

161 FERC ¶ 62,119
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Boyce Hydro Power, LLC

Project No. 10808-053, -047

ORDER TO CEASE GENERATION

(Issued November 20, 2017)

1. Boyce Hydro Power, LLC (licensee) is in violation of the Federal Power Act (FPA), Commission regulations, and the license¹ for the Edenville Hydroelectric Project No. 10808. The licensee is also in violation of a Compliance Order issued June 15, 2017 (Compliance Order).² The Edenville Project is located on the Tittabawassee River in Gladwin and Midland counties, Michigan.

2. Given the licensee's failure to comply with the Compliance Order and new violations (discussed below) since the Compliance Order was issued, we are requiring the licensee to cease generation at the project until further order by the Commission. We are also referring this matter to the Commission's Office of Enforcement for further investigation and action.

I. Background

3. The Commission's primary concern with the Edenville Project is the licensee's longstanding failure to address the project's inadequate spillway capacity. The project's spillway deficiencies must be remedied. Commission staff have worked with the licensee for over 13 years to address this problem but to no avail. The licensee has similarly been unresponsive in addressing other compliance matters related to dam safety, recreation at the project, and property rights.

4. On June 15, 2017, the Commission's Director of the Division of Hydropower Administration and Compliance issued the Compliance Order outlining the licensee's violations of the terms of its license and the Commission's regulations for: 1) failing to

¹ *Wolverine Power Corporation*, 85 FERC ¶ 61,063 (1998).

² *Boyce Hydro Power, LLC*, 159 FERC ¶ 62,292 (2017). Also see two orders granting extensions of time issued on July 25, 2017 and August 15, 2017. *Boyce Hydro Power LLC*, unpublished (2017).

increase the spillway capacity of the project to address the probable maximum flood (PMF);³ 2) performing unauthorized dam repairs; 3) performing unauthorized earth-moving activities; 4) failing to file an adequate Public Safety Plan;⁴ 5) failing to construct approved recreation facilities pursuant to the Commission's 2001 Order approving its Recreation Plan and for unduly restricting public access; 6) failing to acquire all necessary property rights; and 7) failing to comply with the Commission's 1999 Order approving its Water Quality Monitoring Plan. The Compliance Order required the licensee to provide the Commission with specific plans, specifications, reports, and other information in order to come into compliance with the conditions of its license and the Commission's regulations.⁵

5. On July 14, 2017 and July 27, 2017, the licensee filed two requests for more time to comply with certain requirements in the Compliance Order. By orders issued July 25, 2017 and August 15, 2017, Commission staff granted all of the extensions that the licensee requested, with the exception of one portion of the second requested extension, because Commission staff determined that the requirement to file a plan and schedule covered by that portion could be completed in the time provided in the first extension without the need for a second.⁶ Commission staff granted those extensions based on

³ The flood that may be expected from the most severe combination of critical meteorological and hydrologic conditions that is reasonably possible in the drainage basin under study.

⁴ The Compliance Order discusses the licensee's failure to file an adequate Public Safety Plan pursuant to Article 4 and its failure to follow directives from the Regional Engineer. The licensee must first resolve the compliance matters with the Recreation Plan in order to update its July 8, 2008 Public Safety Plan.

⁵ On June 19, 2017, July 5, 2017, and July 13, 2017, the licensee filed documentation that it had installed water quality monitoring equipment and had connected this equipment to the project's SCADA system, as well as documentation that the equipment is in good working order, pursuant to ordering paragraph (L) of the Compliance Order. Therefore, the licensee has complied with the Compliance Order with respect to this issue. *See* Commission staff's letter to the licensee issued July 28, 2017 under subdocket -055. In addition, on July 26, 2017 and August 23, 2017, the licensee filed documentation with the Commission regarding Article 5 and property rights at the project. Commission staff is reviewing these filings which will be addressed separately under subdocket -044.

⁶ The first order granted an additional 30 days to comply with the requirements in ordering paragraphs (B), (C), (D), (E), (F), and (G) of the Compliance Order. The second order granted more time to comply with ordering paragraphs (B), (G), and (D), but (*continued ...*)

representations made by the licensee and its counsel regarding steps that the licensee was taking to satisfy the requirements of the Compliance Order.

II. Summary of Compliance Order Violations

6. As of the date of this order, the licensee is in violation of the following ordering paragraphs in the Compliance Order and associated orders extending time, as discussed below:

- Ordering paragraph (B) directed:

For the Tobacco Auxiliary Spillway: By July 15, 2017 (extended to September 18, 2017), the licensee was required to file a complete design package with the Commission's Division of Dam Safety and Inspection, Chicago Regional Engineer (Regional Engineer) for a Tobacco auxiliary spillway. The design package must fully address all items noted in the Regional Engineer's letter to the licensee dated June 6, 2016.

- Ordering paragraph (D) directed:

For the Tittabawassee Auxiliary Spillway: By August 14, 2017 (extended to November 14, 2017), the licensee was required to file with the Regional Engineer, plans, specifications, and a schedule to construct a Tittabawassee auxiliary spillway.

- Ordering paragraph (F) directed:

By October 13, 2017 (extended to November 14, 2017), the licensee was required to file with the Regional Engineer, a plan and schedule for additional modifications to the project to meet the full (100%) Probable Maximum Flood.

- Ordering paragraph (G) directed:

By July 30, 2017 (extended to September 30, 2017), the licensee was required to file with the Regional Engineer, complete plans and specifications for permanent repairs to both left and right Tobacco abutment spillway walls, a complete work schedule, detailed drawings, a water management plan, an erosion control plan, a Temporary Construction Emergency Action Plan, and a Quality Control Inspection Program as originally specified in the Regional Engineer's letter to the licensee issued December 8, 2016.

denied more time for complying with ordering paragraph (F).

- Ordering paragraph (J) directed:

By September 13, 2017, the licensee was required to provide reasonable access to project lands and waters for the public and to file documentation that such access has been provided. The licensee's documentation must include photographs showing that gates restricting access to parking and fishing areas are open, that fencing blocking access to recreation features has been removed, and that reasonable access to the water is allowed. The licensee's documentation must also include a statement from the licensee affirming its compliance with the access provisions of Article 18.

- Ordering paragraph (K) directed:

By September 13, 2017, the licensee was required to file with the Regional Engineer, a complete design package for construction of all recreation facilities required by the project's approved Recreation Plan. The approved recreation facilities for the Tittabawassee side include: a parking lot for 15 cars off of State Highway 30, a parking lot with two handicapped spaces, a barrier-free restroom, a railed handicapped-accessible fishing pier next to the powerhouse, two canoe portages, access paths, and signs that identify the recreation facilities. The approved recreation facilities for the Tobacco side include: a parking lot for 15 cars off of State Highway 30, an access path, stairs to a railed fishing pier, and signs that identify the recreation facilities. Within 90 days of completing this work, the licensee must file documentation including as-built drawings and photographs demonstrating that the recreation facilities in the approved Recreation Plan have been constructed.

7. The licensee has failed to make the filings required by ordering paragraphs (B), (D), (F), (G), (J), and (K) of the Compliance Order and, in addition, has failed to provide the public access to project lands and waters required by ordering paragraph (J).

III. Additional Violations since the Compliance Order

8. Since issuance of the Compliance Order, the Regional Engineer has issued directives to the licensee in letters dated August 31, 2017 and September 18, 2017 to comply with additional dam-safety related matters of which the licensee is now in violation.

9. The August 31, 2017 letter required the licensee to file a plan and schedule for designing and carrying out corrective measures recommended in the Part 12D report of

the independent consultant pursuant to the Commission's regulations at 18 CFR § 12.39(a).⁷ This plan and schedule was due October 31, 2017.

10. The September 18, 2017 letter required the licensee to file a plan and schedule to perform a Focused Spillway Assessment pursuant to Article 4 of the license⁸ and directives issued by the Regional Engineer on April 28, 2017. This plan and schedule was due October 3, 2017. Neither of the above two plans and schedules have been filed with the Commission.

IV. Discussion and Conclusions

11. The Commission's primary concern is the licensee's failure to address the project's inadequate spillway capacity. In addition, the licensee has failed to comply with other requirements of its license. The Compliance Order required the licensee to provide the Commission with specific plans, specifications, reports, and other information as discussed in that order.

12. Section 309 of the FPA authorizes the Commission "to perform any and all acts, and to ... issue ... such orders ... as it may find necessary or appropriate to carry out the provisions of the [FPA]." Commission staff have provided repeated and specific notice to the licensee that continued non-compliance could result in the Commission issuing a cease generation order or assessing civil penalties or revoking the project's license pursuant to section 31 of the FPA.⁹

13. Commission staff have worked with the licensee for over 13 years on the spillway capacity issue alone and have sent numerous letters and other communications directing the licensee to bring the project into compliance. Notwithstanding multiple extensions and other accommodations by staff, the licensee still has not made substantial progress toward meeting its compliance obligations. Given the licensee's persistent pattern of non-compliance, and the unlikely chance that the licensee will change course without further Commission action, we are requiring the licensee to cease generation at the

⁷ Also see the letter from the Regional Engineer to the licensee dated June 30, 2016 discussing the violations regarding the Part 12D report.

⁸ Article 4 states, in part, that "...the licensee shall cooperate fully with [the Regional Engineer] and shall furnish him such information as he may require concerning the operation and maintenance of the project..."

⁹ See, e.g., Compliance Order, 159 FERC ¶ 62,292 at P 149; Letter from John A. Zygaj to Lee Mueller, at 2 (Nov. 14, 2016).

project by November 27, 2017.¹⁰ We are also referring this matter to the Commission's Office of Enforcement for further action which could include penalties, license revocation, or other action.

14. To ensure compliance with this directive, ordering paragraph (B) requires the licensee to file written notification with documentation that includes the date and time that generation was ceased, the generator meter reading at that time, and a photograph of the reading on the meter. Generation must not resume until further order by the Commission.

15. While in non-generating status, the licensee must continue to comply with all other license conditions including its water quality standards required by Article 402, minimum flows required by Article 403, and reservoir elevations required by Article 404. The licensee can meet these conditions through the appropriate operation of gates at the project and other means. Public safety must not be compromised while in a non-generating status.

16. Finally, the licensee must comply with the Regional Engineer's directives as stated in the August 31, 2017 and September 18, 2017 letters concerning the Part 12D report and the Focused Spillway Assessment as discussed above. Ordering paragraph (D) addresses these new issues.

17. Nothing in this order relieves the licensee of its requirements under the FPA, Commission regulations, the license, or the Compliance Order. The licensee will remain in violation of its license and the Commission's regulations until it has filed the various plans, specifications, reports, and other information as discussed in that order and has followed all Regional Engineer directives.

The Director orders:

(A) Boyce Hydro Power, LLC (licensee) must cease generation at the Edenville Hydroelectric Project by November 27, 2017. Generation must not resume until further order by the Commission.

(B) On the day the licensee ceases generation, it must file written notification with the Secretary of the Commission, in Docket No. P-10808, providing the date and time that generation ceased, the generator meter reading at that time, and a photograph of the reading on the meter.

¹⁰ See 18 C.F.R. § 375.308(g) (2017).

(C) The licensee must continue to comply with the terms and conditions of its license, including water quality standards in Article 402, minimum flows in Article 403, and reservoir elevations in Article 404, while in non-generating status.

(D) The licensee must comply with the June 15, 2017 Compliance Order. The licensee must also comply with the Commission's Division of Dam Safety and Inspection's Chicago Regional Engineer's directives as stated in the August 31, 2017 and September 18, 2017 letters, pursuant to Article 4 of the project license, concerning additional dam safety related matters regarding the Part 12D report and a Focused Spillway Assessment. The licensee will remain in violation of the Compliance Order and Regional Engineer directives until the Commission or its staff provides written determination that the licensee has provided adequate plans, specifications, schedules, and information to address these violations.

(E) This order constitutes final agency action. Any party may file a request for rehearing of this order within 30 days from the date of its issuance, as provided in section 313(a) of the Federal Power Act, 16 U.S.C. § 8251 (2012), and the Commission's regulations at 18 C.F.R. § 385.713 (2017). The filing of a request for rehearing does not operate as a stay of the effective date of this order, or of any other date specified in this order. The licensee's failure to file a request for rehearing shall constitute acceptance of this order.

Terry L. Turpin
Director
Office of Energy Projects

Document Content(s)

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