

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

In the Matter of Summit Hydro, LLC )  
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Filing Date: August 4, 2023 ) Case No.: HEA-23-0004  
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Issued: September 1, 2023

**Decision and Order**

This Decision considers an Appeal filed by Summit Hydro, LLC, (“Summit”) 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, Summit contests a decision issued by DOE denying Summit’s application for an incentive payment for hydroelectricity produced in the 2021 2022 calendar years at its Dayville Pond Hydroelectric Project. For reasons discussed in this Decision, we have determined that Summit’s Appeal should be denied.

**I. Background**

**A. Section 242 of the Energy Policy Act of 2005**

In the Energy Policy Act of 2005 (“EPAAct 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) (codified as amended at 42 U.S.C. § 15881). Under Section 242 of the EPAAct 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.

*Id.* 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”).<sup>1</sup> 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, Summit 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 Summit’s hydroelectric generation facility, the Dayville Pond Hydroelectric Project (“Facility”), was originally “built and put online circa 1924.” *Id.* at 3. It was then “decommissioned and taken offline circa 1968” and sat idle in disrepair for “27 consecutive years.” *Id.* It was completely rebuilt and put back online in 1995, and it has since been in continuous operation. *Id.*

On July 25, 2023, DOE issued a letter informing Summit that it was ineligible for incentive payments under the Section 242 Program. Determination Letter at 1 (2023). Specifically, DOE stated that Summit 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 (referencing Guidance Document, Section V(d), at 5). However, DOE concluded that Summit did not provide any documentation to show that the Facility “was offline for at least five consecutive years immediately prior to October 1, 2005.” *Id.*

Summit filed a timely appeal with OHA on August 4, 2023, and argued that the Facility met the definition of a qualified hydroelectric facility set forth in the Guidance Document with regard to facilities that had been in operation prior to October 1, 2005. Appeal (2023). Specifically, Summit argued that DOE erroneously considered whether the Facility had been offline for five consecutive years immediately prior to October 1, 2005, because the wording of that provision in the Guidance Document does not include the word “immediately.” *Id.* Summit further argued that it demonstrated the Facility “underwent significant changes” because it was “completely rebuilt.” *Id.* at 2.

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<sup>1</sup> *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](https://www.energy.gov/sites/default/files/2023-03/Section-242-Guidance-for-FY23_3.22.23.pdf).

DOE responded to Summit's arguments on appeal on August 22, 2023, by asserting that Summit was ineligible for incentive payments because under Section 242 "DOE may only make incentive payments to qualified hydroelectric facilities that began generating electric energy on or after October 1, 2005[.]" and, by Summit's own admission, it began operations in 1995—prior to the requisite eligibility window that began on October 1, 2005. DOE Response at 3 (2023).

On August 29, 2023, Summit replied to DOE's response. Summit Reply (2023). Summit asserted that hydroelectric projects are decommissioned and put "back online" in a cycle that "can and does repeat" because economic and other conditions change the feasibility of operations from one year to the next, and thus the Guidance Document's use of the terms "'began producing hydroelectric energy' and 'operations began' could encompass many dates." *Id.* at 3. Summit also argued that DOE's addition of the word "immediately" before the wording "prior to October 1, 2005" changes the meaning of that provision and "is arbitrary and/or capricious." *Id.* at 1. Therefore, Summit argued that DOE's interpretation of the Guidance Document "capriciously leaves out an entire section of wording that makes an exception for projects that came online before October 1, 2005." *Id.* at 2. Summit explained that the Facility is eligible according to a "strict interpretation" of the Guidance Document. *Id.* Summit concluded by stating the following:

If the DOE intended to include projects that operated, then went offline for 5 or more consecutive years, then put online [sic] after October 1, 2005, then it should have stated as such clearly. Also, giving an example would have reduced perplexity. However, DOE created wording that is ambiguous and must abide by it. The wording is not clear and it is thus subject to interpretation. The interpretation that we proclaim above is reasonable and valid thus DOE must accept our appeal.

*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 Summit 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 leave no doubt that Summit 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. Summit 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 Summit 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 Summit 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, Summit began producing hydroelectricity in 1995, it cannot meet the requirements of a qualified hydroelectric facility pursuant to the Section 242 Program. 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 4, 2023, by the Summit Hydro, LLC, No. HEA-23-0004, is denied.

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

Poli A. Marmolejos  
Director  
Office of Hearings and Appeals