



directed applicants to submit either documentation stamped by a licensed engineer “that quantitatively demonstrate[s] the efficiency improvement” or calculations showing the improved efficiency of the hydroelectric facility, including time series data on the hourly, daily, or monthly operation of the facility. Program Guidance at §§ VI(b)(7)(a)(ii), VI(b)(7)(b). The Program Guidance included a link to a workbook of Excel spreadsheets examples that applicants could use at their discretion to self-perform the calculations if they elected not to obtain documentation stamped by a licensed engineer. *Id.* at § VI(b)(7)(b).

## **B. Procedural History**

NWE submitted a timely application for incentive payments under the Program. NWE Application for Hydroelectric Production Incentive Payments (Application).<sup>1</sup> NWE included in the Application as Attachment 3 a document titled “DOE Hydropower Facility Efficiency Increase Tool.” *Id.* at 80. Attachment 3 contained a PDF image of a spreadsheet showing cumulative power generation by NWE’s hydroelectric facility and expected generation after capital improvements. *Id.* at 81. This spreadsheet matched one of the spreadsheets contained in the sample workbook linked in the Program Guidance. *Compare id. with Hydropower Facility Efficiency Increase Tool*, U.S. DEP’T OF ENERGY (2023) available at <https://www.energy.gov/media/292226>. However, Attachment 3 did not include all of the spreadsheets necessary to perform the calculations specified in Program Guidance, including time series data on the hourly, daily, or monthly operation of NWE’s hydroelectric facility.

On August 7, 2023, GDO notified NWE that it required additional information to process the Application. GDO Request for Supplemental Information (Aug. 7, 2023) (RSI). The RSI specifically requested the following:

Efficiency increase calculation. You may provide calculations made using the spreadsheets provided in the [Program] Guidance. We require a calculation of at least a 3% efficiency increase so that we may determine the eligibility of your project. Please provide documentation and or invoices to support the past generation figures provided in your application.

*Id.* The RSI noted that any information provided after August 21, 2023, the due date for a response, would not be considered. *Id.*; *see also* Program Guidance at § VIII(a)(3) (indicating that failure to respond to an RSI within 10 business days “shall constitute the basis for classifying a hydroelectric facility as ineligible”).

On August 21, 2023, NWE responded to the RSI. NWE Response to RSI (Aug. 21, 2023). NWE indicated that it had “used hourly unit generation data” in the Application and that there was “no outside source of validation for the [data] . . . used in the *DOE Hydropower Facility Efficiency Increase Tool*.” *Id.* On November 7, 2023, GDO issued NWE a letter notifying it that it was ineligible for the Program because the Application “did not include the required information, including the provided spreadsheet or stamped documentation from a licensed engineer . . . .” Determination Letter (Nov. 7, 2023).

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<sup>1</sup> The Application is not dated, but DOE does not contest that the Application was timely submitted. DOE Response to Appeal at 2 (Dec. 4, 2023).

NWE filed the Appeal on November 17, 2023. In the Appeal, NWE asserted that it had fully completed the Excel spreadsheets linked in the Program Guidance in June 2023, but that “errata oversight resulted in the native Excel file seemingly not successfully upload[ing]” with the Application. Appeal at 2. NWE further indicated that it did not understand that the RSI was seeking the spreadsheets linked in the Program Guidance because “NWE believed that the native Excel efficiency tool had been successfully uploaded . . . .” *Id.* NWE appended the completed spreadsheets, which had not been modified since June 2023, to the Appeal.

DOE responded to the Appeal on December 4, 2023. DOE Response to Appeal (Dec. 4, 2023) (Response). In the Response, DOE argued that GDO’s determination that NWE was ineligible for incentive payments was reasonable because NWE failed to timely provide the information specified in the Program Guidance to show that it met the Program eligibility requirements. *Id.* at 2–4. DOE further argued that, because the Program was oversubscribed, granting the Appeal would be prejudicial to eligible applicants that timely filed complete applications because their applications would need to be denied in order to provide incentive payments to NWE. *Id.* at 2, 4.

On December 8, 2023, NWE submitted a reply to the Response. NWE Reply to Response (Dec. 8, 2023) (Reply). NWE’s Response asserted that the RSI had not provided it with an opportunity to correct the deficiencies in the Application because GDO’s request to “provide documentation and or invoices to support the past generation figures provided in your application” did not explicitly request the Excel spreadsheets NWE had omitted from the Application. *Id.* at 2. NWE noted that it had promptly provided the spreadsheets after receiving GDO’s Determination Letter and asserted that it would have done so in response to the RSI had the RSI been worded with reasonable clarity. *Id.* at 2–3.

## **II. Standard of Review**

Appeals of denials of applications to the Program are evaluated under OHA’s procedural regulations codified at Part 1003 of Title 10 of the Code of Federal Regulations (Part 1003). 10 C.F.R. § 1003.1(a) (indicating that OHA’s procedural regulations apply to proceedings not covered under any other DOE regulations); Program Guidance at § XI(a) (indicating that appeals of denials of applications to the Program will be decided under the Part 1003 regulations). An appeal of a denial of an application to the Program will be granted only “upon a showing that the DOE acted arbitrarily, capriciously, or in violation of a law, rule, regulation, or delegation . . . .” 10 C.F.R. § 1003.17(b).

## **III. Analysis**

NWE has not alleged that DOE violated any law, rule, regulation, or delegation in denying it incentive payments under the Program, and therefore we will consider whether DOE’s determination was arbitrary or capricious. An agency action is arbitrary and capricious if it:

relied on factors . . . [it was] not intended to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be

ascribed to a difference in view or the product of agency expertise.

*Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983). It is readily apparent that DOE strictly adhered to the terms of the Program Guidance in determining that NWE did not provide sufficient information in the Application to perform the Program eligibility calculations specified in the Program Guidance, providing NWE with an opportunity to correct the defect through the RSI, and determining that the Application was ineligible after NWE failed to provide the requested data. Accordingly, there is no basis for us to conclude that DOE relied on factors it was not intended to consider, offered an explanation for its decision that runs counter to the evidence, or made a determination so implausible that it could not be ascribed to a difference in view.

NWE's argument that the RSI did not clearly inform it of the deficiency in the Application, and that DOE deemed the Application ineligible without regard for NWE's failure to understand GDO's request in the RSI, is an assertion that DOE "failed to consider an important aspect of the problem." *Id.* While NWE argues that the RSI was insufficiently clear to inform NWE of the deficiency in the Application, we do not agree. The RSI requested that NWE provide "efficiency increase calculation[s]," and noted that NWE could use the spreadsheets linked in the Program Guidance to satisfy this request. *Supra* p. 2. While the RSI's general request for "documentation" and "invoices" was not a model of clarity, any ambiguity may be attributable to the fact that the Program Guidance allowed applicants to perform the efficiency increase calculations through whatever means the applicant selected, noting that "[u]se of the spreadsheets is strictly voluntary." Program Guidance at § VI(b)(7)(b). As GDO could not have known that NWE intended to perform the calculations through the missing spreadsheets as opposed to any other permissible means, the RSI's general reference to documentation appropriately took into account the fact that NWE could have submitted documentation other than the spreadsheets to address the deficiency. We find that the RSI's indication that the Application was missing efficiency increase calculations and reference to the sample spreadsheets was sufficient to alert NWE of the deficiency in the Application, and therefore that it was not arbitrary or capricious for GDO to determine that NWE was ineligible for incentive payments under the Program based on its failure to provide required documentation in response to the RSI.

To the extent that NWE asserts that its omission was harmless error which it has subsequently remedied through the Appeal, we find that "it is difficult to divine exactly how the [agency's] decision to enforce a deadline that is established well in advance . . . is arbitrary and capricious." *Baystate Franklin Med. Ctr. v. Azar*, 950 F.3d 84, 89 (D.C. Cir. 2020) (determining that the Secretary of the Department of Health and Human Services' decision not to allow a hospital to revise incorrect wage data used to calculate Medicare reimbursements after an established deadline was not arbitrary and capricious). While we credit NWE's statement that it performed the calculations well before the application deadline and omitted them from the Application through an unfortunate error, we find that DOE has articulated a logical basis for denying the Application and did not fail to consider an important aspect of the problem. Accordingly, we conclude that DOE did not act arbitrarily or capriciously in determining that NWE was ineligible for incentive payments under the Program.

#### **IV. Conclusion**

It is hereby ordered that the Appeal filed by NWE on November 17, 2023, is denied.

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

Poli A. Marmolejos  
Director  
Office of Hearings and Appeals