

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Richard Glick, Chairman;  
Neil Chatterjee, James P. Danly,  
Allison Clements, and Mark C. Christie.

Boyce Hydro Power, LLC

Project Nos. 10809-052  
10810-058  
2785-104

ORDER ASSESSING PENALTY

(Issued April 15, 2021)

1. In this order, we find that Boyce Hydro Power, LLC (Boyce Hydro or Respondent), licensee for the Secord (P-10809), Smallwood (P-10810), and Sanford (P-2785) Projects (collectively, the Boyce Projects), violated numerous FERC staff orders and license provisions addressing safety of project facilities and surrounding communities. More specifically, following catastrophic failures of the Sanford Dam and the non-jurisdictional Edenville Dam, Boyce Hydro failed to begin a Commission-directed forensic study of the dam failures and ignored staff's orders to conduct engineering safety studies and to file certain required reports with the Commission to ensure homes and other buildings surrounding the Boyce Projects were not at risk of further damage. In light of the seriousness of these violations and the lack of effort by Respondent to remedy its violations, we find that it is appropriate to assess a civil penalty of \$15,000,000, pursuant to section 31(c) of the Federal Power Act (FPA),<sup>1</sup> for the violations of Standard Article 4 of the Boyce Projects' licenses and section 12.4(b) of the Commission's regulations.<sup>2</sup>

2. While we assess a civil penalty of \$15,000,000 herein, the Commission took, and will continue to take, steps to ensure that this penalty assessment against Boyce Hydro does not threaten recovery by community members who were harmed by the dam failures and related flooding.<sup>3</sup>

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<sup>1</sup> 16 U.S.C. § 823b(c).

<sup>2</sup> 18 C.F.R. § 12.4(b) (2020).

<sup>3</sup> See *infra* P 60.

## I. Background

### A. The Boyce Projects and Edenville Dam

3. Boyce Hydro is a limited liability corporation with its principal place of business in Edenville, Michigan. Boyce Hydro is the license-holder for the Boyce Projects, which are located on the Tittabawassee River in Gladwin and Midland counties, Michigan. The Secord Project<sup>4</sup> is the most upstream of the Boyce Projects. The Smallwood Project<sup>5</sup> is located approximately seven river miles downstream from the Secord Project. Boyce Hydro's formerly-licensed Edenville Project (formerly FERC Project No. 10808),<sup>6</sup> is located approximately 13 river miles downstream of the Smallwood Project, at the confluence of the Tittabawassee and Tobacco Rivers. The Sanford Project<sup>7</sup> (the most downstream of the Boyce Projects) is located approximately 11 river miles downstream of Edenville Dam.

4. The three Boyce Projects and the formerly-licensed Edenville Project are closely linked to each other, sharing common ownership and hydrology. Indeed, the

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<sup>4</sup> *Wolverine Power Corp.*, 85 FERC ¶ 61,064 (1998) (Secord License Order). The 1.2-megawatt (MW) Secord Project includes the Secord Dam, which has three sections totaling about 2,085 feet in length and a maximum height of 55 feet and creates the 1,100-acre Secord reservoir.

<sup>5</sup> *Wolverine Power Corp.*, 85 FERC ¶ 61,065 (1998) (Smallwood License Order). The 1.2-MW Smallwood Project includes the Smallwood Dam, which has three sections totaling about 1,095 feet in length and a maximum height of 38 feet and creates the 6,000-acre Smallwood reservoir.

<sup>6</sup> *See Boyce Hydro Power, LLC*, 164 FERC ¶ 61,178 (2018) (Edenville Revocation Order), *reh'g denied*, 166 FERC ¶ 61,029 (2019). The Commission's revocation order stated that the Edenville Project included the Edenville Dam, totaling about 6,600 feet in length and a maximum height of 54.5 feet, spanning the Tittabawassee and Tobacco Rivers, creating the 2,600-acre reservoir known as Wixom Lake. Edenville Revocation Order, 164 FERC ¶ 61,178 at P 2. The Edenville Dam breached and failed due to heavy rainfall on May 19, 2020.

<sup>7</sup> *Wolverine Power Corp.*, 41 FERC ¶ 62,192 (1987), *amended by*, 85 FERC ¶ 61,066 (1998) (Sanford Amendment Order). The 3.3-MW Sanford Project includes the approximately 26-foot-high and 1,600-foot-long Sanford Dam, which breached on May 19, 2020. Prior to the breach, the dam created a 1,526-acre project reservoir.

Commission issued the operative licenses for all four projects on the same day,<sup>8</sup> noting that it intended to coordinate treatment of these four “hydrologically-related” projects in the future.<sup>9</sup>

5. The four projects also are linked by Boyce Hydro’s troubled compliance history. Its compliance failures at the formerly-licensed Edenville Project were particularly egregious, as Boyce Hydro ignored FERC staff’s dam safety requirements for 14 years.<sup>10</sup> Consequently, on September 10, 2018, the Commission revoked the license for the Edenville Project.<sup>11</sup> Jurisdiction over the facilities of the Edenville Project passed from the Commission to the State of Michigan upon revocation of the license.<sup>12</sup>

## **B. Procedural History**

6. On December 9, 2020, the Commission issued an Order to Show Cause<sup>13</sup> to Boyce Hydro relating to its apparent violation of numerous Commission staff orders and license provisions addressing safety of project facilities at the Secord, Smallwood, and Sanford Projects. In the Order to Show Cause, the Commission directed Boyce Hydro to provide an answer within 30 days, pursuant to Rule 213(a) of the Commission’s Rules of Practice and Procedure, and show cause why the Commission should not assess a \$15,000,000 civil penalty.<sup>14</sup> The Commission, under Rule 213(c), required Boyce Hydro in its answer to provide “a clear and concise statement regarding any

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<sup>8</sup> See *Wolverine Power Corp.*, 85 FERC ¶ 61,063 (1998) (Edenville License Order); Sanford Amendment Order, 85 FERC ¶ 61,066; Secord License Order, 85 FERC ¶ 61,064; Smallwood License Order, 85 FERC ¶ 61,065.

<sup>9</sup> Sanford Amendment Order, 85 FERC at 61,239; *see also* Edenville License Order, 85 FERC at 61,204 (“The four projects’ reservoirs occupy about 39 river miles on the Tittabawassee River, with the tailwater of each project being the headwater of the next downstream project.”).

<sup>10</sup> Edenville Revocation Order, 164 FERC ¶ 61,178 at PP 39-60.

<sup>11</sup> *Id.* at Ordering Para. (A); *see also* *Boyce Hydro Power, LLC*, 159 FERC ¶ 62,292 (2017) (compliance order detailing numerous violations at the Edenville Project).

<sup>12</sup> *Id.* P 60.

<sup>13</sup> *Boyce Hydro Power, LLC*, 173 FERC ¶ 61,217 (2020) (Order to Show Cause).

<sup>14</sup> *Id.* P 2 (citing 18 C.F.R. § 385.213(a)), Ordering Para. (A).

disputed factual issues and any law upon which they rely”<sup>15</sup> and “to the extent practicable, admit or deny, specifically and in detail, each material allegation and set forth every defense relied upon.”<sup>16</sup> The Order to Show Cause noted that, under Rule 213(a), the Office of Enforcement (Enforcement staff) may reply to Boyce Hydro’s answer within 30 days of the filing of the answer.<sup>17</sup> The Order to Show Cause also provided Boyce Hydro 30 days, establishing January 8, 2021, as the deadline, to decide whether it was going to elect to have the procedures set forth in section 31(d)(3) of the FPA<sup>18</sup> for a prompt penalty assessment by the Commission.<sup>19</sup>

7. On January 8, 2021, Boyce Hydro filed its answer to the Order to Show Cause.<sup>20</sup>

8. On February 3, 2021, Enforcement staff filed its answer to Boyce Hydro’s answer.<sup>21</sup>

## **II. Summary Disposition Pursuant to Rule 217**

9. On January 8, 2021, Boyce Hydro responded to the Order to Show Cause and did not contest the majority of the facts and material allegations set forth therein. Instead, Boyce Hydro made only a handful of factual assertions relating to bankruptcy and argued that “[t]he Commission should not interpret this response as conceding all of the factual allegations in the Order to Show Cause . . . .”<sup>22</sup> The only defense to the allegations in the Order to Show Cause that Boyce Hydro offered was that it lacked funds to comply with the Commission’s dam safety orders because of its bankruptcy.<sup>23</sup> Further, Boyce Hydro did not elect within 30 days to have the procedures set forth in section 31(d)(3) of the

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<sup>15</sup> *Id.* P 46 n.52 (citing 18 C.F.R. § 385.213(c)).

<sup>16</sup> *Id.* (citing 18 C.F.R. § 385.213(e)).

<sup>17</sup> *Id.* P 2.

<sup>18</sup> 16 U.S.C. § 823b(d)(3).

<sup>19</sup> Order to Show Cause, 173 FERC ¶ 61,217 at P 46, Ordering Para. (C).

<sup>20</sup> Boyce Hydro LLC’s Response to Order to Show Cause and Notice of Proposed Penalty (filed Jan. 8, 2021) (Response).

<sup>21</sup> Enforcement Staff Reply to Response Submitted by Boyce Hydro (filed February 3, 2021).

<sup>22</sup> Response at 4.

<sup>23</sup> *Id.* at 3.

FPA apply<sup>24</sup> to this proceeding. Thus, those procedures are not applicable and instead the procedures set forth in section 31(d)(2) of the FPA apply.<sup>25</sup>

10. Because Boyce Hydro failed to respond to the factual record set forth in the Order to Show Cause, we find that Boyce Hydro's Response should "be treated as a general denial"<sup>26</sup> and that summary disposition therefore is appropriate under Rule 217.<sup>27</sup> We therefore find there is no need for a hearing before an Administrative Law Judge (ALJ) pursuant to section 31(d)(2) and in this order assess a penalty.<sup>28</sup>

11. The Commission previously has analogized summary disposition under Rule 217 to summary judgment under the Federal Rules of Civil Procedure.<sup>29</sup> Expanding upon this concept, we have explained that summary disposition is appropriate where: (1) the party opposing it has had a reasonable opportunity to present arguments and factual support, and its submitted evidence is viewed in the most favorable light; and (2) it is found that a hearing is unnecessary and would not affect the ultimate disposition of an issue because there are no material facts in dispute or because the facts presented by the party opposing summary disposition have been accepted in reaching the decision.<sup>30</sup> Both of

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<sup>24</sup> 16 U.S.C. § 823b(d)(3).

<sup>25</sup> *Id.* § 823(b)(d)(2).

<sup>26</sup> 18 C.F.R. § 385.213(e)(2) (2020) ("General denials of facts referred to in any order to show cause, unsupported by the specific facts upon which the respondent relies . . . may be the basis for summary disposition under Rule 217 . . .").

<sup>27</sup> 18 C.F.R. § 385.217(b) ("If the decisional authority determines that there is no genuine issue of fact material to the decision of a proceeding or part of a proceeding, the decisional authority may summarily dispose of all or part of the proceeding.").

<sup>28</sup> 16 U.S.C. § 823b(d)(2).

<sup>29</sup> *Coastal States Mktg., Inc. v. Texas-New Mexico Pipeline Co.*, 25 FERC ¶ 61,164, at 61,452 (1983) ("[I]t is within the Commission's decision-making authority to summarily dispose of cases or particular issues . . . without hearing, and, in effect, to grant summary judgment as done by Federal District Courts under Rule 56 of the Federal Rules of Civil Procedure.").

<sup>30</sup> *See K N Interstate Gas Transmission Co.*, 86 FERC ¶ 61,229, at 61,824 (1999) (citing *Columbia Gulf Transmission Co.*, 79 FERC ¶ 61,351 (1997)); *see also Enron Power Mktg., Inc.*, 103 FERC ¶ 61,343, at PP 33-35 (2003) (*Enron*) (denying hearing where record was sufficient to act without a trial-type hearing and parties seeking hearing

these factors favor summary disposition here – (1) Boyce Hydro had, and in fact took, the opportunity to respond to the Order to Show Cause, and (2) Boyce Hydro failed to respond to the factual allegations set forth in the Order to Show Cause.<sup>31</sup> As a result, there are no material questions of fact for the Commission to decide and summary disposition pursuant to Rule 217 is appropriate.<sup>32</sup>

12. Rather than respond to the factual allegations in the Order to Show Cause, Boyce Hydro makes two arguments in defense of its contention that the Commission should not assess a civil penalty. We conclude that both are without merit and detail our reasoning below.

### **III. Findings of Fact**

#### **A. May 19, 2020 Flood and Aftermath**

13. On May 19, 2020, the Tittabawassee and Tobacco Rivers flooded. According to reports that Boyce Hydro provided to the Commission’s Division of Dam Safety and Inspections (D2SI) - Chicago Regional Engineer, the floodwaters breached the Edenville Dam at approximately 5:45 pm EDT on May 19, 2020. The downstream Sanford Dam breached after that. The Secord and Smallwood Dams were not breached.

14. The breaches and resulting flooding caused substantial damage to the surrounding communities, washing out major roads, destroying homes, and forcing the evacuation of

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had an opportunity to submit evidence, criticize evidence offered against it, and make its case to the Commission).

<sup>31</sup> See *infra* section III.F, Boyce Hydro’s Ability to Comply with the Commission’s Orders. “The Commission may resolve factual issues on a written record[,]” particularly if the credibility of witnesses is not at issue. See *Enron*, 103 FERC ¶ 61,343 at P 33 (citing *Exxon Co., U.S.A. v. FERC*, 182 F.3d 30, 45-46 (D.C. Cir. 1999)) (footnote omitted). Moreover, Boyce Hydro did not request a trial-type hearing.

<sup>32</sup> *Infra* section III, details the Commission’s findings of fact in light of Boyce Hydro’s failure to contest the factual allegations in the Order to Show Cause.

ten thousand residents.<sup>33</sup> In June 2020, the State of Michigan estimated that the economic harm from failure of the Boyce Hydro facilities exceeded \$190,000,000.<sup>34</sup>

15. Boyce Hydro filed a voluntary petition for bankruptcy protection on July 31, 2020.<sup>35</sup>

**B. Commission Order Directing Forensic Investigation of Boyce Projects**

16. On May 20, 2020, the day after the dam breaches, the Commission's Director of D2SI issued a delegated order directing Boyce Hydro to "immediately begin formation of a fully Independent Forensic Investigation Team [(Forensic Investigation Team or Team)] to focus on the Sanford Dam, Smallwood Dam, and Secord Dam."<sup>36</sup> He said that Commission staff would "reach[] out to [the Michigan Department of Environment, Great Lakes, and Energy (EGLE)] regarding coordination for investigation of the Edenville Breach."<sup>37</sup> He directed Boyce Hydro to "eFile a letter with the Commission which provides a copy of each proposed Forensic Investigation Team member's resume within 7 days from the date of this letter."<sup>38</sup>

17. On May 22, 2020, Boyce Hydro requested an extension of the filing deadline regarding the forensic investigation to May 29, 2020. The Director of D2SI granted that extension but admonished Boyce Hydro in a delegated order that "no additional extensions will be granted."<sup>39</sup>

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<sup>33</sup> See Letter from Hon. Gretchen Whitmer to Hon. Donald Trump, at 2 (Jun. 15, 2020), [https://content.govdelivery.com/attachments/MIEOG/2020/06/15/file\\_attachments/1474175/Letter%20GOV.%20Whitmer%20to%20Pres.%20Trump%20re%20MDD%20request%20%286.15.10%29.pdf](https://content.govdelivery.com/attachments/MIEOG/2020/06/15/file_attachments/1474175/Letter%20GOV.%20Whitmer%20to%20Pres.%20Trump%20re%20MDD%20request%20%286.15.10%29.pdf).

<sup>34</sup> See *id.* at 4.

<sup>35</sup> See *In re Boyce Hydro, LLC*, No. 20-21214 (Bankr. E.D. Mich. July 31, 2020).

<sup>36</sup> *Boyce Hydro Power, LLC*, Letter from Director of D2SI to Boyce Hydro, Project Nos. 2785, 10809 & 10810 (May 20, 2020) (delegated order) (May 20, 2020 Letter Order).

<sup>37</sup> *Id.* at 2.

<sup>38</sup> *Id.* at 2-3.

<sup>39</sup> *Boyce Hydro Power, LLC*, Letter from Director of D2SI to Boyce Hydro, Project Nos. 2785, 10809 & 10810 at 3 (May 26, 2020) (delegated order).

18. Boyce Hydro did not submit any names for proposed team members until June 1, 2020, and it did not submit all names until June 10, 2020, nearly two weeks after the extended deadline.<sup>40</sup> Commission staff promptly approved the members of the proposed Forensic Investigation Team.<sup>41</sup> In each of the letters, FERC staff directed Boyce Hydro to schedule an introductory meeting with the Forensic Investigation Team, Boyce Hydro, Commission staff, and EGLE to discuss the Team's work.

19. That meeting occurred on June 17, 2020, and during that meeting, Commission staff again explained to Boyce Hydro that the Forensic Investigation Team must analyze both the Edenville and Sanford Dam failures. In a June 22, 2020, delegated order following up on that meeting, Commission staff directed Boyce Hydro that, "[a]s soon as possible, but not later than Thursday, June 25, 2020, you must confirm in writing the schedule for the Forensic Team being able to fully begin their work."<sup>42</sup>

20. Boyce Hydro did not submit the required written confirmation. Instead, it sent a letter on July 2, 2020, claiming that it "ha[d] received several questions from the Team

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<sup>40</sup> Boyce Hydro Power, LLC, Letter from Boyce Hydro to Director of D2SI, Project Nos. 2785, 10809 & 10810 (filed June 1, 2020); Boyce Hydro Power, LLC, Letter from Boyce Hydro to Director of D2SI, Project Nos. 2785, 10809 & 10810 (filed June 4, 2020); *Boyce Hydro Power, LLC*, Letter from Boyce Hydro to Director of D2SI, Project Nos. 2785, 10809 & 10810 (June 8, 2020) (delegated order). The Chicago Regional Engineer sent Boyce Hydro a letter on June 3, 2020, reminding it of the obligation, set out in the May 20, 2020 Letter Order, to "immediately begin formation of a fully Independent Forensic Investigating Team to focus on the Sanford Dam, Smallwood Dam, and Secord Dam" and asking for an immediate response with the qualification/resumes of the additional team members. *See Boyce Hydro Power, LLC*, Letter from Chicago Regional Engineer to Boyce Hydro, Project Nos. 2785, 10809 & 10810 (June 3, 2020) (delegated order).

<sup>41</sup> *See Boyce Hydro Power, LLC*, Letter from Director of D2SI Approving Additional Member of the Forensic Investigation Team, Project Nos. 2785, 10809 & 10810 (June 5, 2020) (delegated order); *Boyce Hydro Power, LLC*, Letter from Director of D2SI Approving Additional Member of the Forensic Investigation Team, Project Nos. 2785, 10809 & 10810 (June 9, 2020) (delegated order); *Boyce Hydro Power, LLC*, Letter from Director of D2SI Approving Additional Member of the Forensic Investigation Team, Project Nos. 2785, 10809 & 10810 (June 11, 2020) (delegated order).

<sup>42</sup> *Boyce Hydro Power, LLC*, Letter from Director of D2SI to Boyce Hydro Project Nos. 2785, 10809 & 10810 (June 22, 2020) (delegated order).

regarding the appropriate scope of their investigation.”<sup>43</sup> Notwithstanding Commission staff’s numerous instructions to include the Edenville Dam breach in the scope of the Forensic Investigation Team’s work, the letter asked Commission staff to “confirm that the scope of the Team’s forensic analysis for purposes of complying with FERC’s May 20, 2020 Letter Order does not include the cause or causes of the Edenville Dam breach given the fact that FERC does not regulate that former dam as of September, 2018.”<sup>44</sup> The letter also observed that “without in any way attempting to prejudice the outcome of the Team’s forensic analysis, BHP [(Boyce Hydro)] believes that it is fairly evident that the root cause of the Sanford Dam failure was the Edenville Dam failure.”<sup>45</sup>

21. Commission staff responded in a July 8, 2020 delegated order, explaining again the thorough nature of the required investigation.<sup>46</sup> Staff explained that Boyce Hydro had more than sufficient time to resolve contractual arrangements and that delays in starting the post-failure analyses were unacceptable. Accordingly, Commission staff ordered Boyce Hydro to file within three business days “documentation that Boyce has fully executed contracts with the [Forensic Investigation] Team,” specifically requiring that “[t]he contracts must authorize the [Forensic Investigation] Team to start immediately on a scope of work consistent with the May 20, 2020 Letter Order, the June 17, 2020 introductory meeting discussion, and this Order.”<sup>47</sup> Staff also notified Boyce Hydro that the Commission might take further enforcement action, including potentially assessing civil penalties, if Boyce Hydro failed to comply with the order.

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<sup>43</sup> Boyce Hydro Power, LLC, Letter from Boyce Hydro to Kimberly D. Bose, Projects Nos. 2785, 10809 & 10810, at 2 (filed July 2, 2020).

<sup>44</sup> *Id.* at 2-3.

<sup>45</sup> *Id.* at 4. Boyce Hydro has described in Federal District Court filings the “choreographed water ballet” necessary to manage flows and reservoir levels in the four projects, recognizing that “the operation of any one of these four dams will . . . inevitably influence the operation of the others.” Defs’ Resp. in Opp’n To Pls’ Mot. To Remand at 13, *EGLÉ v. Mueller*, No. 1:20-cv-528 (W.D. Mich. June 15, 2020), ECF No. 14. Given the Commission’s past coordinated treatment of the four projects and Boyce Hydro’s recognition of their linked hydrology in these Federal District Court filings, there should be no confusion regarding why study of the Edenville Dam failure necessarily is intertwined with study of the three jurisdictional Boyce Projects.

<sup>46</sup> *Boyce hydro Power, LLC*, Letter from Director of D2SI to Boyce Hydro, Docket Nos. 2785, 10809 & 10810 (July 8, 2020) (delegated order).

<sup>47</sup> *Id.* at 2.

22. Boyce Hydro has not responded to the July 8, 2020 delegated order or filed the required documentation.

23. On August 7, 2020, the Commission contracted directly with the approved members of the Forensic Investigation Team to insure the independent forensic investigation was conducted.

**C. Commission Orders Regarding Dam Safety Inspections and Reports**

24. In the May 20, 2020 Letter Order, the Commission's Director of D2SI also directed Boyce Hydro to immediately perform dam safety inspections of the Sanford, Secord, and Smallwood Dams. He ordered Boyce Hydro to orally report the result of those inspections to the Commission's Chicago Regional Engineer as soon as they were complete and to submit written reports within three weeks (by June 10, 2020).<sup>48</sup>

25. Boyce Hydro filed the required inspection reports for the Smallwood and Secord Dams, but it has not filed an inspection report for the Sanford Dam.<sup>49</sup>

26. On July 15, 2020, the Chicago Regional Engineer sent Boyce Hydro a letter identifying deficiencies with the Smallwood Dam inspection report and ordering it to submit a supplemental report by August 14, 2020.<sup>50</sup> On July 21, 2020, the Chicago Regional Engineer sent Boyce Hydro a similar letter regarding deficiencies with the Secord Dam inspection report, ordering it to submit a supplemental report by August 20, 2020.<sup>51</sup>

27. On August 18, 2020, the Director of the Commission's Division of Hydropower Administration and Compliance (DHAC) sent Boyce Hydro a letter citing the outstanding Sanford Dam report and reminding it to submit supplemental dam safety reports for the

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<sup>48</sup> See May 20, 2020 Letter Order at 2.

<sup>49</sup> See Boyce Hydro Power, LLC, Letter from Lee W. Mueller to John Zygaj, Project No. 10810 (filed June 30, 2020) (transmitting Smallwood Emergency Inspection Report); Boyce Hydro Power, LLC, Letter from Lee W. Mueller to John Zygaj, Project No. 10809 (filed July 8, 2020) (transmitting Secord Emergency Inspection Report).

<sup>50</sup> See *Boyce Hydro Power, LLC*, Letter from Chicago Regional Engineer to Boyce Hydro, Project No. 10810 (July 15, 2020) (delegated order).

<sup>51</sup> See *Boyce Hydro Power, LLC*, Letter from Chicago Regional Engineer to Boyce Hydro, Project No. P-10809 (July 21, 2020) (delegated order).

Smallwood and Secord Dams.<sup>52</sup> She noted that Boyce Hydro’s “failure to comply with the [D2SI] directives has resulted in a prolonged state of drawdown and the reservoirs cannot be refilled until compliance is achieved.”<sup>53</sup>

28. In that letter, the DHAC Director ordered Boyce Hydro to submit the overdue Sanford Dam safety report and the two supplemental dam safety reports within three days (by August 21, 2020).<sup>54</sup>

29. Boyce Hydro did not file those dam safety reports. Instead, on September 21, 2020, (more than a month after the DHAC Director’s August 18, 2020 Order) Boyce Hydro requested a stay of the outstanding obligations addressed by that order. The Commission denied that stay request on October 15, 2020.<sup>55</sup>

#### **D. Commission Orders Regarding Debris Removal at Sanford Dam**

30. On June 4, 2020, the Commission’s Chicago Regional Engineer sent Boyce Hydro a letter reporting that “[a] significant amount of debris ha[d] accumulated at the Sanford Dam after the May 19, 2020 breach/failure of the upstream Edenville Dam” and ordering Boyce Hydro to remove that debris immediately.<sup>56</sup> He ordered Boyce Hydro to report on the status of debris removal by June 8, 2020.<sup>57</sup> Boyce Hydro failed to file a report on the status of debris by that date.

31. On August 18, 2020, the DHAC Director sent a letter reminding Boyce Hydro of its obligation to remove the debris at Sanford Dam and ordered it to file within three days (by August 21, 2020) documentation demonstrating its efforts to remove the debris.<sup>58</sup>

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<sup>52</sup> See *Boyce Hydro Power, LLC*, Letter from Director of DHAC to Boyce Hydro, Project No. 10809-045, et al., at 2-3 (Aug. 18, 2020) (delegated order) (August 18, 2020 Order).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> See *Boyce Hydro Power, LLC*, 173 FERC ¶ 61,071, PP 17-21 (2020).

<sup>56</sup> *Boyce Hydro Power, LLC*, Letter from Regional Engineer to Boyce Hydro, Project No. 2785 (June 4, 2020) (delegated order).

<sup>57</sup> *Id.*

<sup>58</sup> See *Boyce Hydro Power, LLC*, Letter from Director of DHAC to Boyce Hydro, Project No. 10809-045, et al., at 3 (Aug. 18, 2020) (delegated order).

Boyce Hydro has not submitted any report or documentation indicating that it has made any effort to remove the debris.

**E. Commission Dam Safety Orders Regarding Shoreline Study**

32. On June 4, 2020, the Commission's Chicago Regional Engineer sent a delegated order to Boyce Hydro stating that emptying of the Sanford reservoir due to the dam breach may make residences and structures along the shoreline unstable and that the shoreline itself may be subject to additional erosion due to increased speed of the river.<sup>59</sup> Accordingly, he directed Boyce Hydro to "have a Professional Engineer survey the shoreline for these conditions and develop a report as soon as possible" and to undertake stabilization measures for residences or structures in jeopardy.<sup>60</sup> Boyce Hydro did not respond and provided no evidence that it had hired a Professional Engineer to study the shoreline to evaluate whether erosion might cause additional damage.

33. On July 1, 2020, the DHAC Director issued a delegated order informing Boyce Hydro that it was in violation of Part 12 of the Commission's regulations for failing to comply with the Chicago Regional Engineer's order.<sup>61</sup> She clarified the Chicago Regional Engineer's order by directing Boyce Hydro to file that survey and analysis immediately, and she reminded Boyce Hydro that the Commission might take further enforcement action, including potentially assessing civil penalties, if Boyce Hydro failed to comply.<sup>62</sup>

34. Boyce Hydro provided no evidence that it engaged a professional engineer to conduct the ordered survey and analysis.

**F. Defenses: Alleged Inability to Pay and Constructive Surrender of Licenses**

35. Boyce Hydro contends in its Response that it could not "comply with Commission requirements" after filing for bankruptcy, because it did not have funds to do so.<sup>63</sup> Boyce Hydro explains that while it did receive \$1,000,000 in insurance proceeds in

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<sup>59</sup> *Boyce Hydro Power, LLC*, Letter from Chicago Regional Engineer to Boyce Hydro, Project No. 2785 (June 4, 2020) (delegated order).

<sup>60</sup> *Id.*

<sup>61</sup> *See Boyce Hydro Power, LLC*, Letter from Director of DHAC to Boyce Hydro, Project No. 10809-045, et al. (July 1, 2020) (delegated order).

<sup>62</sup> *Id.*

<sup>63</sup> Response at 3.

bankruptcy, its bank held a security interest that entitled it to a veto over any potential use of the funds and the bank “was not willing to allow [Boyce Hydro] to expend substantial sums on license compliance issues.”<sup>64</sup> Further, Boyce Hydro contends that “the bankruptcy court would likely not have allowed [it to use the money] over [the bank’s] objections.”<sup>65</sup>

36. Enforcement staff asserts that Boyce Hydro has “fail[ed] to offer any support for its assertion” that it lacked funds to comply with the Commission’s dam safety orders and notes that, as discussed in the Order to Show Cause, the Bankruptcy Court previously authorized Boyce Hydro to spend funds to fulfill its license-related compliance obligation, as long as it obtained the Bankruptcy Trustee’s [or Trustees’] approval to do so.<sup>66</sup>

37. We agree with Enforcement staff that Boyce Hydro has failed to support its assertion that it lacked funds to resolve the identified dam safety concerns and to comply with the Commission’s orders. Boyce Hydro offers no evidence that it requested permission from its bank to expend funds on license-related compliance efforts, nor that the bank rejected the request, instead simply asserting these things happened.<sup>67</sup> Further, having not asked the Bankruptcy Court and brought the issue of a potential restriction on use of funds to a head, we find that Boyce Hydro’s claim that it would not have been possible to obtain approval to expend the funds it did have to remedy the identified dam safety concerns and to comply with the Commission’s orders is pure speculation.<sup>68</sup>

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<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> Office of Enforcement, Enforcement Staff Reply to Response Submitted by Boyce Hydro Power, Project Nos. 10809-050, et al., at 2 (filed Feb. 3, 2021) (citations omitted). Enforcement staff also provides evidence that “Boyce Hydro . . . has been able to pay Lee Mueller, the subject dams’ owner who is responsible for Boyce Hydro’s long history of noncompliance, \$3,000 every two weeks during Boyce Hydro’s pending bankruptcy.” *Id.* (citing Transmittal of Financial Reports and Certification of Compliance with United States Trustee Operating Requirements for The Period Ended: November 30, 2020, *In re Boyce Hydro, LLC*, Case No. 20-21214 (Bankr. E.D. Mich. Jan. 19, 2021), ECF No. 430).

<sup>67</sup> Response at 3.

<sup>68</sup> Indeed, we are aware that the Bankruptcy Court previously authorized Boyce Hydro to use funds for license-related work. On September 21, 2020, Boyce Hydro filed a motion with the Commission seeking to stay or delay the obligations to file dam safety inspection reports and to document removal of the Sanford Dam debris,

Conclusory statements and speculation are not evidence, and we thus find Boyce Hydro did not establish a factual dispute as to whether it was prevented by its bankruptcy from complying with the Commission's prior orders and the requirements of licenses for the Projects (e.g., hiring engineers to perform the forensic investigation or removing debris at the Sanford Project). As a result: (a) summary disposition is appropriate; and (b) Boyce Hydro offers no evidence supporting its claim that it was unable to make payments necessary to comply with its license requirements.

38. We have not recognized an inability to pay defense to compliance with license obligations,<sup>69</sup> and Boyce Hydro makes no argument, cites no prior orders, and cites no other authority that suggests we should do so now.

39. Regardless, we would find an inability to pay unpersuasive even if, assuming for purposes of argument that such a defense exists *and* that Boyce Hydro had presented evidence in support of its defense. Boyce Hydro did not respond to multiple communications from Commission staff about its license compliance failures, much less respond by explaining its financial situation and seeking relief from its obligations or a way to comply in whole or part with those obligations despite its lack of funds. This alone would be fatal to Boyce Hydro's claim as its real-time failure to address even the existence of its obligations is not mooted by any financial distress that may have made fulfilling those obligations difficult or impossible. Moreover, Boyce Hydro apparently

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claiming that it needed to get permission from the U.S. Bankruptcy Trustee and Bankruptcy Court before it could spend money to satisfy those obligations. The Commission denied that motion on October 15, 2020, specifically noting that the Bankruptcy Court already had authorized Boyce Hydro to use funds, with the approval of the Bankruptcy Trustee, to fulfill license-related compliance obligations. *See Boyce Hydro Power, LLC*, 173 FERC ¶ 61,071 at PP 11, 17-20.

<sup>69</sup> In fact, we have said the opposite. When the Commission ordered Boyce to cease generation at the Edenville Project for failure to comply with license requirements, Boyce Hydro, on rehearing argued this would cause a loss of revenue and preclude it from complying with the license. *Boyce Hydro Power, LLC*, 162 FERC ¶ 61,116, at P 20 (2018). The Commission found that:

A licensee's requirement to satisfy all license terms does not change, regardless of whether revenues exceed, match, or fail to meet its costs. Otherwise, licensees could decline to meet their public interest obligations if they alleged that their projects were not profitable. To the extent that Boyce Hydro's revenue have been cut as a result of it being required to cease generation, this is a situation of Boyce Hydro's own making.

*Id.*

did not take steps to run its business in a fashion that would allow it to meet its license obligations should it have financial trouble, such as by creating an emergency fund or obtaining a bond or insurance sufficient to allow it to comply with its license obligations after the floods. Absent evidence offered by Boyce Hydro to explain why its failure to plan in this fashion was caused by its recent financial troubles, such an argument would not support an inability to pay defense, even if one existed.

40. We note also that Boyce Hydro argues it was not responsible for the compliance work ordered by the Commission, because all of the properties at issue were condemned, resulting in “constructive abandonment and implied surrender”<sup>70</sup> of its licenses, retroactive to July 31, 2020. We find this argument unpersuasive because Boyce Hydro in fact, as licensee, owned and controlled the Projects until the condemnations were made effective by court orders dated December 23 and 28, 2020.<sup>71</sup> It therefore had both the license obligations and the control necessary to do the compliance work long before the condemnations took place.

#### **IV. Determination of Violations**

##### **A. Failure to Follow Dam Safety Orders re Forensic Investigation**

41. Standard Article 4 of the licenses for the Secord, Smallwood, and Sanford Projects states, in pertinent part:

The project, including its operation and maintenance, . . . shall be subject to the inspection and supervision of the Regional Engineer, Federal Energy Regulatory Commission, in the region wherein the project is located, or of such other officer or agent as the Commission may designate, who shall be the authorized representative of the Commission for such purposes. The licensee shall cooperate fully with said representative and shall furnish him such information as he may require concerning the operation and maintenance of the project. The licensee shall comply with such rules and regulations of general or special applicability as the Commission may prescribe from time to time for the protection of life, health, or property.

42. Section 12.4(b) of the Commission’s regulations states:

Supervisory authority of the Regional Engineer or other authorized representative.

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<sup>70</sup> Response at 1-3.

<sup>71</sup> *Id.* at 1-2. See Four Lakes Task Force, Letter from Four Lakes Task Force to the Secretary of the Commission, Project Nos. 2785, et al., at 1 (filed Jan. 5, 2021); see also *infra* PP 58-59.

(1) Any water power project and the construction, operation, maintenance, use, repair, or modification of any project works are subject to the inspection and the supervision of the Regional Engineer or any other authorized Commission representative for the purpose of: (i) Achieving or protecting the safety, stability, and integrity of the project works or the ability of any project work to function safely for its intended purposes, including navigation, water power development, or other beneficial public uses; or (ii) Otherwise protecting life, health, or property. (2) For the purposes set forth in paragraph (b)(1) of this section, a Regional Engineer or other authorized Commission representative may: (i) Test or inspect any water power project or project works or require that the applicant or licensee perform such tests or inspections or install monitoring instruments; (ii) Require an applicant or a licensee to submit reports or information, regarding: (A) The design, construction, operation, maintenance, use, repair, or modification of a water power project or project works; and (B) Any condition affecting the safety of a project or project works or any death or injury that occurs at, or might be attributable to, the water power project; (iii) Require an applicant or a licensee to modify: (A) Any emergency action plan filed under subpart C of this part; or (B) Any plan of corrective measures, including related schedules, submitted after the report of an independent consultant pursuant to § 12.37 or any other inspection report; (iv) Require an applicant or licensee to take any other action with respect to the design, construction, operation, maintenance, repair, use, or modification of the project or its works that is, in the judgment of the Regional Engineer or other authorized Commission representative, necessary or desirable; and (v) Establish the time for an applicant or licensee to provide a schedule for or to perform any actions specified in this paragraph.<sup>72</sup>

43. On June 22, 2020, an authorized Commission representative (the Director of D2SI) ordered Boyce Hydro by June 25, 2020 to “confirm in writing the schedule for the Forensic Team being able to fully begin their work.”<sup>73</sup> Boyce Hydro has not responded; therefore, Boyce Hydro is in violation of Standard Article 4 of the licenses for the Boyce Projects and section 12.4(b) of the Commission’s regulations.

44. On July 8, 2020, an authorized Commission representative (FERC’s Director of D2SI) ordered Boyce Hydro within three business days (by July 13, 2020) to file “documentation that Boyce has fully executed contracts with the [Forensic Investigation]

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<sup>72</sup> 18 C.F.R. § 12.4(b).

<sup>73</sup> *Boyce Hydro Power, LLC*, Letter from Director of D2SI to Boyce Hydro, Project Nos. 2785, 10809 & 10810 (June 22, 2020) (delegated order).

Team.<sup>74</sup> The contracts must authorize the [Forensic Investigation] Team to start immediately on a scope of work consistent with the May 20, 2020 Letter Order, the June 17, 2020 introductory meeting discussion, and this Order.”<sup>75</sup> Boyce Hydro did not file such documentation; therefore, Boyce Hydro is in violation of Standard Article 4 of the licenses for the Boyce Projects and section 12.4(b) of the Commission’s regulations.

**B. Failure to Follow Dam Safety Orders re Dam Safety Inspections and Reports**

45. On May 20, 2020, an authorized Commission representative (the Director of D2SI) ordered Boyce Hydro to immediately perform a dam safety inspection of the Sanford Dam, to orally report the result of that inspection to the Chicago Regional Engineer as soon as it was complete, and to submit a written report by June 10, 2020. On July 21, 2020, the Chicago Regional Engineer ordered Boyce Hydro to submit a supplemental dam safety report for Smallwood by August 14, 2020, and he later ordered Boyce Hydro to submit a supplemental dam safety report for Secord Dam by August 20, 2020.

46. Boyce Hydro has not filed any of the above required reports; therefore, Boyce Hydro is in violation of Standard Article 4 of the licenses for the Boyce Projects and section 12.4(b) of the Commission’s regulations.

**C. Failure to Follow Dam Safety Orders re Debris Removal at Sanford Dam**

47. On June 4, 2020, an authorized Commission representative (the Chicago Regional Engineer) ordered Boyce Hydro to immediately remove debris that had accumulated at the Sanford Dam and to report back on its efforts by June 8, 2020. Boyce Hydro has not filed any such report; therefore, Boyce Hydro is in violation of Standard Article 4 of the licenses for the Boyce Projects and section 12.4(b) of the Commission’s regulations.

**D. Failure to Follow Chicago Regional Engineer’s Shoreline Stability Order, as Clarified by DHAC Order**

48. On July 1, 2020, the Director of DHAC issued a delegated order clarifying the Chicago Regional Engineer’s Part 12 dam safety order and directing Boyce Hydro to immediately file a Professional Engineer’s survey and analysis of the Sanford Project shoreline. Boyce Hydro did not file any such survey or analysis; therefore, Boyce Hydro

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<sup>74</sup> *Boyce Hydro Power, LLC*, Letter from Director of D2SI to Boyce Hydro, Project Nos. 2785, 10809 & 10810, at 2 (July 8, 2020) (delegated order).

<sup>75</sup> *Id.*

is in violation of Standard Article 4 of the licenses for the Boyce Projects and section 12.4(b) of the Commission's regulations.

#### **V. Assessment of Civil Penalty Against Boyce Hydro**

49. Section 31(c) of the FPA<sup>76</sup> states that “[a]ny licensee, permittee, or exemptee who violates or fails or refuses to comply with any rule or regulation under this subchapter, any term, or condition of a license, permit, or exemption under this subchapter . . . shall be subject to a civil penalty in an amount not to exceed \$10,000 for each day that such violation or failure or refusal continues.” Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015,<sup>77</sup> that as of the date of the Order to Show Cause the maximum penalty had been increased to \$23,331 per-day for each violation.<sup>78</sup>

50. A total of 44 days elapsed from June 25, 2020, when Boyce Hydro was obligated to provide written confirmation of the Forensic Investigation Team's work schedule, until August 7, 2020, when FERC executed contracts with the team to initiate that work itself. At \$23,331 per-day, the maximum civil penalty for this violation is \$1,026,564.

51. A total of 26 days elapsed from July 13, 2020, when Boyce Hydro was obligated to file documentation of executed contracts with the Forensic Investigation Team, to August 7, 2020, when FERC executed contracts with the team to initiate that work itself. At \$23,331 per-day, the maximum civil penalty for this violation is \$606,606.

52. A total of 309 days have elapsed since June 10, 2020, the deadline by which Boyce Hydro was obligated to submit the Sanford Dam Safety Report, a total of 238 days have elapsed since August 20, 2020, the deadline by which Boyce Hydro was obligated to submit the Secord Supplemental Dam Safety Report, and a total of 244 days have elapsed since August 14, 2020, the deadline by which Boyce Hydro was obligated to submit the Smallwood Supplemental Dam Safety Report to the date of this order. Boyce Hydro has not complied with any of those deadlines. At \$23,331 per-day, the maximum civil penalty for these violations, based on the longest elapsed time of 309 days, is \$7,209,279.

53. A total of 311 days have elapsed since June 8, 2020, the deadline by which Boyce Hydro was obligated to submit a report on its efforts to remove debris that accumulated at the Sanford Dam. Boyce Hydro has not complied with that deadline. At \$23,331 per-day, the maximum civil penalty for this violation is \$7,255,941.

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<sup>76</sup> 16 U.S.C. § 823b(c).

<sup>77</sup> Sec. 701, Public Law 114-74, 129 Stat. 584, 599.

<sup>78</sup> 18 C.F.R. § 385.1602 (2020).

54. A total of 288 days have elapsed since July 1, 2020, when the Director of DHAC ordered Boyce Hydro to immediately file a Professional Engineer's survey and analysis of the Sanford Project shoreline. Boyce Hydro has not complied with that order. At \$23,331 per-day, the maximum civil penalty for this violation is \$6,719,328.

55. In determining an appropriate penalty, we take into consideration the nature and seriousness of the violations and the efforts (or lack thereof) of Boyce Hydro to remedy the violations in a timely manner, as required by section 31(c) of the FPA, as well as the factors set out 18 C.F.R. § 385.1505 which provides:

(a) In determining the amount of a proposed penalty, the Commission will consider the nature and seriousness of the violation, and the efforts of the licensee, exemptee, permittee or one who should possess appropriate authority but does not, to remedy the violation in a timely manner.

(b) In making its determination under paragraph (a), the Commission will consider the following factors: (1) Whether the person had actual knowledge of the violation; (2) Whether the person had constructive knowledge of the violation deemed to be possessed by a reasonable individual acting under similar circumstances; (3) Whether the person has a history of previous violations; (4) Whether the violation caused loss of life or injury to persons; (5) Whether economic benefits were derived because of the violation; (6) Whether the violation caused damage to property or the environment; (7) Whether the violation endangered persons, property or the environment; (8) Whether there were timely remedial efforts; (9) Whether there were untimely remedial efforts; (10) Whether there were no remedial efforts; and (11) Whether there are any other pertinent considerations.

56. Considering these factors makes clear a substantial penalty is appropriate here. Boyce Hydro had actual knowledge of the violations as it received numerous letters from staff, as well as Commission orders, with which it eventually did not comply; that Boyce Hydro received these is proven by its providing written responses to certain of these letters and orders (factors 1 and 2).<sup>79</sup> Boyce Hydro has a history of prior violations (factor 3),<sup>80</sup> and through its violations it created a risk of loss of life, injury, and property

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<sup>79</sup> See *infra* section III.B.-F.

<sup>80</sup> The Director of DHAC sent numerous letters to Boyce Hydro for failing to comply with the Chicago Regional Engineer's directive and various license conditions. *E.g.*, *Boyce Hydro Power, LLC*, Letter from Director of DHAC to Boyce Hydro, Project No. 2785 (Aug. 29, 2018) (delegated order); *Boyce Hydro Power, LLC*, Letters from Director of DHAC to Boyce Hydro, Project Nos. 10809 & 10810 (Jan. 23, 2019) (delegated order); *Boyce Hydro Power, LLC*, Letter from Director of DHAC to

damage because it did not remediate them (and thus exposed the public to additional harm such as that caused by the previous dam failures) (factors 4, 6, and 7).<sup>81</sup> Boyce also benefited economically by not spending money to comply with the Commission's prior orders (factor 5), and it engaged in no remedial efforts despite being ordered by the Commission to engage in such efforts (factors 8, 9, and 10).<sup>82</sup>

57. In sum, the dam safety violations here pose the risk of further failure of project works and shoreline, thereby putting surrounding communities at risk of additional flooding and other significant harm to human life, property, and the environment. The violations were serious, and Boyce Hydro failed to take any remedial efforts, notwithstanding the actual knowledge provided by Commission staff's numerous letters regarding the violations. By ignoring its dam safety obligations, Boyce Hydro elevated its own economic interests (*e.g.*, avoidance of professional fees) above the safety of the public. Considering the foregoing factors and Boyce Hydro's lengthy history of non-compliance, the Commission concludes that a substantial civil penalty is justified, and therefore will impose a civil penalty totaling \$15,000,000 for the foregoing violations.

58. Boyce Hydro asserts in its Response that Four Lakes Task Force, Midland County, Michigan and Gladwin County, Michigan have now condemned the real property associated with the Boyce Projects via court orders dated December 23 and 28, 2020, retroactively effective to July 31, 2020.<sup>83</sup> Boyce Hydro argues that due to the condemnations, it can no longer fulfill its obligations under the Projects' licenses and "is no longer a licensee subject to the Commission's jurisdiction."<sup>84</sup> Boyce Hydro claims that the condemnation of the real property resulted in "constructive abandonment and implied surrender" or in the alternative that it is "legal[ly] impossible" for Boyce Hydro

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Boyce Hydro, Project No. 10810 (June 24, 2019) (delegated order); *Boyce Hydro Power, LLC*, Letter from Director of DHAC to Boyce Hydro, Project No. 10809 (Feb. 24, 2020) (delegated order).

<sup>81</sup> *See infra* section III.A.

<sup>82</sup> *See infra* section III.B.-F.

<sup>83</sup> Response at 1-2. *See* Four Lakes Task Force, Letter from Four Lakes Task Force to the Secretary of the Commission, Project Nos. 10809-000, et al., at 1 (filed Jan. 5, 2021).

<sup>84</sup> Response at 4.

“to comply with the Standard License Article 5 ownership requirements . . . .”<sup>85</sup> Based on this and its bankruptcy, Boyce Hydro argues that there is no public benefit to assessment of a large penalty against it.<sup>86</sup>

59. We do not find Boyce Hydro’s argument persuasive for three reasons. First, as discussed *supra* in section III, Boyce Hydro does not dispute that it retained complete control and ownership of the Projects until the December 23 and 28, 2020 condemnation orders. Therefore, despite the retroactive dates of those orders, as a factual matter, Boyce Hydro owned and controlled the Projects when the violations took place. The proposed civil penalties here are for Respondent’s failure to comply with the Commission’s orders during that time. Second, as of the date of this order, Boyce Hydro’s licenses remain in place and Boyce Hydro therefore continues to be the licensee for the three projects. Third, we account for Boyce Hydro’s bankruptcy as discussed below.

60. The Commission takes notice that on February 25, 2021, the Bankruptcy Court confirmed Boyce Hydro’s plan of liquidation.<sup>87</sup> The confirmed plan provides for a settlement fund and subordinates any claim made by the Commission, including any claim based on the civil penalty assessed herein, below all claims made to the settlement fund.<sup>88</sup> The Commission agreed to subordination because it does not intend to imperil any direct recovery of damages by victims of the dam breaches and flooding.

## VI. Rehearing

61. Boyce Hydro 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, and the Commission’s regulations at 18 C.F.R. § 385.713. The filing of a request for rehearing does not operate as a stay of the effective date of this order, or

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<sup>85</sup> *Id.* at 1-3. We note that on February 5, 2020, Boyce Hydro filed an Application for Unconditional Surrender of Licenses. *See* Notice of Application for Surrender of Boyce Hydro Projects (March 3, 2021) and Errata Notice (March 5, 2021). We will address the application in a separate order.

<sup>86</sup> Response at 4-5.

<sup>87</sup> *See* Non-Consensual Order Confirming Debtors’ Fourth Modified Joint Consolidated Chapter 11 Plan of Liquidation, *In re Boyce Hydro, LLC*, et al., Case No. 20-21214 (Bankr. E.D. Mich. Feb. 25, 2021), ECF No. 489.

<sup>88</sup> *See* Fourth Modified Joint Consolidated Chapter 11 Plan of Liquidation [*In re Boyce Hydro, LLC*, et al., Case No. 20-21214 (Bankr. E.D. Mich. February 23, 2021), ECF No. 481.

of any other date specified in this order. Boyce Hydro's failure to file a request for rehearing shall constitute acceptance of this order.

**VII. Conclusion**

62. Staff shall take such steps in Bankruptcy Court as are necessary to preserve and pursue the \$15,000,000 civil penalty we levy here, subject to our instruction that in doing so they take all reasonable steps to have any recovery of civil penalties be given lower priority than the victims' recovery in the bankruptcy proceeding.

The Commission orders:

Boyce Hydro is hereby directed to pay to the United States Treasury by wire transfer a civil penalty in the sum of \$15,000,000 within 60 days of the issuance of this order, as discussed in the body of this order. Should Boyce Hydro be unable to make this payment due to its bankruptcy, it is directed to file in this docket an update regarding the status of its bankruptcy and the payment of claims made therein within 30 days of this order and to file additional updates every 30 days thereafter until it has made whatever payment of this civil penalty it is allowed to make under the confirmed plan of liquidation.

By the Commission. Commissioner Danly is concurring with a separate statement attached.

( S E A L )

Kimberly D. Bose,  
Secretary.

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Boyce Hydro Power, LLC

Project Nos. 10809-052  
10810-058  
2785-104

(Issued April 15, 2021)

DANLY, Commissioner, *concurring*:

1. I concur in the \$15 million penalty assessment against Boyce Hydro Power, LLC (Boyce), pursuant to section 31(c) of the Federal Power Act (FPA),<sup>1</sup> for the violations of Standard Article 4 of the Boyce projects' licenses<sup>2</sup> and section 12.4(b) of the Commission's regulations<sup>3</sup> for the licensee's non-compliance with Commission directives issued following the failure of the Sanford Dam and the non-jurisdictional Edenville Dam.

2. I write separately to underscore two points: *first*, while I agree with the imposition of this penalty, I also strongly support the Commission's determination that these civil penalties shall not displace any direct recovery of damages by victims of the dam breaches and flooding in ongoing bankruptcy proceedings.<sup>4</sup> Victim recovery should be the first priority.

3. *Second*, I also strongly support strengthening financial assurance measures to ensure dam safety and compliance to prevent exactly this type of incident. This is the subject of a still-pending Commission Notice of Inquiry issued at the January Commission meeting in my final days as the preceding Chairman of this Commission.<sup>5</sup>

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<sup>1</sup> 16 U.S.C. § 823b(c).

<sup>2</sup> Boyce is the licensee for the Secord (Project No. 10809), Smallwood (Project No. 10810), and Sanford (Project No. 2785) Hydroelectric Projects.

<sup>3</sup> 18 C.F.R. § 12.4(b) (2020).

<sup>4</sup> See *Boyce Hydro Power, LLC*, 175 FERC ¶ 61,049, at PP 59, 61 (2021).

<sup>5</sup> See *Financial Assurance Measures for Hydroelectric Projects*, 174 FERC ¶ 61,039 (2021).

It is critical that each licensed hydro project have sufficient financial assurance to carry out its license requirements and, particularly, maintain projects in safe condition.

For these reasons, I respectfully concur.

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James P. Danly  
Commissioner