

payment and which satisfies such other requirements as the Secretary deems necessary. Such application shall be in such form, and shall be submitted at such time, as the Secretary shall establish.

b) DEFINITIONS. For purposes of this section:

- a. 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[.]
- b. Existing Dam or Conduit. The term “existing dam or conduit” means any dam or conduit the construction of which was completed before November 15, 2021, 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 22 fiscal years beginning with the first full fiscal year occurring after the date of enactment of the 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[.] Such period shall begin with the fiscal year in which electrical energy generated from the facility is first eligible for such payments.

Congress first provided funding for the program in 2014—providing incentive payments for energy produced in fiscal year 2013—and since that time, the DOE has distributed over \$51 million under the program. As a result of the 2021 Infrastructure Investment and Jobs Act, the DOE received \$125 million for the incentive program. *See* 88 Fed. Reg. 17202 (March 22, 2023); 88 Fed. Reg. 21187 (April 10, 2023). As such, the DOE distributed \$13.5 million in incentive payments to 55 hydroelectric facilities in fiscal year 2022.

DOE has developed a Guidance Document for use in administering the Section 242 Program. *See* U.S. Department of Energy Grid Deployment Office Guidance on Implementing Section 242 of the Energy Policy Act of 2005 (Guidance Document) (March 2023). 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 appeal DOE’s determinations and calculations to the DOE Office of Hearings and Appeals (OHA). *Id.* at 13–14.

B. Procedural History

On April 10, 2023, Appellant submitted its application for an incentive payment under Section 242. Appeal from Benjamin Singer (2023). In the application, Appellant included the text of Section

242 that set forth the requirements for a qualified hydroelectric facility and responded to each requirement specifically. In response to Section 242's requirement (d), which requires that the facility began generating hydroelectric energy for sale on or after October 1, 2005, Appellant wrote on his application that "[i]nitial hydroelectric energy production began in the new facility in August of 2012." Application from Benjamin Singer at 2. In its application, Appellant did not draw a distinction between when the facility began generating energy and when it began selling energy.

On July 25, 2023, DOE informed Appellant of its determination that Appellant, while it was a qualified hydroelectric facility for fiscal year 2021, it was not a qualified hydroelectric facility for fiscal year 2022 because 2021 was the 10th year since it was first eligible for an incentive payment under Section 242. Determination Letter from DOE to Benjamin Singer (2023). Appellant timely filed an appeal with the OHA. In the appeal, Appellant asserts that it did not begin selling hydroelectric energy until 2013. Appeal at 1. Appellant argues that because Section 242 uses the phrase "producing hydroelectric energy for sale," the ten-year incentive payment period started in 2013, making 2022 Appellant's 10th year of possible eligibility. Appeal at 1. DOE responded to the appeal, arguing that its decision was justified based on the information Appellant provided in its application. Response from Nick Rising at 2-4 (Aug. 8, 2023). DOE further argued that Appellant's documents showing payments received in 2013 were not sufficient to prove that Appellant did not sell hydroelectric energy prior to 2013. *Id.* at 4.

II. STANDARD OF REVIEW

Section 1003.17 of Chapter 10 of the Code of Federal Regulations states that unless otherwise indicated by a program, statute, regulation, or rule, the OHA will grant petitions brought under Part 1003, such as the instant appeal, upon a showing that DOE acted arbitrarily, capriciously, or in violation of a law, rule, regulation, or delegation with respect to the final disposition of DOE that is the subject of the petition. In this case, we apply this standard of review to DOE's determination that Appellant was not eligible for an incentive payment for 2022.

III. ANALYSIS

Appellant points to no law that DOE's determination violates, leaving OHA to consider only whether the determination by DOE to deny Appellant an incentive payment was arbitrary and capricious. In defending its determination, an agency is limited to the grounds it invoked when making the determination. *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1907 (2020). Because we review the propriety of DOE's determination, we are limited to looking at what evidence and information DOE was provided by Appellant at the time it made the determination. Any information submitted after that is not relevant to whether DOE acted arbitrarily or capriciously.

In its determination letter to Appellant, DOE stated that Appellant's eligibility period to receive incentive payments under Section 242 began on October 1, 2011, and ended on September 30, 2021. Accordingly, DOE determined that Appellant was not a qualified hydroelectric facility and would not receive a payment for 2022. The application stated explicitly that Appellant began producing energy for sale in August 2012, which fell within DOE's 2011 fiscal year. Appellant did not provide any other date to specify that energy was first sold after that date. The documents submitted with the application do show energy sales in 2013, but those documents do not rule out

the possibility that Appellant sold energy prior to that year. Moreover, when viewed together with Appellant's unambiguous statement that it started producing energy for sale in 2013, there was no reason for DOE to assume that the proofs of payment in 2013 represented Appellant's first energy sales.

It is reasonable to use Appellant's own statement to determine the beginning of its eligibility window. Applying Section 242, if Appellant first produced energy in August 2012, it became eligible to receive incentive payments on October 1, 2011, because August 2012 falls in fiscal year 2011—which ran from October 1, 2011, to September 30, 2012. Further application of Section 242 indicates that Appellant was eligible to receive incentive payments for the 10 years following its initial eligibility date. Therefore, September 30, 2021, was the final day on which Appellant could generate energy that qualified for incentive payment under Section 242.

Having applied the plain language of Section 242 to the information Appellant provided to DOE in its original application, we reach the same conclusion as DOE. Even if Appellant did indeed sell energy for the first time in 2013, it did not tell DOE at the time it applied. It was reasonable for DOE to rely on Appellant's statements when it processed the application. We will not substitute our judgment for that of DOE because the agency's path to its determination is readily discernable. *See FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 513 (2009). For the foregoing reasons, we find that DOE did not act arbitrarily or capriciously in determining that Appellant is not eligible for a hydroelectric incentive payment for 2022.

IV. CONCLUSION

It is hereby ordered that the Appeal filed on July 25, 2023, by The Lower South Fork Hydroelectric Plant, on behalf of its client, No. HEA-23-0001, is denied.

This is a final decision and order of the Department of Energy from which Appellant may seek judicial review in the appropriate U.S. District Court.

Poli A. Marmolejos
Director
Office of Hearings and Appeals