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ONE HUNDRED SIXTEENTH CONGRESS

Congress of the United States
House of Representatives

COMMITTEE ON ENERGY AND COMMERCE
2125 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6115

Majority (202) 225-2927
Minority (202) 225-3641

May 29, 2020

The Honorable Neil Chatterjee
Chairman
Federal Energy Regulatory Commission
888 First Street NE
Washington, DC 20426

Dear Chairman Chatterjee:

We write to request further information about the actions the Federal Energy Regulatory Commission (FERC or the Commission) took in overseeing hydropower Project No. 10808, the Edenville project, operated by Boyce Hydro Power, LLC (Boyce Hydro) in Michigan. At the outset, we recognize FERC's jurisdiction over the Edenville project ended in September 2018 when the Commission revoked Boyce Hydro's license[1] for cause, thus transferring authority to the State of Michigan (Michigan). The breach of the Edenville dam last week resulted in catastrophic damage in the areas downstream of the dam. In addition to the massive property damage caused by the dam's failure, flooding of contaminated sites and chemical facilities—including one containing a federally-regulated nuclear research reactor—in Midland, Michigan, threatened public health and the environment.

As you know, the Edenville project and its operator, Boyce Hydro, have a long history of dam safety and compliance problems. The project was mentioned in a 2018 Government Accountability Office report on FERC's dam safety program requested by our Committee in response to the 2017 Oroville Dam failure.[2] Prior to issuing the order, the Commission engaged in a multi-year effort to bring Boyce Hydro into compliance with FERC's dam safety requirements. We are concerned that three other projects operated by Boyce within the same river system—the Sanford, Secord, and Smallwood Dams—may present a similar threat to surrounding communities.

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[1] United States Federal Energy Regulatory Commission, *Order Revoking License*, 164 FERC ¶ 61,178 (2018).

[2] Government Accountability Office, *Dam Safety: FERC Should Analyze Portfolio-Wide Risks* (Oct. 2018) (GAO 19-19).

To assist us in better understanding the current situation and the sufficiency of tools available to FERC under the Federal Power Act (FPA) to address the public safety risks presented by high hazard dams, we request responses to the following questions:

1. Section 31 of the FPA gives FERC the authority to levy civil penalties on licensees for non-compliance with FERC orders and license requirements. Did the Commission levy civil penalties against Boyce Hydro for its repeated non-compliance? If so, what penalties did Boyce Hydro pay? If not, why not?

2. The record indicates that FERC's dam safety engineers were aware of the deficiencies in the spillway capacity of the Edenville facility since at least 1999 when the facility was operated by a previous licensee. Was Boyce Hydro aware of the issues with the spillway and the need to repair the spillway when it acquired the license? At that time, did the Commission include limitations on reservoir level or capacity or other operational conditions in the license to minimize the risk of dam failure?

3. Why was Boyce Hydro allowed to continue operating out of compliance for over 10 years before the Commission revoked its license?

4. Boyce Hydro made repeated assertions during its years of non-compliance that the cost for repairs and lack of financing was a major barrier to complying with FERC's directive to address the spillway capacity. Since the spillway issue was known at the time Boyce Hydro took over the license, did FERC assess Boyce Hydro's financial capacity to make those repairs prior to approving the license transfer? What were the estimated costs of bringing the project into compliance with dam safety standards? Does FERC have authority to assess the financial capacity of a licensee if significant repairs are needed to the project prior to licensing?

5. FERC's 2017 Compliance Order[3] stated that: "the Commission's primary concern is Boyce Hydro's longstanding failure to address the project's inadequate spillway capacity, which must be remediated to protect life, limb, and property." When FERC made the decision to go forward with the Revocation Order, did FERC consult Michigan regarding the significant public safety concerns stemming from the longstanding non-compliance pattern by Boyce Hydro and the implications for the state?

6. What, if any, involvement did Michigan have during the non-compliance proceeding? What, if any, involvement did Michigan have during the revocation proceeding? Did FERC determine what authorities Michigan has in order to compel necessary repairs to the facility under State law after revocation?

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[3] United States Federal Energy Regulatory Commission, *Compliance Order*, 159 FERC ¶ 62,292 (2017).

7. Boyce Hydro continues to operate three other similar projects in the region — Sanford (P-2785), Secord (P-10810) and Smallwood (P-10809),. These three FERC-licensed projects appear to present similar risks of dam failure. What actions is FERC taking to lower the risk that these facilities also fail? Is Boyce Hydro in compliance with all license conditions and dam safety standards with respect to these three facilities? Has FERC started non-compliance proceedings for any of these facilities?

8. Since the Edenville facility is no longer under FERC jurisdiction, will the Commission have any role in a post-event examination of this incident of dam failure?

9. In May 2020, the State of Michigan sued Boyce Hydro for alleged counts of environmental violations, public nuisance, and conversion, based upon Boyce Hydro's lowering of Lake Wixom's water level.[4] Did Michigan consult with FERC with regard to this lawsuit? Will FERC investigate whether the reservoir water level caused or contributed to the breach of Edenville Dam?

10. Does FERC have any recommendations to improve the safety of dams, such as Edenville, that have had their Federal license revoked and that are under the primary jurisdiction of a State agency? Does FERC have any recommendations to improve federal law with respect to the safety of dams under its control or those being transferred from federal to state control?

[4] Summons and Complaint (May 1, 2020), *Attorney General MI vs Mueller, Michele G et al et al*, MI 30th Cir. Ct. (No. 20-000255-CE).

Please provide a response to the above questions by Friday, June 12, 2020. If you have any questions please contact Jean Fruci (Jean.Fruci@mail.house.gov) or Rick Kessler (Rick.Kessler@mail.house.gov) with the Committee Majority Staff at (202) 225-2927 or Brandon Mooney (Brandon.Mooney@mail.house.gov) with the Committee Minority Staff at (202) 225-3641. Thank you for your consideration and attention.

Sincerely,

Frank Pallone, Jr.
Chairman

Greg Walden
Ranking Member

Bobby L. Rush
Chairman
Subcommittee on Energy

Fred Upton
Ranking Member
Subcommittee on Energy

Debbie Dingell
Member of Congress

Tim Walberg
Member of Congress