

**U. S. DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS**

DECISION AND ORDER

In the Matter of: Kane County Water Conservancy)
District)
Date of Filing: May 21, 2015) OHA Case No.: HEA-15-0001
_____)

Issued: June 1, 2015

Order

This Decision considers an Appeal filed by Kane County (Utah) Water Conservancy District (KCWCD) relating to the Hydroelectric Production Incentives Program authorized by Section 242 of the Energy Policy Act of 2005 (Section 242 Program), being administered by the Office of Energy Efficiency and Renewable Energy (EERE), U.S. Department of Energy (DOE). In its Appeal, KCWCD contests a notice (Notice) issued by the EERE denying KCWCD's application for an incentive payment under the Section 242 Program. For the reasons discussed in this decision, we have determined that KCWCD's Appeal must be denied.

I. Background

A. Section 242 of the Energy Policy Act of 2005

In the Energy Policy Act of 2005 (EPAct 2005; Public Law 109-58), Congress established a new program to support the expansion of hydropower energy development at existing dams and impoundments through an incentive payment procedure. Under section 242 of EPAct 2005, the Secretary of Energy is directed to provide incentive payments to the owner or operator of qualified hydroelectric facilities for electric energy generated and sold by a qualified hydroelectric facility for a specified 10-year period. *See* 42 U.S.C. 15881. Section 242 of EPAct 2005 states, in pertinent part:

SEC. 242. 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. The amount of such payment made to any such owner or operator shall be as determined under subsection (e) of this section.

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 which generates hydroelectric energy for sale and which 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 the date of the enactment of this section 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.

(3) CONDUIT.—The term “conduit” has the same meaning as when used in section 30(a)(2) of the Federal Power Act (16 U.S.C. 823a(a)(2)). The terms defined in this subsection shall apply without regard to the hydroelectric kilowatt capacity of the facility concerned, without regard to whether the facility uses a dam owned by a governmental or nongovernmental entity, and without regard to whether the facility begins operation on or after the date of the enactment of this section.

(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 10 fiscal years beginning with the first full fiscal year occurring after the date of enactment of this subtitle.

(d) INCENTIVE PERIOD.—A qualified hydroelectric facility may receive payments under this section for a period of 10 fiscal years (referred to in this section as the “incentive period”). Such period shall begin with the fiscal year in which electric energy generated from the facility is first eligible for such payments.

(e) AMOUNT OF PAYMENT.—

(1) IN GENERAL.—Payments made by the Secretary under this section to the owner or operator of a qualified hydroelectric facility shall be based on the number of kilowatt hours of hydroelectric energy generated by the facility during the incentive period. For any such facility, the amount of such payment shall be 1.8 cents per kilowatt hour (adjusted as provided in paragraph (2)), subject to the availability of appropriations under subsection (g), except that no facility may receive more than \$750,000 in 1 calendar year.

42 U.S.C. § 15881. DOE has not made these incentive payments in prior years due to a lack of Congressional appropriations for the hydroelectric production incentive program. The conference report to the Fiscal Year 2014 Omnibus Appropriations bill, however, includes \$3,600,000 for payments for conventional hydropower under section 242 of EPAct 2005.

Accordingly, on July 2, 2014, DOE published a notice in the Federal Register announcing its intention to allocate hydroelectric incentive payments to eligible facilities, from the \$3,600,000 allocated by Congress for Fiscal Year 2014. 79 Fed. Reg. 37733 (July 2, 2014). In the notice, DOE solicited comments on a draft guidance document (Guidance Document)¹ setting forth proposed procedures for the filing of an application for a Section 242 Program incentive payment, the information necessary for DOE to make a determination of eligibility under the Program, and the manner in which the amount of an incentive payment would be calculated. In addition, the Guidance Document provides for an administrative appeal process where an application for a Section 242 Program incentive payment is denied in whole or in part. In this regard, the Guidance Document states:

In order to exhaust administrative remedies, an applicant who receives a notice denying an application in whole or in part must file an appeal with the DOE Office of Hearings and Appeals, 1000 Independence Avenue, S.W., Washington, D.C. 20585, in accordance with the procedures set forth below.

If an applicant does not file an appeal in accordance with these requirements, the determination of the Secretary or designee shall become final. If an applicant files an appeal on a timely basis in accordance with these requirements, the decision and order of the Office of Hearings and Appeals shall be final. If the Office of Hearings and Appeals orders an incentive payment, the Director of the Office of Hearings and Appeals shall send a copy of such order to the DOE Finance Office with a directive to make the required payment.

Guidance Document at 6. The Guidance Document further specifies the procedures governing OHA's adjudication of such appeals. *Id.* at 6-7.² Following the receipt and consideration of comments, DOE issued a final notice in the Federal Register establishing an application period, from January 20, 2015 to February 19, 2015, for filing a request for incentive payment under the Section 242 Program and adopting the application procedures proposed in the draft Guidance Document. *See* 80 Fed. Reg. 2685 (January 20, 2015).

B. The Present Appeal

During the application period, KCWCD filed an application for a Section 242 Program incentive payment based upon its production and sale of hydroelectric power from its facility located in Kanab, Utah. On March 18, 2015, DOE issued a Notice denying the application on the basis

¹ The Draft Guidance document was made available at: <http://energy.gov/eere/water/water-power-program>.

² Under the appeal procedures specified in the Guidance Document, an appeal must be filed within ten (10) days of receiving the notice to deny the application for payment, in whole or in part. OHA may issue an order summarily dismissing an appeal if: (a) it is not filed in a timely manner, unless good cause is shown; (b) the filing is defective on its face; or (c) there is insufficient information upon which to base a decision and if, upon request, the necessary additional information is not submitted within the time specified by OHA. Within thirty (30) days of receiving all required information, OHA shall issue a written decision that will include a written statement setting forth the relevant facts and basis for the determination. *See* Guidance Document at 7.

that KCWCD began operating its hydroelectric power facility prior to October 1, 2005, contrary to the eligibility requirements specified in Section 242 of EAct 2005.

In its Appeal, filed on May 21, 2015, KCWCD states that “[o]ur hydro facility was completed during the fall of 2003 and we began operation in December of that year.” KCWCD Appeal at 1. KCWCD further acknowledges that § 242 (c) of EAct 2005, entitled “Eligibility Window”, specifies that: “Payments may be made under this section only for electric energy generated from a qualified hydroelectric facility which begins operation during the period of 10 fiscal years beginning with the first full fiscal year occurring after August 8, 2005.” 42 U.S.C. § 15881(c). Notwithstanding, KCWCD argues in its Appeal:

It seems reasonable that as long as the hydro facility was completed before August 8th 2005 and the plant operated after that date and within the 10 year period, that it should qualify for the incentive program. I guess the question arises as to the definition of the word “begin.” I think it can be reasonably argued that the word “begin” doesn’t necessarily mean that the plant’s initial start up had to be after August 8th 2005 to qualify. It could mean that the plant commenced generating kilowatt hours after that date and within the 10 year window. Does it make sense that if a hydro plant was constructed a year or two before August 8th 2005 that it must delay its operations until after that date to qualify for the 242 program? I believe the intent or purpose of the program is to support an expansion of energy development at “existing dams” within the 10 year period.

KCWCD Appeal at 1.

II. Analysis

We have carefully considered KCWCD’s Appeal. As explained below, we find KCWCD’s argument reflects a misreading of key statutory provisions and a misunderstanding of Congressional intent concerning the Section 242 Program.

The “Definitions” provisions of § 242 state, in pertinent part, that for purposes of the incentive payment program, the term “qualified hydroelectric facility” means “a turbine or other generating device . . . which generates hydroelectric energy for sale and which is added to an existing dam or conduit.” EAct 2005, § 242(b)(1), 42 U.S.C. § 15881(b)(1) (emphasis supplied). The statute then defines “existing dam or conduit” as “any dam or conduit the construction of which was completed before [August 8, 2005] . . .” *Id.* § 242(b)(2). Thus, it is clear from these provisions that the intent of Congress was to incentivize installation of new turbines and generating devices at previously existing dams or conduits at the time EAct 2005 was enacted. The definition of “Eligibility Window” quoted by KCWCD in its Appeal serves to clarify that a new hydroelectric facility (i.e. turbine or other generating device) may qualify for incentive payment only if it came into operation within the 10 fiscal years subsequent to the promulgation of EAct 2005, *viz.* fiscal years 2006 through 2015. Accordingly, we believe that KCWCD has misinterpreted the clear language set forth in the statute and we thus decline to

adopt its reasoning for seeking coverage under the Section 242 Program.

III. Conclusion

In its Appeal, KCWCD confirms that its hydroelectric facility began operation in December 2003, prior to the Section 242 eligibility window. We therefore find that DOE properly denied KCWCD's application for an incentive payment under the Section 242 Program. Accordingly, the Appeal filed by KCWCD must be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Kane County Water Conservancy District, on May 21, 2015, is hereby denied.

(2) This is a final Order of the Department of Energy from which the Appellant may seek judicial review in the appropriate U.S. District Court.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: June 1, 2015