

Draft Guidance for EPO Act 2005 Section 242 Program

I. Purpose

In the Energy Policy Act of 2005 (EPO Act 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 EPO Act 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 from a qualified hydroelectric facility for a specified 10-year period. (See 42 U.S.C. 15881) The Department of Energy (DOE) has not made these incentive payments in the past due to a lack of appropriations for the hydroelectric production incentive. The conference report to the Fiscal Year 2014 Omnibus Appropriations bill, however, includes \$3,600,000 for conventional hydropower under section 242 of EPO Act 2005.¹

Section 242 of EPO Act 2005 states:

EPO Act 2005 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

¹ See <http://docs.house.gov/billsthisweek/20140113/113-HR3547-JSOM-D-F.pdf>.

appropriations under subsection (g), except that no facility may receive more than \$750,000 in 1 calendar year.

(2) ADJUSTMENTS.—The amount of the payment made to any person under this section as provided in paragraph (1) shall be adjusted for inflation for each fiscal year beginning after calendar year 2005 in the same manner as provided in the provisions of section 29(d)(2)(B) of the Internal Revenue Code of 1986, except that in applying such provisions the calendar year 2005 shall be substituted for calendar year 1979.

(f) SUNSET.—No payment may be made under this section to any qualified hydroelectric facility after the expiration of the period of 20 fiscal years beginning with the first full fiscal year occurring after the date of enactment of this subtitle, and no payment may be made under this section to any such facility after a payment has been made with respect to such facility for a period of 10 fiscal years.

(g) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated to the Secretary to carry out the purposes of this section \$10,000,000 for each of the fiscal years 2006 through 2015.

This guidance is intended to describe the application process and the information necessary for DOE to make a determination of eligibility under section 242 and assist qualified hydropower facility owners apply to DOE for this incentive payment. Determinations to make incentive payments under this part are not subject to the provisions of 10 CFR part 600 and such payments shall not be construed to be financial assistance.

II. Definitions

Calendar year means a calendar year beginning on January 1 and ending on December 31.

Conduit means any tunnel, canal, pipeline, aqueduct, flume, ditch, or similar manmade water conveyance that is operated for the distribution of water for agricultural, municipal, or industrial consumption and not primarily for the generation of electricity.

Dam means any structure for impounding water, including any diversion structure that is designed to obstruct all or substantially all of the flow of a natural body of water.

DOE means the Department of Energy.

Existing dam or conduit means any dam or conduit the construction of which was completed before August 8, 2005, 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. An increase in dam height, expansion of reservoir topographic area or expansion of conduit cross-section after the date of enactment of EPAct 2005 would eliminate facilities from eligibility for the hydroelectric production incentive.

FERC means the Federal Energy Regulatory Commission.

Fiscal year means the Federal fiscal year beginning October 1 and ending on September 30 of the following calendar year.

Net electric energy means the metered kilowatt-hours (kWh) generated and sold, and excludes electric energy used within the hydroelectric facility to power equipment such as pumps, motors, controls, lighting, heating, cooling, and other systems needed to operate the facility.

Not-for-profit electric cooperative means a cooperative association that is legally obligated to operate on a not-for-profit basis and is organized under the laws of any State for the purpose of providing electric service to its members.

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. This equipment shall be recognized as an electric generator in common application and obtained

from a manufacturer with warranty and maintenance schedule for the planned operations. Construction should not require any enlargement of impoundment or diversion structure when installed.

Sale means a transfer of currency between two unrelated parties in exchange for delivered electrical current.

State means the District of Columbia, Puerto Rico, and any of the States, Commonwealths, territories, and possessions of the United States.

The terms defined in this part 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 August 8, 2005. The meaning of the definitions in this guidance is not appealable in regard to decisions made by DOE.

III. Eligible Applicants and Facilities

Any owner of a qualified hydroelectric facility or operator of a qualified hydroelectric facility (with the written consent of the owner) may apply for incentive payments for net electric energy generated from a qualified hydroelectric facility and sold.

In order to qualify for an incentive payment under section 242, a hydroelectric facility must meet the following qualifications.

1. The owner must be applying on behalf of:
 - (a) a FERC-jurisdictional hydroelectric facility, as the holder of a license or exemption issued by FERC for the operation of such hydroelectric facility; or
 - (b) a non-FERC-jurisdictional hydroelectric facility, as the holder of the exclusive rights to the beneficial use of the hydroelectric facility, including legal title.
2. Payments may be made under this part only for net electric energy generated from a new qualified hydroelectric facility that begins operation at an existing dam or conduit during the inclusive period beginning October 1, 2005 and ending on September 30, 2015.
3. The qualified renewable energy facility must be located in a State or in U.S. jurisdictional waters.

Where and when to apply

An application for an incentive payment for electric energy generated and sold in a calendar year must be filed during the applications period defined by the DOE. The DOE will announce the schedule for accepting application and establish a deadline for submission. Failure to file an application for any eligible year for payment for energy generated in the preceding year shall disqualify the owner or operator from eligibility for any incentive payment for energy generated in that preceding year.

Notify DOE of plans to operate

To assist DOE in its budget planning, the owner or operator of a qualified hydroelectric facility is requested to provide notification at least 6 months in advance of when a facility is expected to be first used, providing projected information specified in "application content" listed below. This notification should be sent to the address listed in the application process.

IV. Eligible Production

Subject to the availability of appropriated funds, DOE shall make incentive payments under this program with respect to a qualified hydroelectric facility for 10 consecutive fiscal years. 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. Any year in which the facility does not operate partially or fully will be considered an eligible year if contained in the 10 year period. Subject to the availability of appropriated funds which, until Federal fiscal year 2014, have not been available, the period for payment under this program ends with Federal fiscal year 2025.

The net electric energy generated and sold (kilowatt-hours) by the owner or operator of a qualified hydroelectric facility must be measured by a standard metering device that:

- (a) Meets generally accepted industry standards;
- (b) Is maintained in proper working order according to the instructions of its manufacturer;
- (c) Is calibrated according to generally accepted industry standards; and
- (d) Measures the net output of the plant directly at a point of utility interconnection.

V. Application Requirements

Content

In order to be able to determine eligibility and to calculate the amount of individual facility payments, DOE needs sufficient information about an owner or operator and the facility. An application for an incentive payment must be signed by an authorized executive official of the owner or operator claiming the payment and shall provide the following information. Applications and notifications to the Department shall be submitted to the Hydropower Incentive Program, at hydroincentive@ee.doe.gov.

- (a) A statement indicating that the applicant is the owner of the facility or is the operator of the facility and has the written consent of an authorized executive official of the owner to file an application;
- (b) The name of the facility or other official designation;
- (c) The location and address of the facility and description of the type of hydropower energy source;
- (d) The name, address, and telephone number of a point of contact to respond to questions or requests for additional information;
- (e) A clear statement of how the applicant facility satisfies each and every part of the eligibility criteria described above;
- (f) A statement of the annual and monthly metered net electric energy generated and sold during the prior calendar year by the qualified hydroelectric facility, measured in kilowatt-hours, for which an incentive payment is requested;
- (g) The total amount of electric energy for which payment is requested;
- (h) Copies of permit authorizations if the date of first use is based on permit approvals and this is the initial application;
- (i) Instructions for payment by electronic funds transfer;
- (j) A tax identification number of the qualifying facility;
- (k) A statement agreeing to retain records for a period of three (3) years which substantiate the annual and monthly metered number of kilowatt-hours generated and sold and to provide access to or copies of, such records, for possible audit within 30 days of a written request by DOE;

(l) Confirmation of creation of a Federal System for Award Management (SAM) account;

(m) A statement signed by an authorized executive official certifying that the information contained in the application is accurate.

Processing applications

Following submission of an application DOE will review and consider the completeness of the application data and may request supplementary information relating to the application. When DOE has been satisfied that sufficient information has been reported, the application will be reviewed for eligibility under the incentive payment requirements. Timely response to allow all applications to be considered in a reasonable period is required. Delays exceeding 10 days in response to DOE requests for information shall constitute the basis for classifying a facility as ineligible.

DOE may require the applicant to conduct at its own expense and submit an independent audit, or DOE may conduct an audit, to verify the number of kilowatt-hours claimed to have been generated and sold by the qualified hydroelectric facility and for which an incentive payment has been requested or made.

The Secretary, or DOE official delegated by the Secretary, will determine the extent to which appropriated funds are available to be obligated under this program. Upon evaluating each application and any other relevant information, DOE shall further determine:

(1) Eligibility of the applicant for receipt of an incentive payment, based on the criteria for eligibility specified in this guidance;

(2) The number of kilowatt-hours to be used in calculating a potential incentive payment, based on the net electric energy generated and sold from a qualified renewable energy source at the qualified hydroelectric facility during the prior calendar year; and

(3) Potential incentive payments under this program shall be determined by multiplying the number of qualified kilowatt-hours by 1.8 cents per kilowatt-hour, and adjusting that product for inflation for each fiscal year beginning after calendar year 2005 in the same manner as provided in section 29(d)(2)(B) of the Internal Revenue Code of 1986, except that in applying such provisions calendar year 2005 shall be substituted for calendar year 1979.

Federal fiscal year appropriations will be identified for the section 242 incentive payment program and in some years there may be insufficient funds to make full payments as calculated above. If funds are not sufficient to make full incentive payments to all qualified applicants the total amount of qualified payment will be divided into the appropriated amount and a proportional payment will be made to each qualified recipient. This reduced payment will be a fraction of the full payment and will be calculated and applied proportionately based on eligible kilowatt-hours in an identical manner to all applicants deemed eligible by the Secretary or designee.

After calculating the amount of the incentive payment using the method described, the Secretary or designee shall then issue a written notice of the determination to each applicant and for every facility with the following content:

(1) Disapproving or approving the application as eligible for payment;

(2) Setting forth the calculation of the approved amount of the incentive payment.

If the application does not meet the requirements of this program or some of the kilowatt-hours claimed in the application are disallowed as unqualified, the Secretary or designee shall issue a written notice denying the application in whole or in part with an explanation of the basis for denial.

Administrative appeals

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.

A. What must the appeal contain and what is the standard of review?

The appeal shall contain a concise statement of the ground(s) upon which the applicant contests the written notice of the Secretary or designee. With its appeal, the applicant should provide (i) a copy of such notice, and (ii) contact information (i.e., name, telephone number, mailing and e-mail addresses) for a representative able to respond to questions and provide information relevant to the appeal.

The appeal should also include any data, documentation or other relevant information supporting a showing by the appellant that the denial of eligibility or disallowance of payment, either in whole or in part, is erroneous, not supported by the whole record, or is arbitrary and capricious.

B. How should the appeal be filed?

The appeal, including attachments, should be electronically filed with the Office of Hearings and Appeals (OHA), U.S. Department of Energy, at: OHA.filings@hq.doe.gov. Upon filing, OHA will confirm receipt of the appeal and assign a case number.

C. What matters are not appealable?

The following matters are not subject to appeal: 1) the denial of an application on the basis of untimeliness, and 2) a proportional award of an incentive payment based upon DOE's determination that insufficient appropriated funds are available to make full incentive payments to all qualified applicants.

D. What are the steps in the process?

(1) An appeal under these procedures must be filed within ten (10) days of receiving the notice by the Secretary or designee denying eligibility or a claim for payment, in whole or in part.

(2) In evaluating an appeal, OHA may require the submission of additional information by the appellant regarding any statement in an appeal. OHA may also solicit and accept submissions of relevant information from other sources, provided that the appellant is afforded an opportunity to respond to all such submissions. OHA on its own initiative may convene a conference or hearing if, in its discretion, it considers that such conference or hearing will advance its evaluation of the appeal. OHA will determine the scope and format of any conference or hearing convened under these procedures, as well as the parties allowed to participate.

(3) OHA may issue an order summarily dismissing an appeal if: (a) 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.

(4) Within thirty (30) days of receiving all required information, OHA shall issue a written decision granting or denying the appeal. The decision shall include a written statement setting forth the relevant facts and basis for the determination. Upon issuance, OHA shall serve an electronic version of the decision upon the appellant and the DOE Office of Energy Efficiency and Renewable Energy. The decision will also be published on the OHA website: <http://www.oha.doe.gov>. The decision of OHA shall constitute final agency action and the appellant's final right of administrative review under the Hydropower Incentive Program.

(5) All expenses incurred in pursuing any appeal before OHA shall be borne exclusively by the appellant.