriously impact its revenue and financial capabilities.<sup>24</sup> This is simply not enough to support issuance of a stay.

14. In addition, the public interest in ensuring that the dam is safe outweighs the potential economic harm to Boyce.<sup>25</sup> We take our duty to protect the public extremely seriously. As explained above, the failure of the Edenville Dam would pose a very substantial risk to life and property, and Boyce has repeatedly failed to comply with the orders of the Regional Engineer and other Commission staff or to work with Commission staff to resolve these instances of noncompliance, notwithstanding being given many opportunities to do so.

15. In its pleading, Boyce pledges to work to remediate the dam and proposes to escrow 50 percent of the project's proceeds to fund the necessary work. For its part, the Wixom Lake Association contends that Boyce has previously offered, and not fulfilled, similar plans, and opposes delaying necessary repairs.

16. In light of the importance of protecting public safety, Boyce's lengthy, extensive record of noncompliance, and Boyce's failure to show that justice requires a stay, we will not issue a permanent stay of the order to cease generation.<sup>26</sup>

17. Nevertheless, given the potential safety concerns at the project during extremely cold weather, we will allow use of the powerhouse to pass flows until March 1, 2018, unless further extended by the Regional Engineer based on ice conditions. However, Boyce must still ensure that all gates are adequately de-iced and maintained in an

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<sup>22</sup> *Guardian Pipeline, L.L.C.*, 96 FERC ¶ 61,204, at P 26 (2001) (citing *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)).

<sup>23</sup> *Id.*

<sup>24</sup> Request for Stay at 6-7.

<sup>25</sup> See *Turlock Irrigation District and Modesto Irrigation District*, 144 FERC ¶ 61,051, at P 23 (2013) (stating that "the public interest in ensuring that the dam is safe outweighs the potential economic harm to the Districts of complying with the Commission's dam safety regulations.").

<sup>26</sup> We note that on December 20, 2017, Boyce filed a request for rehearing of the November 20, 2017 order. We will act on the request for rehearing separately.

operational condition regardless of temperature, and provide to the Commission, on a weekly basis, photos of the de-iced gates.

The Commission orders:

(A) The emergency motion for stay, filed by Boyce Hydro Power, LLC on December 1, 2017, as supplemented on December 28, 2017, is granted from the date of this order until March 1, 2018, unless further extended by the Regional Engineer based on ice conditions.

(B) For the duration of the stay, Boyce shall submit to the Commission as a weekly public eFiling photos of the de-iced gates.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.