



the applicant is eligible to receive such payment and which satisfies such other requirements as the Secretary deems necessary . . . .

(b) DEFINITIONS. For purposes of this section:

(1) QUALIFIED HYDROELECTRIC FACILITY. The term “qualified hydroelectric facility” means a turbine or other generating device owned or solely operated by a non-Federal entity which generates hydroelectric energy for sale and which is added to an existing dam or conduit . . . .

(2) EXISTING DAM OR CONDUIT. The term “existing dam or conduit” means any dam or conduit the construction of which was completed before the date of the enactment of this section [enacted Aug. 8, 2005] and which does not require any construction or enlargement of impoundment or diversion structures (other than repair or reconstruction) in connection with the installation of a turbine or other generating device . . . .

(c) ELIGIBILITY WINDOW. Payments may be made under this section only for electric energy generated from a qualified hydroelectric facility which begins operation during the period of 10 fiscal years beginning with the first full fiscal year occurring after the date of enactment of this subtitle [enacted Aug. 8, 2005].

(d) INCENTIVE PERIOD. A qualified hydroelectric facility may receive payments under this section for a period of 10 fiscal years (referred to in this section as the “incentive period”). Such period shall begin with the fiscal year in which electric energy generated from the facility is first eligible for such payments . . . .

42 U.S.C. § 15881.

DOE did not initially make incentive payments under the Section 242 Program due to a lack of Congressional appropriations. However, after Congress provided funding for the program in 2014, the DOE solicited applications and awarded incentive payments for hydroelectricity generated and sold by qualified hydroelectric facilities in calendar year 2013. *See* 80 Fed. Reg. 2685 (January 20, 2015). The DOE subsequently processed a second round of applications for hydroelectricity generated and sold in calendar year 2014. *See* 80 Fed. Reg. 78215-16 (December 16, 2015). In the most recent round, DOE accepted applications for hydroelectricity generated and sold in calendar year 2015. *See* 81 Fed. Reg. 24591 (April 26, 2016).

The DOE has developed, with public input, a Guidance Document to assist in administering the Section 242 Program.<sup>1</sup> *See* Guidance for EPA Act Section 242 Program (Guidance Document)

---

<sup>1</sup> DOE initially sought comments on a draft Guidance Document in a notice published in the Federal Register on July 2, 2014. 79 Fed. Reg. 37733 (July 2, 2014). Following two comment periods, the Guidance Document was finalized and used for determining incentive payments for electric energy generated in calendar year 2013. *See* 80 Fed. Reg. 2685-86. On December 16, 2015, DOE issued a revised Guidance Document for use in determining incentive payments for electric energy generated in calendar year 2014. 80 Fed. Reg. 78215. That same Guidance Document remains in effect for determining eligibility for incentive payments for calendar year 2015. 81 Fed. Reg. 24591.

(December 16, 2015); 80 Fed. Reg. at 78215-16. The Guidance Document sets forth procedures for the filing of an application for a Section 242 Program incentive payment, the criteria that DOE will use to make eligibility determinations and the manner in which the amount of an incentive payment will be calculated. *See* Guidance Document. In addition, the Guidance Document permits applicants to file an administrative appeal with the Office of Hearings and Appeals (OHA) in circumstances in which an application for an incentive payment is denied in whole or in part. *Id.* at 8-9.

## **B. The Present Appeal**

Between April 26, 2016, and May 31, 2016, the DOE accepted applications for incentive payments under the Section 242 Program for hydroelectricity generated and sold in calendar year 2015. 81 Fed. Reg. at 24591. During the application period, Steels Pond filed an application for an incentive payment for hydroelectricity that it produced at a hydropower plant in Antrim, New Hampshire. *See* Application from Lori Barg, Steels Pond, to DOE (May 30, 2016) (Application). According to the Application, in 2012, Steels Pond's hydropower plant was non-operational and disconnected from the grid. *Id.* at 2. New owners bought the site in 2013. *Id.* They removed all of the turbines and generating devices and installed four new turbines with a total capacity of 600 KW. *Id.* In addition, the owners made a number of other significant improvements to the hydropower plant. *Id.* On January 5, 2015, the site began producing power and selling it to the grid. *Id.* at 4. In its Application, Steels Pond seeks an incentive payment for all the hydroelectricity it produced in 2015. *Id.*

On July 14, 2016, the EERE issued a notice finding that Steels Pond was not eligible for an incentive payment. Letter from Timothy J. Welch, Wind and Water Power Technologies Office, EERE to Lori Barg, Steels Pond (July 14, 2016) (Notice). In the Notice, the EERE provided the following reason for the denial:

Electricity produced from the facility did not result from the addition of a new generator . . . or generation device placed in operation on or after October 1, 2005, as required. Rather, electricity production resulted from maintenance or rehabilitation of an existing facility.

*Id.* On July 25, 2016, Steels Pond filed this Appeal. Appeal from Lori Barg, Steels Pond, to OHA (July 23, 2016). In its Appeal, Steels Pond describes, in greater detail, the new equipment it installed at the site. *Id.* at 7-15. Steels Pond argues that it conducted such a complete overhaul of the hydropower plant that the work it performed should not be regarded as maintenance or rehabilitation, but rather as the installation of new generation devices. *Id.* at 4-5. Steels Pond emphasizes that it removed old equipment and installed new equipment that utilizes a different technology. *Id.* at 4, 7-11.

## **II. Analysis**

The Guidance Document describes the eligibility criteria that DOE will use when deciding whether an applicant is eligible for a Section 242 payment. In relevant part, the Guidance Document defines a “qualified hydroelectric facility” as follows:

*Qualified hydroelectric facility* means a turbine or other generating device (including conventional or new and innovative technologies capable of continuous operation) . . . that: (1) began producing hydroelectric energy for sale on or after October 1, 2005; (2) is added to an existing dam completed before August 8, 2005 (“added” means new hydropower generation where none existed before, or where an existing facility had been offline because of disrepair or dismantling for at least five consecutive years prior to October 1, 2005 before new construction); and (3) the majority of which was developed through new construction incorporating new equipment, refurbished equipment, or both.

Guidance Document at 3. In a section titled “Eligible Applicants and Facilities,” the Guidance Document provides further detail, particularly with respect to the amount of new construction required for an existing facility to be eligible:

Payments may be made under this part only for net electric energy generated from a *qualified hydroelectric facility* [emphasis added] that begins operation at an existing dam or conduit during the inclusive period beginning October 1, 2005 and ending on September 30, 2015. Improvements on an existing facility may be eligible for payment under Section 242, only if the new turbine or generating device included significant changes to the mechanical equipment installed to capture kinetic energy from moving water, equipment used to transfer that energy, the electric generator driven by the energy transfer, and control equipment to manage the entire facility for safe and reliable electricity output. Changes to existing facilities and equipment, such as maintenance that replace[s] damaged or worn or equipment or cause[s] incremental increases in energy output from facilities[,] do not qualify for payment under Section 242 . . . .

Guidance Document at 4.

Based on its Appeal, it appears that Steels Pond concluded that it was denied an incentive payment because the EERE found that Steels Pond made only “[c]hanges to existing facilities and equipment, such as maintenance that replace[s] damaged or worn equipment or cause[s] incremental increases in energy output.” However, the EERE informed us that the Application was denied for a different reason. Specifically, referring to the second element in the Guidance Document’s definition of “qualified hydroelectric facility,” the EERE indicated that it denied the Application because Steels Pond’s hydropower plant was not offline for five consecutive years prior to October 1, 2005. *See* Memorandum of Telephone Conversation between Daniel Rabon, EERE, and Gregory Krauss, OHA (August 10, 2016) (Rabon Memo); Email from Gary Johnson, EERE, to Daniel Rabon, EERE (August 10, 2016) (Johnson Email).

We begin by noting that, under Section 242, a “qualified hydroelectric facility” eligible for an incentive payment is “a turbine or other generating device . . . which generates hydroelectric energy for sale and which is added to an existing dam or conduit.” 42 U.S.C. § 15881(b)(1). Further, Section 242 establishes an “eligibility window” for the installation of the turbine or other generating device, stating that it must be one that “begins operation during the period of 10 fiscal

years beginning with the first full fiscal year occurring after the date of enactment of this subtitle.” 42 U.S.C. § 15881(c). Because the EPAct, including Section 242, was enacted on August 8, 2005, the beginning of the next fiscal year after that date is October 1, 2005. Accordingly, to receive an incentive payment under Section 242, the turbine or generating device must begin operations between October 1, 2005 and September 30, 2015.

The Guidance Document’s definition of “qualified hydroelectric facility” contains three main elements, the first of which implements this requirement. Under the first element, the turbine or other generating device must be one that “began producing hydroelectric energy for sale on or after October 1, 2005.” When Steels Pond installed four turbines that began operating in January 2015, those turbines began producing hydroelectric energy for sale on or after October 1, 2005. It is therefore clear that Steels Pond has satisfied the first element in the Guidance Document’s definition of “qualified hydroelectric facility.” Moreover, with respect to the third element in the definition, which regards the level of new construction, the EERE made no finding that Steels Pond failed to meet this requirement; in fact, the EERE indicated to us that it agreed that Steels Pond had made significant changes to its site. *See Rabon Memo.*

The issue in this matter is therefore the second element in the Guidance Document’s definition of “qualified hydroelectric facility,” pursuant to which the turbine or other generating device must be “added.” This requirement comes directly from the definition of “qualified hydroelectric facility” in Section 242, which provides that the turbine or other generating device must be “*added* to an existing dam or conduit” (emphasis added). The Guidance Document elaborates on the meaning of “added” by describing two circumstances that will satisfy this element. One way a turbine or other generating device can qualify as “added” is if it represents “new hydropower generation where none existed before.” In the instant matter, although a hydropower plant on the site was disconnected from the grid in 2012, Steels Pond did not add its turbines to a dam where no hydropower generation had ever existed before. Nor did it add an extra turbine in a new location at an existing hydropower plant, a circumstance which might qualify as adding new hydropower generation where none existed before. Consequently, based on the facts before us, we are unable to conclude that Steels Pond added new hydropower generation where none existed before.

The other circumstance in which the Guidance Document treats a turbine or other generating device as “added” is “where an existing facility had been offline because of disrepair or dismantling for at least five consecutive years prior to October 1, 2005 before new construction.” Steels Pond stated in its Application that this requirement is satisfied because it has evidence that the entire hydropower plant was offline for five consecutive years at some time prior to 1981. Application at 2, 4. However, there would be little purpose in a requirement that an existing facility be offline for any five consecutive years prior to October 1, 2005. The most logical interpretation is that this provision refers to the five consecutive years *immediately prior to* October 1, 2005. Thus, a turbine or generating device installed on or after October 1, 2005, does not qualify as “added” if another turbine or generating device was operating in that location immediately prior to that date. Essentially, the Guidance Document expresses the idea that the purpose of Section 242 is to encourage the addition of new turbines and generating devices beyond those that existed before the start of the eligibility window—not to incentivize the replacement of turbines and generating devices that were operational before October 1, 2005, and then failed during the eligibility window.

Based on records that the EERE provided to us, it appears that the EERE denied Steels Pond's application on the grounds that the entire hydropower plant was not offline in the five years prior to October 1, 2005. *See Johnson Email*. However, given that a "qualified hydroelectric facility" is a turbine or generating device, we interpret the term "existing facility" to mean a turbine or generating device, not an entire hydropower plant. We thus believe that the second element in the Guidance Document's definition of "qualified hydroelectric facility" could be satisfied if any turbine or generating device at a hydropower plant were offline for five consecutive years before October 1, 2005, and that turbine or generating device were subsequently replaced on or after October 1, 2005. We therefore provided Steels Pond an opportunity to show that one or more turbines was offline during that time period. Steels Pond informed us that it had no way of verifying that any particular turbines were offline at any time during those five years. Memorandum of Telephone Conversation between Lori Barg, Steels Pond, and Gregory Krauss, OHA (August 24, 2016).<sup>2</sup> Accordingly, we find that Steels Pond has not demonstrated that any of the four turbines it installed qualify as "added."

Because Steels Pond has not shown that it "added" a turbine or other generating device, we agree with the EERE that Steels Pond did not install equipment that meets the Guidance Document's definition of "qualified hydroelectric facility." Consequently, Steels Pond is not eligible for an incentive payment under the Section 242 Program for the hydroelectricity its site produced in calendar year 2015.

It Is Therefore Ordered That:

- (1) The Appeal filed by Steels Ponds Hydro Inc. on July 25, 2016, OHA Case No. HEA-16-0003, is hereby denied.
- (2) This is a final Order of the Department of Energy from which the Appellant may seek judicial review in the appropriate U.S. District Court.

Poli A. Marmolejos  
Director  
Office of Hearings and Appeals

Date: August 30, 2016

---

<sup>2</sup> Steels Pond did provide us production data from those years showing that hydroelectricity production generally decreased between 2000 and 2005. Steels Pond stated that it was possible to infer from the data that at least one turbine was non-functional. Email from Lori Barg, Steels Pond, to Gregory Krauss, OHA (August 23, 2016). However, we believe that there are alternative ways of interpreting the data. Moreover, given that Steels Pond itself was not certain that a turbine was offline, we decline to reach that conclusion ourselves.