



GRETCHEN WHITMER
GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF NATURAL RESOURCES
LANSING



M. SCOTT BOWEN
DIRECTOR

August 18, 2025

VIA ELECTRONIC FILING

Debbie-Anne Reese, Secretary
Federal Energy Regulatory Commission
888 First Street NE, Room 1A
Washington, DC 20426

**SUBJECT: COMMENT ON BOYNE P-3409, INFORMATION FOR RELICENSING AND
REITERATING POSITION REGARDING ACCESS AND RECREATION**

Dear Secretary Reese,

This letter is Michigan Department of Natural Resources' (DNR) response to Boyne USA's July 25, 2025 filing in the above-referenced docket, which was assigned Accession Number 20250725-5167 and titled "Response to the Little Traverse Bay Band of Odawa Indians' Comments on Boyne River Hydroelectric Project EA Following Consultation and Comments" (hereinafter "Boyne's Response to LTBB").

In Boyne's Response to LTBB, Boyne asserts that the Boyne River has been classified as non-navigable, based on a memo from the Charlevoix County prosecutor (hereinafter "Prosecutor Memo") which is in turn based on a letter from DNR (hereinafter "DNR Letter"); these documents are collectively labeled as "Exhibit B" by Boyne. In Michigan, navigability is a question for the courts—and only the courts—as navigability is a common law doctrine. See *generally Moore v Sanborne*, 2 Mich 519 (1853); *Collins v Gerhardt*, 237 Mich 38 (1926); and *Bott v Comm'n of Natural Resources*, 415 Mich 45 (1982). Neither a letter from the DNR, nor from a county prosecutor, carries any legal weight in the State of Michigan in determining navigability. These documents should be viewed as irrelevant to the questions of navigability and public access on the Boyne River, including public access to the impoundment.

While DNR has no authority to revoke or renounce a letter from a county prosecutor, DNR hereby revokes and renounces its letter to Mr. Charles Mott, dated September 16, 1980, and to the extent the Prosecutor Memo is based on the DNR Letter, the Prosecutor Memo should be considered null and void.

DNR revokes and renounces the DNR Letter for two reasons. First, DNR asserts that the DNR Letter is being misrepresented by Boyne. In Boyne's Response to LTBB, Boyne asserts that Exhibit B "categorize[s] the Boyne River as non-navigable." This mischaracterizes the contents of those documents; nowhere in either DNR's Letter or in the Prosecutor Memo is

there a statement that the Boyne River is non-navigable. Rather, the documents in Exhibit B refer to the public's rights to portage around the dam and fish in the impoundment based on the Recreational Trespass Act, not based on the navigability of the river itself.

Moreover, the DNR Letter explicitly states that the "final determination of the character [i.e. navigability] of any given water is presently a judicial function. . . . **Unquestionably, there are portions of the Boyne River above the dam, including the impoundment**" which meet the criteria of navigability. (Emphasis added). Contrary to Boyne's assertion, the DNR Letter is more of an indication that the river was considered navigable than that it was considered non-navigable. However, as noted, DNR has no legal authority to determine either that water is navigable or that it is non-navigable. To date, there has been no judicial determination on the navigability of the Boyne River, meaning that whether the river is navigable or non-navigable is an open question. **Absent a court ruling definitively determining the navigability of the Boyne River, the Boyne River can be considered neither navigable nor non-navigable.** In order to avoid any confusion to the contrary, DNR is revoking and renouncing the DNR Letter.

Second, as noted above, the determination in the DNR Letter that there was no public right to fish on the impoundment was based on the Recreational Trespass Act. In 1980, at the time the DNR Letter was written, the Recreational Trespass Act provided that if a "navigable, public stream [was] a length greater than 15 miles," a fisherman could "enter upon the upland within the clearly defined banks of the stream" to navigate around an obstruction, such as a dam, without permission of the landowner. Based on the cumulative length of the sections of the river that DNR determined to be navigable—a determination which DNR had no authority to make—DNR concluded that the total navigable length was less than 15 miles and therefore landowner permission was required to enter the uplands of the impoundment.

In 1994, Michigan reorganized and consolidated all of its environmental laws into a single statutory scheme, the Natural Resources and Environmental Protection Act (NREPA), MCL 324.101 *et seq.* The Recreational Trespass Act has been codified in NREPA at MCL 324.73101 *et seq.* The provision referenced in the DNR Letter, in its current form, reads as follows in its entirety:

"On fenced or posted property or farm property, a fisherman wading or floating a navigable public stream may, without written or oral consent, enter upon property within the clearly defined banks of the stream or, without damaging farm products, walk a route as closely proximate to the clearly defined bank as possible when necessary to avoid a natural or artificial hazard or obstruction, including, but not limited to, a dam, deep hole, or a fence or other exercise of ownership by the riparian owner." MCL 324.73102(3).

This is very similar to the language of the Recreational Trespass Act in 1980, with one key exception: **there is no longer any reference to 15 miles, nor is there any other limit based on the total length of navigable portions of the river.** In other words, the very

language that DNR—and, correspondingly, the county prosecutor—relied on to reach the opinion that there was no public right to fish the impoundment or portage the dam has been stricken from the law. Because of this amendment to the Recreational Trespass Act, there is no longer any legal basis for the opinion proffered in the DNR Letter and it is appropriate to revoke and renounce that letter.

In our comments on the 2022 Boyne Environmental Assessment, DNR fully supported the conditions/articles set forth in the staff alternative and recommended their complete inclusion in any new license, and provided additional recommendations to improve recreational opportunities and other benefits. (20220715-5056). The FERC staff alternative 20220601-3003 included:

“Develop a recreation management plan to improve public access to recreation opportunities at the project that includes: (1) a description and map of all project recreation facilities; (2) designating the impoundment boat launch as a project feature that is open to the public; (3) a new, barrier-free shoreline fishing area and parking area for four cars, including one barrier-free spot, at the project reservoir; (4) provisions for operation and maintenance of the project’s recreation facilities; (5) a description of the methodology used to monitor recreation use at the project reservoir for three years; and (6) an implementation and construction schedule.”

MDNR supports the inclusion of these items, along with the ability to expand, improve, or replace parking facilities, and for the provision of bathroom facilities during peak fishing season, and have impoundment facilities be accessible.

DNR’s position is unchanged; DNR firmly believes public access and recreational amenities provided in the new license must include the impoundment.

In sum, DNR asserts that there has been no determination as to the navigability of the Boyne River. DNR also revokes and renounces the DNR Letter referred to in Boyne’s Response to LTBB because it has been misrepresented and because the legal basis for that letter no longer exists. DNR still encourages FERC to require public access as a condition of licensing.

MDNR appreciates the opportunity to comment. If any additional information is needed, please feel free to contact me at 231-285-1042 or castled1@michigan.gov.

Sincerely,

A handwritten signature in black ink that reads "Dana K. Castle". The signature is written in a cursive, slightly slanted style.

Dana K. Castle
Fisheries Biologist
Fisheries Division, MDNR

Document Content(s)

2025_08_18_MDNR_Comments_Access_Navigability.pdf1