

BOYCE HYDRO POWER LLC

A W.D. Boyce Trusts Legacy Enterprise

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15 March, 2018

Mr. Kyle Kruger, Senior Fisheries Biologist
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RE: Letter dated 8 March, 2018 regarding recreation access at the Edenville Hydroelectric Project (No. 10808)

Mr. Kruger: Boyce Hydro Power, LLC (BHP), the Licensee of the above-referenced Project, is in receipt of your March 8, 2018 letter correspondence addressed to the Secretary, Federal Energy Regulatory Commission (FERC) setting forth, once again, your concerns that the Project is not in compliance with the Edenville Dam license obligation to offer and maintain recreation facilities at that facility.

BHP disagrees with your nonlegal conclusion that reasonable public recreation access is not in place at the Edenville Dam site. Since, at least, 2015, you have consistently mischaracterized and misrepresented in writing to the FERC and the public the scope, nature, and extent of that license obligation with respect to all of BHP's projects, especially the Edenville Project.

Most egregiously, you have made these assertions without providing a single reference to an objectively defined (non-subjective) legal standard contained within the Federal Power Act (FPA) or the Edenville Dam license in support thereof. In addition, your allegations have conspicuously failed to set forth, in full disclosure, our prior discussions and communications regarding the inapplicability and nonvalidity of the unofficial cartoon drawings that had been originally supplied by the prior owner-licensee as then-current conceptual proposals for recreational facilities at the Edenville Dam site.

As a public official, you are held to high standards of truth and veracity; however, your communications-to-date to FERC with respect to this matter fail to meet these standards. For example, your communications conspicuously omit BHP's multiple consultations with you/MDNR dating back to August of 2006. You should recall that we had discussed the 2001 Commission-approved recreation plans prepared and submitted by the prior owner-licensee. You also should recall how I had explained to you, in 2006, that the unofficial cartoon drawings informally submitted for the project license constituted no more than mere concept drawings expressing the then-current intentions of the prior owner-licensee for the recreation plan; they met neither engineering nor architectural drafting or design standards. Indeed, these concept drawings were infeasible and/or did not take into account the following circumstances: 1) location within the accepted project boundary; 2) feasible access due to topography; 3) project security for operations structures; 4) protection of earthen embankments from pedestrian foot traffic; and 5) visitor safety.

Edenville Dam License Article 410 requires that the licensee provide:

(1) a fishing access site at the Tittabawassee River outlet of the project dam, including a barrier-free, tailwater fishing pier, a 15-vehicle parking area with designated barrier-free parking spaces, a barrier-free restroom, connecting access paths, and directional signs; (2) a fishing

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access site at the Tobacco River outlet of the project dam, including a shoreline fishing pier on the dike near the project dam, a 15-vehicle parking area, connecting access paths, and directional signs; (3) a canoe portage around the project dam; and (3) signs that identify all recreation facilities and access at the project.

Consistent with Edenville Dam License Article 410 (i.e., of the above enumerated recreation features and amenities), BHP has ensured the construction of and public access to the following recreational amenities at the Tobacco portion of the Edenville Dam site:

- *Reservoir fishing piers located on both sides of M-30.*
 Your photographs demonstrate the existence of well designed, attractive and properly constructed fishing decks/piers that certainly exceed the minimum attributes for structures required for their purpose. The fencing and gates you object to as restricting “informal fishing access” beyond the decks/piers is in fact a reasonable and entirely appropriate measure for structural protection of the earthen embankments, project security, and public safety. There are no fenced barriers to these decks/piers. Furthermore, since the Edenville Dam license sets forth no legal requirement for or definitional standard of “informal fishing access,” it appears to be your intention to “read” such a requirement/standard into the license that suits your subjective preference and/or desire and the unreasonably broad notion of the “public interest” to which you individually subscribe. In other words, rather than adhere to an objective statutory or contractual standard, you consistently have endeavored to persuade FERC to informally amend the Edenville Dam license prior to its expiration by intentionally conflating your personal agenda for property access with the written description of requirements contained in the license.
- *Parking lot on the west side of M-30 with parking for 15 spaces including handicap parking.*
 You are on record for having objected to the location of this parking lot and for having stated that it is too close to the bridge. However, you have neither referenced nor cited any objective legal (statutory or contractual) standard as support for your allegations. You point to no objective criteria about proximity to a bridge or any other public structure contained in the license or the FPA that directs or restricts the location of the constructed parking lot. Your serial criticisms fail to consider the formidable time, effort and expense BHP has expended to design, plan and construct the parking lot in order to ensure its proper and legal location within the project boundary, in the vicinity of the Tobacco River tailrace, and its adjacency to and at the same level as the reservoir fishing deck/pier. Your serial criticisms, furthermore, fail to recognize how the entrance to the lot from M-30 had been designed in consultation with MDOT, approved by MDOT, and constructed to MDOT standards. As your photograph demonstrates, there are no gates or barriers to this lot which preclude utilization of its intended purpose.
- *Barrier-free restroom facilities.*
 An accessible restroom has been provided in an appropriate location within the new parking lot at the west side of M-30 in the form of a portable unit which is in place for the entire spring, summer, and early fall fishing season. It is serviced weekly while in place. The restroom structure is removed during the winter months when there is no usage of the facilities it serves.
- *Tobacco River tailrace fishing access.*
 A railed fishing plaza and picnic area has been constructed which is accessed by means of a trail and a staircase that connects it to the parking lot some forty-five feet above at the top of the dam. One of the photographs accompanying your correspondence very nicely reflects this feature. Access to the earthen embankment is restricted for public safety, structural

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protection of the embankment from foot traffic, and for project security reasons. Public access to the tailrace slab below the three spillway gates is not permitted for obvious public security and safety reasons. BHP would be pleased to provide photographic evidence of how this recreational facility has been and continues to be used and enjoyed by the public.

- *Tittabawassee River tailrace fishing access.*
Access to the Tittabawassee River tailrace below the east side of the Edenville Dam via Lively Road is currently available to the public, and BHP would be pleased to provide photographic evidence of this fact. Upon completion of the existing sheet pile wall restoration project to be constructed with FERC approval during the summer of 2018, BHP will provide appropriate additional features, including a railed fishing deck. Please note that there is no requirement in the license that the railed fishing deck be located adjacent to or next to the powerhouse or spillway structures.
- *Portage pathways for Tittabawassee and Tobacco Rivers.*
Portage for the Tittabawassee River has been long established on the east side of the Edenville Dam. Admittedly, the previously installed signage is now faded, but new signs will be installed by June 2018 when the summer recreation season begins. The portage at the Tobacco River is somewhat more challenging due to the configuration of the Edenville Dam. BHP intends to construct a stair case and portage platforms and to install portage signs by 21 June, 2018.

In October 2017, BHP submitted, in consultation with and for DNR review a Proposed Amended Recreation Plan which comprehensively documented existing (as-built) and proposed recreational features at the Edenville Project. You responded to that plan on October 23, 2017. BHP is considering your comments and will submit its response in a separate letter correspondence.

FERC's Compliance Order of June 15, 2017 required the licensee to open gates restricting access to parking and fishing areas, remove fencing blocking access to recreational features, and allow reasonable access to the water. BHP maintains that the features that provide reasonable access are not now and have not been blocked off or fenced off. BHP considers the areas within the project boundary that are not publicly accessible as inappropriate for public access given BHP's obligations under the Edenville Dam license to ensure protection of the earthen embankments, project security, and public safety. While the Compliance Order refers to a "fishing pier next to the powerhouse", this is not a requirement of License Article 410 or the July 19, 2001 Order Modifying and Approving Recreation Plan. As we stated in our letter to you dated 5 October, 2017:

The Amended Plan encompasses the need for operational security of the hydroelectric station, the spillways, and the majority of the dam structure.

In short, BHP understands its license obligation to provide recreational facilities and access, and in fact, has substantially fulfilled those obligations at considerable expense and in a constructive manner, that holistically takes into account physical topography, prudent architectural site design, public safety and site security considerations. The prior owner-licensee's cartoon representations, however, failed to address these critical issues inconsistent with the former owner-licensee's Edenville Dam license recreational obligations. Therefore, these informal conceptual depictions, which are devoid of engineering and architectural foundation, cannot be utilized as the basis for construing and implementing BHP's legal obligations to provide recreational facilities and access consistent with the recreational provisions of the Edenville Dam license, especially when BHP has substantially fulfilled those obligations as generally described in writing.

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Mr. Kruger, your serial allegations of noncompliance pertaining to gates and fencing erected on private property not contemplated in the FERC license application for the Edenville Project, and not contained in or encumbered by the accepted FERC project boundary, are seriously misplaced, inappropriate, and arguably beyond your agency jurisdiction, if not *ultra vires*. Your failure to provide full disclosure to FERC of your correspondences and liaison with BHP dating back to 2006, and your failure to fully disclose any objective statutory or contractual standards supporting your "vision" of recreational facilities at the Edenville Dam site, moreover, is offensive given your oath of Michigan State office relating to truth and veracity. Nevertheless, and despite these failures, BHP will continue to work constructively and cooperatively to complete its already substantial fulfillment of the Edenville Dam FERC license recreation plan requirements as referenced herein.

A handwritten signature in black ink, reading "Lee W. Mueller", written over a horizontal line.

Lee W. Mueller, Architect
Co-Member Manager
Boyce Hydro Power, LL

Cc: Federal Energy Regulatory Commission
John Clements

Document Content(s)

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