EPAct Section 242 Comments and Responses:

On July 2, 2014 in the Federal Register, the U.S. Department of Energy (DOE) published and requested comment on draft guidance for implementing Section 242 of the Energy Policy Act of 2005 (EPAct 2005). See 79 FR 37733 (July 2, 2014). In many instances, there were common themes among the commenters. This document consolidates and summarizes the comments and responds to the comments. Responses to individual comments or commenters are not required. DOE received comments from the following parties:

Bryan L. Case
General Manager/CEO
Fall River Electric Cooperative

Peter Clermont
President
Dorena Hydro, LLC

Sarah Hill-Nelson
Owner/Operator
The Bowersock Mills and Power Company

Kurt Johnson
Colorado Small Hydro Association

Daniel Lissner
General Counsel
Free Flow Power Corporation

Jim Price
Jordan Hydroelectric Limited Partnership

Luke Rose
President
The Rose Company

Adam Rousselle
CEO
Utility Risk Management Corporation

Douglas A. Spaulding
Principal, Partner
Nelson Energy/ Spaulding Consultants LLC

Jack Thirolf
Director of Regulatory Affairs
Enel Green Power North America, Inc.

Tracy Yount
Director, External Affairs
Chelan County PUD

David Zayas
Senior Manager of Regulatory Affairs & Technical Services
National Hydropower Association

The common themes among the comments were:

1. Non-permanent increases in dam height and conduit cross-section
2. System for Award Management accounts
3. Qualified kilowatt-hour (kWh)
4. Metering
5. Generator warranty
6. Sales to related entities
7. Incremental payment
8. Powered and non-powered dams
9. Incremental energy
10. Definitions are not appealable
11. Consent
12. Application timing

1) Several commenters had questions or comments about ***non-permanent increases in dam height*** based on the definition in the draft guidance document. They suggested that during the installation process for new generators there could be temporary structures which would change the dam and the water height. Others made the point that a dam with a power facility would want to control flow and safety by applying devices which may temporarily change height for some periods of the year. There were also concerns that an inlet to the new generator could be called a conduit and be considered a change in ***conduit cross-section***. After consideration by DOE, an addition to the DOE guidance was made. This addition recognized that reservoir elevation changes routinely at many dam locations. Moreover, the new generation devices would have undergone an environmental review and permitting process where concerns of negative impact presumably would have been considered and mitigated. At locations where changes would not be permanent DOE accepted that there would not be a basis for eliminating a facility from eligibility and altered the definition as recommended.

2) The Rose Company asked to have more clarity about the information available to DOE from the requirement of establishing a System for Award Management (***SAM***) account. Specifically, the company asked if the establishment of a SAM account covers the Electronic Funds Transfer (EFT) data required by DOE to process payments. After consideration by DOE, the guidance was changed to eliminate the application requirement for EFT data because users will instead have a SAM account.

3) The Colorado Small Hydro Association and the Rose Company commented about the source and meaning of the term "***qualified kWh***" and its impact of program payments. In response, a definition was added to the guidance to define a concept developed to deal with the potential of insufficient appropriations to pay all incentives claimed. The new definition makes the concept clear that applicants would have a defined number of qualified kWh to be used for payment calculation and that may become important if funds were insufficient for full payments.

4) Several commenters asked about the requirements for ***metering*** of electricity generated from the new hydropower installation. Some made the point that not all facilities would have a meter at the point of interconnection to the utility as defined in the draft guidance. Others would not have a meter, but a set of sensors that would apply standard electrical engineering calculations to derive a generator output which would form the basis of payments. After consideration DOE edited the guidance to remove the specification of location of metering and added flexible metering and measurement approaches with the requirement of independent professional review and submission to DOE with the application to payment of incentive.

5) Three commenters asked about the requirement for a ***generator warranty*** and the lack of recognition for alternative generators. The point was made that many hydropower facilities will acquire retired equipment and refurbish it for new application. This equipment with years of previous service and high expectations of long operation would have no warranty. In regard to alternate generators, the commenters argued that DOE supports technology development and testing of new hydro generation approaches and these should be considered in early adoption before the technologies are considered established conventional technologies. Based on the comment suggestions, the guidance generator definition language was altered to include alternative generators and eliminate the requirement for a manufacturer warranty.

6) Fall River Electric Cooperative and the National Hydropower Association submitted comments about electricity ***Sales to related entities***. They were concerned that some owner/operators would have members that could be considered related, e.g., sales by electric cooperatives to members or by municipal utilities to owner customers. The DOE accepted the advice and clarified the guidance definition to recognize that some generator operators would be making sales to individuals or organizations that are part of a co-op or municipal utility.

7) The Bowersock Mills and Power Company recommended and the Colorado Small Hydro Association supported the concept of "***incremental payment***." This approach would assure the smallest operators received full payment for all qualified generation before the large generators were paid for all of their qualified kWh. This approach was rejected by the DOE because it would result in a preference for small hydro, which is not addressed in section 242 of EPAct 2005.

8) Several commenters asked if both ***powered and non-powered dams*** were eligible for an incentive payment if new generators were installed. After review of the Section 242 language and consideration of the advice from the industry, the guidance was changed to clearly state both types of dams were considered eligible.

9) Some commenters asked about eligibility of ***incremental energy*** increases as defined in Section 243 of EPAct 2005. After reviewing the language of this section and the instructions in the 2014 appropriation, DOE determined that energy sold by any applicant would be considered in review of applications. DOE does not currently have appropriated funds under Section 243 of EPAct 2005. Therefore, applicants should assure they qualify for Section 242 before submitting information to DOE. For example, a completely new replacement turbine/generator unit could be eligible under Section 242, but an incremental increase in energy generation due to replacing components of a previously operating turbine/generator unit probably would not be eligible under Section 242, nor would incremental energy resulting from efficiency improvements due to capital improvements to other components of the hydroelectric facility not associated with the turbine/generator. The guidance was not changed on this topic.

10) The National Hydropower Association asked to have stricken the statement that ***definitions are not appealable.*** After consideration, DOE agreed and removed definitions from the list of non-appealable actions.

11) DOE was requested to make a clarification that ***consent*** from the owner to make application for the incentive was meant to be from the owner of the generation turbine and not the dam owner. This was considered to be an appropriate change and it was implemented in the final draft guidance.

12) The National Hydropower Association commented on ***application timing***. They requested "...clarification on whether applicants are required to submit their original application in the year they become eligible."
The draft guidance stated, "Such period shall begin with the fiscal year in which application for payment for electricity generated by the facility is first made and the facility is determined by DOE to be eligible for and receives an incentive payment." DOE has reexamined the language of EPAct 2005 and focused on the question of when a facility is first eligible for an incentive payment. Under the statute, payments may be made for a 10-year period consisting of consecutive Federal fiscal years beginning when the "facility is first eligible". (42 U.S.C. 15881(d)) In the reissued draft guidance, DOE considers the first year of eligibility to be the first fiscal year that a qualified hydroelectric facility generates hydroelectric energy for sale. (See 42 U.S.C. 15881(a), (b)) The eligibility period begins the date a qualified hydroelectric facility begins operation (must be between fiscal year 2006 and fiscal year 2015) and ends 10 fiscal years after that date. (See 42 U.S.C. 15881(c), (d)) While the first year of eligibility may vary for each project depending on when that project first became eligible, DOE has determined that calendar year 2013 is the most appropriate year for which it would make payment based on readily available applicant data and amount of appropriated funds. This was expressed in the July draft guidance in the section where and when to apply "file an application for any eligible year for payment for energy generated in the preceding year." DOE has made changes in several areas of the guidance to implement this interpretation and change the date of first eligibility.