

**United States Department of Energy
Office of Hearings and Appeals**

In the Matter of El Dorado Irrigation District)	
)	
Filing Date: August 1, 2023)	Case No.: HEA-23-0003
)	
_____)	

Issued: August 25, 2023

Decision and Order

This Decision considers an Appeal filed by the El Dorado Irrigation District (District) relating to the hydroelectric production incentives program authorized by Section 242 of the Energy Policy Act of 2005 (“Section 242 Program”), currently being administered by the Grid Deployment Office of the Department of Energy (DOE). In its Appeal, the District contests a decision issued by DOE denying the District’s application for an incentive payment for hydroelectricity it produced in the 2021 and 2022 calendar years. For reasons discussed in this Decision, we have determined that the District’s Appeal should be denied.

I. Background

A. Section 242 of the Energy Policy Act of 2005

In the Energy Policy Act of 2005 (“EPAct 2005”), Congress established a new program to support the expansion of hydropower energy development at existing dams and impoundments through an incentive payment procedure. 109 P.L. 58 (2005). Under Section 242 of the EPAct 2005, the Secretary of Energy is directed to provide incentive payments to the owners or operators of qualified hydroelectric facilities for electric energy generated and sold by those facilities during a specified 10-year period. 42 U.S.C. § 15881. Section 242 states in relevant part:

Hydroelectric production incentives

(a) Incentive payments

For electric energy generated and sold by a qualified hydroelectric facility during the incentive period, the Secretary shall make, subject to the availability of appropriations, incentive payments to the owner or operator of such facility. . . Payments under this section may only be made upon receipt by the Secretary of an incentive payment application which establishes that the applicant is eligible to receive such 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:

(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 –

- (A) that generates hydroelectric energy for sale; and
- (B) (i) that 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 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 August 8, 2005.

(d) Incentive period

A qualified hydroelectric facility may receive payments under this section for a period of 10 fiscal years (referred in this section as the “incentive period”). 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 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, 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, 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”).¹ 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 sets forth a procedure whereby applicants can appeal DOE’s determinations and calculations to the DOE Office of Hearings and Appeals (OHA). Guidance Document, Section XI, at 13–14.

B. Procedural History

On May 8, 2023, the District submitted applications for incentive payments for the 2021 and 2022 calendar years pursuant to the Section 242 Program. *See* 2021/2022 Application Packet (2023). The Applications indicated that the District’s hydroelectric generation facility (Facility) was originally commissioned in January 1924, and on approximately December 31, 1996, the Facility was taken offline due to a flood and the resulting damage to the Facility. *Id.* at 1–2. As such, according to the Applications, the Facility was offline and undergoing repairs between the years 1997 and 2003. *Id.*; *see id.* at Abstract. The District indicated that the Facility underwent “significant changes[,] including replacement of the Unit 1 and Unit 2 stator windings and other repairs.” 2021/2022 Application Packet at 3. The Facility subsequently began producing hydroelectric energy once more on November 2, 2003. *Id.* at 2.

On July 25, 2023, DOE issued a letter, informing the District that it was ineligible for incentive payments under the Section 242 Program. Determination Letter at 1 (2023). Specifically, the DOE stated that the District had failed to demonstrate that the Facility was a “qualified hydroelectric facility” in accordance with the definition set forth in the Guidance Document, because the Facility had not “begun producing hydroelectric energy for sale on or after October 1, 2005.” *Id.* at 1; Guidance Document, Section III, at 3. DOE noted that, according to the Guidance Document, a Facility may qualify even if operations began prior to October 1, 2005, “so long as the facility had been offline because of disrepair or dismantling for at least five consecutive years prior and underwent significant changes.” Determination Letter at 1; Guidance Document, Section V(d), at 5. In this case, however, DOE indicated that the District did not provide any documentation to show that the Facility “was offline for at least five consecutive years immediately prior to October 1, 2005.” Determination Letter at 1.

The District filed a timely appeal with OHA on August 1, 2023. Appeal (2023). In the appeal, the District argued that the Facility met the definition of a qualified hydroelectric facility as set forth in the Guidance Document, and DOE erroneously included the word “immediately” within that definition. *Id.* DOE responded to the District’s appeal on August 11, 2023, asserting that the use of the word “immediately” was irrelevant because the District is ineligible for incentive payments as it began operations in November 2003, prior to the requisite eligibility window that began on October 1, 2005. DOE Response at 3 (2023).

On August 18, 2023, the District provided its reply to DOE’s response, stating that, not only does the Facility meet the definition of a qualified hydroelectric facility, but it also “meets the goals of

¹ *Guidance on Implementing Section 242 of the Energy Act of 2005*, U.S. DEPT. OF ENERGY, https://www.energy.gov/sites/default/files/2023-03/Section-242-Guidance-for-FY23_3.22.23.pdf.

the [Section 242] Program by promoting hydropower through restoration of existing generating facilities that had previously been offline.” District Response to DOE at 2–3 (2023). The District stated, in its reply, that due to the flood, “replacement of the two generator stator windings and other associated equipment” was required, and the facility’s “flood protection was vastly improved.” *Id.* at 2. Further, the District added that its receipt of incentive payments will “help assure continued investment in hydropower to add new or restore existing renewable energy resources.” *Id.*

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, 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 the District was not eligible for an incentive payment for the 2021 and 2022 calendar years.

III. Analysis

As indicated above, the Guidance Document answers various questions related to the Section 242 Program, including “What is a Qualified Hydroelectric Facility?” In answer to that question, the Guidance Document states, an applicant for an incentive payment must meet a number of criteria, one of which being that the facility:

Began producing hydroelectric energy for sale on or after October 1, 2005, either through added generational capability, or at a facility where operations began prior to October 1, 2005, so long as the facility had been offline because of disrepair or dismantling for at least five consecutive years prior and underwent significant changes.

Guidance Document, Section V(d), at 5. The review of the documents submitted in connection with the Appeal indicate that the District and DOE are employing differing interpretations of this language. As such, we will articulate and dissect this language herein.

Pursuant to this section of the Guidance Document, an applicant for an incentive payment may meet the requirements of a qualified hydroelectric facility via one of two options. The first is through added generational capability which allows the applicant to begin producing hydroelectric energy for sale on or after October 1, 2005. The District is not arguing that it added generational capability, and therefore, this portion of the criteria does not apply to this analysis.

As such, we turn to the second option, which applies to facilities like the District’s that were operational prior to October 1, 2005. In order to meet the requirements of a qualified hydroelectric facility via this route, the facility must have “been offline because of disrepair or dismantling for a least five consecutive years prior and underwent significant changes.” Guidance Document, Section V(d), at 5. Furthermore, it must have begun producing hydroelectric energy for sale, after the significant changes were made, on or after October 1, 2005.

In other words, both options require that the production of hydroelectric energy for sale began on or after October 1, 2005. To suggest otherwise, as the District does, would be inconsistent with the plain language of the statute enacted by Congress. *See* 42 U.S.C. § 15881(c) (providing that payments may only be made for a facility “which begins operation during the period of 22 fiscal years beginning with the first full fiscal year occurring after August 8, 2005”). Because it is undisputed that, after making the repairs to the Facility, the District began producing hydroelectricity on November 2, 2003, it cannot meet the requirements of a qualified hydroelectric facility pursuant to the Section 242 Program. *Id.*; 2021/2022 Application Packet at 2. 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 the 2021 and 2022 calendar years.

IV. Conclusion

It is hereby ordered that the Appeal filed on August 1, 2023, by the El Dorado Irrigation District, No. HEA-23-0003, is denied.

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

Poli A. Marmolejos
Director
Office of Hearings and Appeals